

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 26.06.2019

CORAM

THE HONOURABLE MR.JUSTICE T.RAJA

C.M.S.A.No.1 of 2008

1. A.R.Arumugham (died)
2. A.Gopalan
3. A.Manoharan
4. S.Devi
5. A.Somasundaram .. Appellants
(Appellants 2 to 5 brought on record as L.Rs.
of the deceased 1st appellant vide Court
Order dated 3.1.2019 made in M.P.No.1/2011)

vs.

1.T.S.Sundarachalam
2.S.Mohan .. Respondents
(R2 set exparte in the court
below and hence given up)

Prayer:Civil Miscellaneous Second Appeal filed under Section 100 of C.P.C. against the judgment and decree of the learned Principal District Judge, Erode District in CMA.No.59/2005 dated 25.4.2007 reversing the order of the learned I Additional Subordinate Judge, Erode, in E.A.No.228/2004 in E.P.No.198/2002 in O.S.No.578/1997 dated 16.12.2004.

For Appellants : Mr.A.K.Kumarasamy,
Senior Counsel
for Mr.S.Kaithamalai Kumaran

For 1st respondent: Mr.A.Sundaravadhanam
R2- Given up

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JUDGMENT

This Civil Miscellaneous Second Appeal has been directed against the judgment and decree of the learned Principal District Judge, Erode District in CMA.No.59/2005 dated 25.4.2007 reversing the order of the learned I Additional Subordinate Judge, Erode, in E.A.No.228/2004 in E.P.No.198/2002 in O.S.No.578/1997 dated 16.12.2004.

2. The case of the appellants herein is that the 1st appellant herein has filed a civil suit in O.S.No.578/1997 on the file of the learned I Additional Subordinate Judge, Erode District for recovery of a sum of Rs.1,00,000/- and it was decreed ex-parte on 5.3.2002. Thereupon E.P.No.198/2002 was also filed for realising the decree passed in O.S.No.578/1997 dated 05.03.2002. During the pendency of the said petition, a third party, namely, T.S.Sundarachalam, the 1st respondent herein filed E.A.No.228/2004 on 10.04.2004 under Order 21 Rule 58 read with Section 151 of CPC to raise the attachment effected in E.P.No.198/2002 in O.S.No.578/1997 with a direction to the respondents to pay the costs to the petitioner therein, taking a stand that even on 25.6.1994, the Partition Deed bearing Document No.638/1994 was effected on the file of the Sub-Registrar Office, Sivagiri and in the said Partition Deed dated 25.6.1994, T.S.Sundarachalam and his wife were allotted to 'A' Schedule Property and the 2nd respondent therein, namely, S.Mohan/the judgment debtor was allotted to a sum of Rs.30,000/-, and ever since from the date of execution of the partition deed, all the parties have taken possession of their shares. Since then, the judgment debtor S.Mohan was left with no property. Therefore, the order passed in E.P.No.198/2002 is unacceptable. Hence, the E.A.No.228/2004 has to be allowed as prayed for.

3. The learned Execution Court agreeing with the case of the appellant herein/Decree Holder, taking into consideration of the fact that the Partition Deed executed on 25.06.1994 is only for the purpose of helping the judgment debtor from any liability, dismissed the E.A.No.228/2004 by order dated 16.12.2004. Aggrieved thereby, the 1st respondent herein filed CMA.No.59/2005 on the file of the learned Principal District Judge, Erode and the same was also allowed by setting aside the order dated 16.12.2004 passed in E.A.No.228/2004 in E.P.No.198/2002 in O.S.No.578/1997 by the 1st Additional Subordinate Judge, Erode. Aggrieved over the same, the appellant/1st respondent therein Mr.Arumugham has filed the present Civil Miscellaneous Second Appeal. During the pendency of the appeal before this Court, since the appellant died, his legal heirs were impleaded as appellants 2 to 5 as per the order of this Court dated 03.01.2009 made in M.P.No.1/2011 in CMSA.No.1/2008.

4. When the matter was called on 11.01.2008, the following substantial question of law has been framed:

(i) When the facts and circumstances of the case would conclusively go to show that Ex.A.1 Partition Deed is a fraudulent one entered into to keep the properties beyond the reach of the creditors Section 53 of the Transfer of Property

Act squarely applies and the same has no legal sanctity?

5. Learned Senior Counsel appearing for the appellants contended that the lower Appellate Court is not justified in holding that Ex.A.1 Partition Deed dated 25.6.1994 cannot be termed as a fraudulent one overlooking the share of the properties allotted to the sharers which would conclusively go to show that the same was not a genuine transaction. Arguing further, the learned Senior Counsel for the appellants submitted that the facts and circumstances of the case would conclusively go to show that Ex.A.1 Partition Deed is a fraudulent one entered into to keep the properties beyond the reach of the creditors, Section 53 of the Transfer of Property Act would squarely apply.

6. In reply, the learned Counsel for the 1st respondent would submit that it is not in dispute that the appellant/decreed holder in O.S.No.578/1997 filed a suit for recovery of a sum of Rs.1,00,000/- in the year 1997 against the judgment debtor, but 3 years ago on 25.6.1994 itself, the properties belonging to the judgment debtor were partitioned among the family members, as a result, there was no any property left with the judgment debtor. It is also not in dispute that when the trial court decreed the suit ex-parte on 05.03.2002, the Decree Holder/the 1st appellant herein filed E.P.No.198/2002. On the date of filing of the E.P.No.198/2002 also, there was nothing to be executed. Therefore, the ex-parte decree obtained by the appellants was unacceptable because there was nothing for execution, although the learned Execution Court allowed the E.P.No.198/2002. Aggrieved over the same, E.A.No.228/2004 was filed by the 1st respondent herein and the same was dismissed. it was agitated by filing CMA.No.59/2005 on the file of the learned Principal District Judge, Erode, taking a strong ground that the appellants have never taken any steps whatsoever to prove that the judgment debtor was indebted on the date of the execution of the partition deed Ex.A.1 on 25.6.1994. Therefore, the learned I Appellate Court has rightly come to a conclusion that without any oral or documentary evidence on the part of the appellants herein, there is no reason in concluding that there was collusion in between the 1st respondent and the 2nd respondent/judgment debtor in execution of the Ex.A.1 Partition Deed and accordingly, rightly passed the impugned judgment and decree. Concluding his arguments, the learned Counsel for the 1st respondent contended that even if this appeal is allowed setting aside the impugned decree and judgment, again the appellants would be forced to face vacuum in realising the decree. The reason being that the judgment debtor is left with no property.

7. I fully agree with the submissions made by the learned

Counsel for the 1st respondent. Admittedly, when the Partition took place on 25.06.1994 between the family members of the judgment debtor, it is not known why the decree holder, the 1st appellant has filed a suit after three years and even after obtaining the ex-parte decree on 05.03.2002, he has failed to make out his case by invoking of Section 53 of the Transfer of the Property Act. Therefore, finding no infirmity in the impugned judgment and decree, the substantial question of law is answered against the appellants herein.

8. In the result, the Civil Miscellaneous Second Appeal fails and the same is accordingly dismissed. No costs.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

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To

1. The Principal District Judge, Erode District
2. The I Additional Subordinate Judge, Erode.
3. The Section Officer, V.R. Section, High Court, Madras.

+1cc to Mr.A.Sundaravadhanan Advocate sr53803
+1cc to Mr.A.K.Kumarasamy Advocate sr53208

C.M.S.A.No.1 of 2008

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