

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 26.06.2019
PRONOUNCED ON : 12.07.2019

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S.A.No.153 of 2016

1. Sathya
2. Minor Dayalan
3.Minor Vidya ...Appellants/Respondents 1 to 3/Plaintiffs
Minor Respondents 2 & 3 are rep by the Mother
Next Friend, the first appellant.

Vs.

1.Nagaraj ...1st Respondent/Appellant/1st Defendant
2. Raja ...2nd Respondent/4th Respondent/2nd Defendant

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 07.07.2015 in A.S.No.3 of 2015 on the file of II Additional District Judge, Salem reversing the judgment and decree dated 04.12.2014 in O.S.No.488 of 2012 on the file of the I Additional Subordinate Judge, Salem.

For Appellants : Mr.P. Jagadeesan

For Respondents: Mr. E.C.Ramesh for R1
R2 - No appearance. Set exparte vide order dated 26.06.2019

JUDGMENT

Challenge in this Second Appeal is made to the judgment and decree dated 07.07.2015 passed in A.S.No.3 of 2015 on the file of II Additional District Court, Salem, reversing the judgment and decree dated 04.12.2014 passed in O.S.No.488 of 2012 on the file of the I Additional Subordinate Court, Salem.

2. For the sake of convenience, the parties are referred to as per their rankings in the trial court.

3. Suit for partition, declaration and permanent injunction.

4. The case of the plaintiffs, in brief, is that the first plaintiff is the wife and the plaintiffs 2 and 3 are the children of the second defendant and the plaint schedule property is the ancestral property of the second defendant and the plaintiffs 2 and 3 and the first plaintiff is also the joint family member and the plaintiffs are having title over the suit property and enjoying the same. While so, according to them on 20.09.2012, the first defendant came to the suit property and endeavoured to measure the same and the same was objected to by the first plaintiff and the first defendant had claimed that he had purchased the suit property from the second defendant and according to the plaintiff, the abovesaid sale transaction put forth by the first defendant is not valid and not binding upon the plaintiffs in any manner and further according to the plaintiff, after the marriage, the first plaintiff had been living with the second defendant, however, the second defendant is not in the habit of disclosing any matter to the plaintiff and the second defendant's family is a male dominated one and hence according to the plaintiffs, the sale transaction put forth by the first defendant is not known to the plaintiffs and according to the plaintiff, on verification of the copy of the sale deed from the Registrar's office, they came to know that the sale deed dated 26.03.2012 had come to be created by the first defendant under the false promise and false representation and also by using the force on the second defendant and hence according to the plaintiffs, the abovesaid sale deed is not valid and liable to be set aside and there is no family necessity for alienating the suit property in favour of the first defendant on the part of the second defendant and no permission had also been obtained from the court for the abovesaid alienation and the plaintiffs are in the possession of the suit property and accordingly, the plaintiffs are entitled to claim the share in the suit property as put forth in the plaint and hence according to the plaintiffs, they have been necessitated to lay the suit against the defendants for appropriate reliefs.

5. The first defendant had totally disputed the case projected by the plaintiffs in the plaint and according to him, the second defendant for himself and on behalf of the minor plaintiffs 2 and 3 had sold the suit property to him for a valid consideration by way of the registered sale deed dated 26.03.2012 and handed over the possession of the suit property to him and only at the instigation of the second defendant, the plaintiffs have now come forward with the false suit and the second defendant had derived the suit property by way of the

partition deed dated 28.06.2010 and hence the suit property is the self acquired property of the second defendant and not the ancestral property as put forth and claimed by the plaintiffs and when the second defendant along with the first plaintiff attempted to disturb his possession and enjoyment of the suit property, the first defendant had filed a civil suit on the file of the District Munsif Court, Salem and obtained the order of injunction and only as a counterblast to the abovesaid suit, the present suit has been laid by the plaintiffs and hence prayed for the dismissal of the plaintiffs' suit.

