IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.07.2019

CORAM

THE HONOURABLE MR.JUSTICE T.RAJA

C.M.S.A.No.10 of 2016 and
CMP.No.4832 of 2016

Mariammal ... Appellant/ Appellant/ Petitioner

-vs-

1.P.Gunasekaran
2. N.Gunasekaran
3. Rajamanickam

4. District Collector,
Collectorate, Erode.
... Respondents/ Respondents/ Respondents

Prayer: Memorandum of Grounds of Civil Miscellaneous Second Appeal filed under Order XLIII R 1 read with Section 104 and Section 100 of CPC. against the decree and judgment dated 11.08.2015 passed in CMA.No.31/2014 on the file of the Principal District Court, Erode, confirming the decree and judgment dated 27.6.2014 passed in P.O.P.No.1 of 2013 by the Principal Sub-Court, Erode.

For Appellant :: Mr.I.C.Vasudevan

For Respondents 1 to 3:: Mr.C.E.Pratap

For 4th respondent :: Mr.A.Dev Narenderan,
Government Advocate (C.S.)

JUDGMENT

The present Civil Miscellaneous Second Appeal has been filed against the decree and judgment dated 11.08.2015 passed in CMA.No.31/2014 by the learned Principal District Judge, Erode, confirming the decree and judgment dated 27.6.2014 passed in P.O.P.No.1 of 2013 by the learned Principal Sub-Judge, Erode, thereby rejecting the request of the appellant to accept her prayer for exemption from paying the court fees as informa pauperis .

2. Mr.I.C.Vasudevan, learned Counsel appearing for the appellant would submit that the appellant filed a petition in POP.No.1/2013 to declare the Sale Deed dated 18.03.2008 as null and void since fraud was played on her by the respondents 1 to 3 misguiding her that there is a power of attorney in the guise of mortgage deed for the loan obtained by the appellant/plaintiff. But, subsequently, the respondents 1 to 3 obtained the signature from the appellant/plaintiff in the sale deed dated 18.03.2008 and the same was also registered. As appellant is not having any means to pay the court fee to prosecute the case filed against the respondents 1 to 3/defendants 1 to 3, she has pleaded before the trial court that she has left with no means to raise money for payment of court fee. But the trial court dismissed her prayer to adjudge the appellant/plaintiff as informa pauperis citing a reason that the appellant failed to disclose the house site having an extent of 1260 sq.ft. for which a case is pending.

3. The learned Counsel for the appellant would further submit that as per Order 33 Rule 1 (a) of CPC, the suit property which can be exempted need not be shown in the plaint. But overlooking the Order 33 Rule 1 (a) of CPC., the trial court wrongly refused the prayer to proceed her as informa pauperis. Therefore, the appellant filed CMA.No.31/2014 before the learned Principal District Judge, Erode. The learned Principal District Judge also confirmed the order of the trial court adding mere erroneous reasons. The reason cited by the I Appellate Court shows that when the Power of Attorney was obtained on 28.09.2007, the sale deed was executed on 18.03.2008, but the suit was filed in the year 2012 which is beyond the period of 3 years as per Article 59 of the Limitation Act, 1953. For filing a suit to set aside a decree or instrument, the period of limitation contemplated under Article 59 of the Limitation Act is only 3 years. Since the appellant/plaintiff came to this Court, according to the I Appellate Court, beyond the period of 3 years forgetting that the appellant/plaintiff has got the knowledge of the sale deed executed only on 16.11.2011 and without taking into account the date of knowledge, namely, 16.11.2011, the learned I Appellate Court has wrongly rejected the appeal. Therefore, every reason given by the learned trial court and the learned I Appellate Court had to be set aside and the appellant/plaintiff should be allowed to proceed with the POP without paying the court fee. The learned Counsel for the appellant has also referred to the meaning of the ''indigent person'' as mentioned in Order 33 Rule 1 of CPC.

4. Finally, the learned Counsel for the appellant submitted that when this Court in the previous occasion directed the District Collector to explain the case leading to the filing of the Civil Miscellaneous Appeal and the Civil Miscellaneous Second Appeal as to why the petition filed by the appellant

should not be accepted as informa pauperis, the Tahsildar, Erode Taluk has filed a report dated 16.01.2019 whereas the District Collector, Erode, has not filed any report. Even the report filed by the Tahsildar clearly shows that the appellant is having a house site to an extent of 1260 sq.ft. and obtained one more house through Slum Clearance Board which is neither saleable nor amenable. Therefore, that cannot be put against the appellant to say that the appellant is a solvent person but not an indigent person.