6. On the basis of the materials placed by the respective parties, both oral and documentary, the trial court was pleased to grant the relief of partition in favour of the plaintiffs 2 and 3 holding that they are each entitled to 1/3 share in the suit property and also granted the relief of declaration as prayed for and accordingly disposed of the plaintiffs' suit. Aggrieved over the same, the first defendant had preferred the first appeal and the first appellate court, was pleased to set aside the judgment and decree of the trial court and by way of allowing the appeal preferred by the first defendant, dismissed the suit laid by the plaintiffs. Challenging the same, the plaintiffs have preferred the second appeal.

7. At the time of admission of the second appeal, the following substantial questions of law were formulated for consideration.

"a) Whether the lower court right in upholding the alienation under Ex.A2, in the absence of any family necessity or it is proved that the said alienation is for the welfare of the minor plaintiffs?

b) Whether the first defendant is a bonafide purchaser of the suit property under Ex.A2, especially when he had not even chosen to give evidence to prove his case?

8. The first plaintiff is the wife and the plaintiffs 2 and 3 are the children of the second defendant. Even as per the case put forth by the plaintiffs in the suit, it is found that the plaintiffs are living only with the second defendant. According to the plaintiffs, the second defendant used to not discuss any family affairs with them and further according to the plaintiffs, the suit property is the ancestral property of the second defendant and the plaintiffs 2 and 3 and accordingly, the plaintiffs are entitled to share in the suit property as put forth in the plaint and it is pleaded by them that the first defendant attempted to disturb their possession and enjoyment of the suit property and claimed that he had purchased the suit

property from the second defendant by way of the sale deed dated 26.03.2012 and thereafter on verification, the plaintiffs came to know that the abovesaid sale deed had been created by the first defendant under the false promise and false representation and also by using force on the second defendant and hence, according to the plaintiffs, as the suit property is the ancestral property and the plaintiffs have share in the same and the abovesaid sale deed not having been created by the second defendant for any legal necessity and for the welfare of the minors abovesaid, the sale deed is invalid and not binding upon the plaintiffs and hence put forth that they had been necessitated to institute the suit against the defendants for appropriate reliefs.

9. Per contra, according to the first defendant, the second defendant for himself and on behalf of the minor plaintiffs 2 and 3 had alienated the suit property in his favour for a valid consideration by way of the registered sale deed dated 26.03.2012 and further according to him, the suit property having been derived by the second defendant by way of the partition deed dated 28.06.2010, the suit property is only the self acquired property of the second defendant and not the ancestral property as put forth and claimed by the plaintiffs and further according to the first defendant, the abovesaid sale deed had been executed only for the welfare of the family on the part of the second defendant and only with a view to deprive his right , interest and title in respect of the suit property, it is stated that, at the instigation of the second defendant, the plaintiffs have come forward with the false suit and hence, the suit is liable to be dismissed.

10. The first appellate court, on the basis of the materials placed on record, has proceeded to hold that the suit property is the ancestral property of the second defendant and however noting that the plaintiffs have admitted that the second defendant has been living with them all along and disbelieving the evidence adduced on the part of the plaintiff through P.W.2 as if there is no love lost between the first plaintiff and the second defendant and accordingly further noting that the sale deed dated 26.03.2012 executed by the second defendant in favour of the first defendant marked as Ex.A2/B2 has been executed by the second defendant for himself and on behalf of the plaintiffs 2 and 3 and accordingly further noting that the second defendant had alienated the suit property only as the kartha of the joint family for meeting the family expenses and welfare of the family and further noting that welfare of the family includes the welfare of the minors and determining that the second defendant in particular and the plaintiffs, as such, have not placed any materials to hold that the abovesaid sale deed had been obtained by the first defendant by false promise, false representation

and using force as put forth in the plaint and in particular when the second defendant is found to have not entered appearance in the matter and remained exparte all along and accordingly determined that the abovesaid sale deed would be binding upon the plaintiffs and accordingly determined that the abovesaid sale deed is valid and the plaintiffs are not entitled to seek and obtain the reliefs prayed for and thereby dismissed the plaintiffs' suit.

11. As rightly found by the first appellate court, it is found that the the impugned sale deed dated 26.03.2012 had been executed by the second defendant as the kartha of the joint family for himself and on behalf of the minor plaintiffs 2 and 3. The abovesaid fact is very well known to the plaintiffs. The plaintiffs have admitted that on verification of the abovesaid sale deed, they had come to know about the sale transaction. In such view of the matter, when Ex.A2/B2 sale deed is found to be executed by the second defendant as the kartha of the joint family and on behalf of the minor plaintiffs 2 and 3 and the minor plaintiffs 2 and 3 are the eo-naminee parties to the abovesaid sale transaction, in such view of the matter, the plaintiffs should have endeavoured to cancel the abovesaid sale deed by paying the requisite court fees under Section 40 of the Tamilnadu Court Fee Act and when the plaintiffs had failed to seek the cancellation of the same and only sought the relief of declaration that the abovesaid sale deed is invalid, the same would not suffice, accordingly, it is seen that on the abovesaid ground alone, the plaintiffs cannot be allowed to seek the relief of declaration as prayed for by them and I had an occasion to consider the abovesaid position of law in the decision reported in (2017) 1 MLJ 153 (M. Panneerselvam vs. Susseela and others) and held that the relief of declaration sought for by the plaintiff therein could not be taken as the prayer for the cancellation of the sale deed wherein the minor plaintiffs are the eo-nominee parties and for arriving at the abovesaid determination, the decisions reported in (1996) 1 CTC 661 (P.B. Ramjee and two others vs. P.B. Lakshmanaswamy Naidu and ten others), AIR 1956 MAD 670 : (1956) 2 MLJ 1411 (Sankaranarayana Pillai vs. Kandasamipillai) and (1976) 2 MLJ 326 (V.Nataraja Iyer and others vs. Arunachalam and Others) were taken into consideration and accordingly held that the relief of declaration sought for by the plaintiff therein could not be taken as a prayer seeking for the cancellation of the impugned sale deed and thereby dismissed the plaintiff's suit in the abovesaid case. The position of law has been culled out in the abovesaid decision as follows:

"Whether Lower Courts right in not considering suit valued under Section 25(d) is correct and proper - Held, sale deed Ex.A8 would show that plaintiffs were co-nominee parties to sale transaction - Relief of declaration sought for by plaintiffs could not be taken

as prayer for cancellation of sale deed - Valuation of suit by plaintiffs under Section 25(d) is not correct - Plaintiffs should have sought for appropriate reliefs and valued suit under Section 40 and paid Court fees and their failure to do so resulted in prejudice to first defendant qua disposal of suit or appeal on its merits - Approach of First Appellate Court in not adjudicating question of under valuation of suit in proper manner not correct - Appeal allowed.

13. That the plaintiffs are eo-nominee parties to the sale transaction dated 27.08.1987 is not in dispute. A perusal of the said sale deed marked as Ex.A8 would go to show that the plaintiffs are eo-nominee parties to the said sale transaction. Therefore, without advertting to much on the said issue i.e. whether Ex.A8 is required to be cancelled as claimed by the appellants, a useful reference may be made to the decision relied upon by the counsel for the appellant reported in P.B. Ramjee and two others vs. P.B. Lakshmanaswamy Naidu and ten others (1996) 1 CTC 661 : LNIND 1995 MAD 777. Therein, it has been held that where minor is eo-nominee party to the sale deed or other document executed by father, suit for cancellation of such document should be sought for and the suit should be valued under Section 40 of the Act. While taking the abovesaid view, the Division Bench followed the Full Bench judgment of the Madras High Court reported in Sankaranarayana Pillai vs. Kandasamipillai AIR 1956 MAD 670 : (1956) 2 MLJ 1411 and has also, extracted the points adjudicated by the Full Bench, in the abovesaid decision, which is extracted below:

"18. On the other hand, the subsequent Full Bench Judgment in Sankaranarayana Pillai vs. Kandasamipillai AIR 1956 MAD 670 : (1956) 2 MLJ 1411, has placed the matter beyond doubt by answering two questions referred to them in the following manner.