5. Per contra, Mr.C.E.Pratap, learned Counsel appearing for the respondents 1 to 3 submitted that the report of the Tahsildar has not been opposed by the appellant by filing any reply. Secondly, the report dated 16.01.2019 filed by the Tahsildar, Erode Taluk clearly shows that the appellant's son Balasubramani, who is residing with the appellant, is also working in a Power Loom Factory as a labour and getting a salary of Rs.5,000/- p.m., besides the appellant is owning a house obtained through the Slum Clearance Board and also another house site to an extent of 1260 sq.ft. for which a case is pending. Therefore, according to the learned Counsel for the respondents 1 to 3, in view of the house allotted by the Slum Clearance Board and another house site having an extent of 1260 sq.ft, and thirdly, her son Balasubramani who is living with her is earning a monthly income of Rs.5,000/- from a Power Loom Factory as a labour, the appellant cannot be treated as an indigent person.

6. Referring to a Division Bench Judgment of this Court in Mohana and another vs. Nirmaladevi and 5 others reported in 2012 (3) CTC 507, the learned Counsel for the respondents 1 to 3 submitted that the possession of sufficient means refers to the possession of sufficient realisable property which will enable the appellant/plaintiff to pay court fee on the plaint. The said judgment also advanced what is ''means''. ''Means'' means income, estate, wealth. ''Sufficient means'' also has been further explained that it is a capacity to raise money to pay the court fee and money can be raised over properties also.

7. I find some substance in the submission made by the learned Counsel for the respondents 1 to 3.

8. At the outset, Order 33 Rule 1 (a) explains what is indigent person which is given here under :

> ''ORDER XXXIII
> [SUITS BY INDIGENT PERSONS]
> 1.Suits may be instituted by indigent person.- Subject to the following provisions, any suit may be instituted by an [indigent person]
> Explanation I.-A person is an indigent person,-

(a) if he is not possessed of sufficient means (other than property exempt from attachment in execution of a decree and the subject-matter of the suit) to enable him to pay the fee prescribed by law for the plaint in such suit, or

(b) where no such fee is prescribed, if he is not entitled to property worth one thousand rupees other than the property exempt from attachment in execution of a decree, and the subject-matter of the suit.''

9. The Division Bench of this Court while dealing with Order 33 Rules 1 and 2 for the purpose of appreciating the indigent person in Mohana and another vs. Nirmaladevi and 5 others reported in 2012 (3) CTC 507 has also held as follows:

"14.'Means' means income, estate, wealth. Appellants-Plaintiffs 1 & 2 are said to be having properties of their own in Keezh Sathampur Village. Respondents have stated that Plaintiffs are entitled to the properties standing in the name of Komaragounder, who is the other brother of the 2nd Respondent. Appellants have not let in any evidence to disprove owning of properties in Keezh Sathampur village. Appellants are said to be owning jewels each worth Rs.10,00,000/-. Appellants deny possessing of any jewels each worth Rs.10,00,000/-, however, no independent evidence was adduced to prove that Appellants were not given any jewels.

16.In P.V.Chandrasekharan and Others V. Thirumalai Chit Funds and Others, AIR 1989 Mad. 30 another Single Judge of this Court held that sufficient means means capacity to raise money to pay Court-fee and money can be raised over properties also. It is not that only if applicant is possessed of cash it can be said that he is possessed of means to pay Court-fee."

Therefore, the word ''means'' has been successfully interpreted as ''means'' means income, estate, wealth and ''Sufficient means'' means the capacity to raise court fee and money can be raised over properties also.

10. Now in the present case, the report of the Tahsildar is extracted here under:

''I invite kind attention to the references cited.

2) Report has been called in the reference cited by the District Collector, Erode regarding the financial status of Tmt.Mariyammal, W/o.Thiru. Ganesan of Periyasemur Village, Erode Taluk, Erode District.

3) The Appeal petitioner, Tmt.Mariyammal was residing at Door No.268, Slum Clearance Board Housing

Unit, Ayyankurai, Malli Nagar, Periyasemur Village, Erode Taluk, five years back. The Appeal Petitioner is now residing at a rental house bearing Door No.9, A.D.Colony, Sooriyampalayam Village, Erode Taluk. She belongs to Hindu-Pallar-Scheduled Caste Community. She is working in a private dying unit as a scavanger and getting a salary of Rs.4,000/- per month. Her husband due to old age and ill health is jobless and staying at home with his wife. The Appeal Petitioner's son Thiru.Balasubramani is residing with her. He is working in powerloom factory as a labour and getting a salary of Rs.5,000/- per month. The Appeal Petitioner's daughter Tmt.Rukmani got married and she is living with her husband. The Appeal Petitioner owns a house obtained through Slum Clearance Board and also a 1260 square feet house site for which case is pending in Honourable High Court, apart from these she does not own any other immovable property for herself or any ancestral property.

I wish to state that from the above details the Appeal Petitioner is not a pauper.''

The report of the Tahsildar clearly shows that the appellant is having a son by name Balasubramani who is also residing with the appellant and working in a Power Loom Factory as Labour and getting a salary of Rs.5,000/- p.m. besides the appellant's daughter Tmt.Rukmani got married, but living separately with her husband, the appellant/plaintiff is also owning a house obtained through the Slum Clearance Board and also having a house site to an extent of 1260 sq.ft. for which a case is pending. Therefore, the contention of the learned Counsel for the appellant that the income of the family members of the appellant cannot be taken for the purpose of deciding the plaintiff as indigent person, cannot be accepted. Hence, when the appellant is having sufficient means to pay the court fees, her prayer to treat her as indigent person, has been rightly refused by the learned trial court and consequently, the finding and the conclusion given by the learned I Appellate Court also required to be affirmed. Therefore, I find no substantial question of law to answer in this Civil Miscellaneous Second Appeal.

11. In the result, the Civil Miscellaneous Second Appeal fails and the same is accordingly dismissed. Four weeks time is granted to the appellant to pay the Court fee. No costs. Consequently, connected Miscellaneous Petition is closed.

26.07.2019

The matter has been taken up for being mentioned.

2.Learned counsel appearing for the appellant would submit that insofar as the limitation aspect is concerned, it is appropriate to clarify that the suit is not barred by limitation, since the appellant came to know the execution of the power of attorney only on 16.11.2011 and filed the suit on 11.03.2013, namely, within three years from the date of knowledge. Referring to Article 59 of the Limitation Act 1963, he would submit that the bar of limitation will be attracted only from the date of knowledge. Taking support from the judgment of the Apex Court in the case of M.D.Noorul Hoda vs. Bibi Raifunnisa and others reported in 1996 (7) SCC 767, learned counsel appearing for the appellant would submit that in para 6 of the judgment it has been held that the starting point of limitation is the date of knowledge of the alleged fraud.

3.It is necessary to extract relevant portion as under:

.... The question is whether in case of person claiming title through the party to the decree or instrument or having knowledge of the instrument or decree or contract and seeking to avoid the decree by a specific declaration, whether Article 59 get attracted? As stated earlier, Article 59 is a general provision. In a suit to set aside or cancel an instrument, a contract or a decree on the ground of fraud, Article 59 is attracted. The starting point of limitation is the date of knowledge of the alleged fraud. When the plaintiff seeks to establish his title to the property which cannot be established without avoiding the decree or an instrument that stands as an insurmountable obstacle in his way which otherwise binds him, though not a party, the plaintiff necessarily has to seek a declaration and have that decree, instrument or contract cancelled or set aside or rescinded. Section 31 of the Specific Relief Act, 1963 regulates suits for cancellation of an instrument which lays down that any person against whom a written instrument is void or voidable and who has a reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, can sue to have it adjudged void or voidable and the court may in its discretion so adjudge it and order it to be delivered or cancelled. It would thus be clear that the word 'person' in Section 31 of the Specific Relief Act is wide enough to encompass a person seeking derivative title from his seller. It would, therefore, be clear that if he seeks avoidance of the instrument, decree or contract and seeks a declaration to have the decrees set aside or cancelled he is necessarily bound to lay the suit within three years from the date when the facts entitling the plaintiff to have the decree set aside, first became known to him.

4.As the appellant got the knowledge of the execution of the alleged power of attorney only on 16.11.2011 and she has filed the suit on 11.03.2013, which is within three years from the date of knowledge and well within Article 59 of the Limitation Act, 1963, the judgment of the First Appellate Court holding that the suit has been filed after the period of three years alone is set aside. The appellant is given two weeks time from the date of receipt of a copy of this order to pay the Court fee.

Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

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To

1.The Principal District Judge, Erode.

2. The Principal Sub-Judge, Erode.

3. The Section Officer,
V.R. Section, High Court, Madras.

+1 cc to Government Pleader Sr.No. 66252,64184
+2ccs to Mr.I.C.Vasudevan,Advocate SR.No. 64560
+1cc to Mr.C.E.Pratap , Advocate SR.No. 64845

A.SK(14/10/2020)