"Our answer to the first question is that if the minor is eo nominee party to a sale deed or other document of alienations, he must sue for the cancellation of the document under Section 7(iv-A) of the Court Fees Act and it is not enough if he applies for possession under Section 7(v) of the Act; and to the second question our answer is that there can be no distinction whether the father as guardian of the minor and not as the manager of the joint family executes the deed. Even

in that case also the document has to be set aside."

There is no doubt whether that the Full Bench has decided against the propositions now contended for by learned counsel for the appellant on the strength of the judgment in V.Nataraja Iyer and others vs. Arunachalam and Others (1976) 2 MLH 326.

19. A Division Bench of this Court, in which one of us was a party, had recently an occasion to consider the question in Sridharan and Others vs. Arumugham and Others, (1993) 2 MLJ 428 and it has held that insofar as the documents in which the minor children are made parties, they are bound in law to pray for setting aside the same and without such prayer, the suit is not sustainable in relation to those documents:

20. Hence, the view taken by the trial judge that the suit is no maintainable in the absence of a prayer to set aside the alienation, is correct"

14. Therefore, it could be seen that the relief of declaration sought for by the plaintiffs, could not be taken as a prayer seeking for cancellation of the sale deed dated 27.08.1987 also and hence the valuation of the suit by the plaintiffs under Section 25(d) of th Act is not correct. Therefore, it could be seen that the plaintiffs should have sought for appropriate reliefs and valued the suit under Section 40 of the Act and accordingly, paid the court fees thereon.

In the light of the abovesaid position of law, considering the nature of the suit property, as determined by the first appellate court, being ancestral and when the impugned sale deed had been executed by the second defendant as the kartha of the family and also on behalf of the minor plaintiffs 2 and 3, in such view of the matter, the plaintiffs, without the seeking the cancellation of the abovesaid sale deed is not entitled to seek for the relief of declaration and on that ground also, in my considered opinion, the plaintiffs have to be non suited.

12. As right found and determined by the first appellate court, when as per the case projected by the plaintiffs in the plaint, it is found that the plaintiffs and the second defendant are living under the same roof and not separated as such, in such view of the matter, it is found that the second defendant being the head of the family would have endeavoured to alienate the suit property under the impugned sale deed only for the benefit of the family and accordingly necessary recitals to that effect

had also been mentioned in Ex.A2/B2 sale deed. The first appellate court is justified in holding that meeting the family expenses and the welfare of the family, as mentioned in the abovesaid sale deed, would also include the interest of the minors. It is not the case of the plaintiffs that the second defendant had been indulging in illegal activities and not looking after the family and leading a wayward life and therefore, the sale deed effected by him is not for legal necessity. Very vaguely they have put forth the plea that Ex.A2/B2 has not been executed for legal necessity. However, considering the facts, as determined by the first appellate court, that the plaintiffs and the second defendant are living together and when Ex.A2/B2 sale deed is found to have been executed only for the welfare of the family which includes the welfare of the minors and when in the decisions relied upon by the plaintiffs reported in (2013) 9 Supreme Court Cases 419 (Rohit Chauhan vs. Surinder Singh and others) and 2009 (5) CTC 170 (M.Yogendra and others vs. N.Leelamma and others), it has been held that when the sale transaction is effected by the kartha of the family for any legal necessity, the same is binding upon the minors as the kartha is entitled to alienate the suit property belonging to the joint family for legal necessity and in such view of the matter, when there is no material to hold that the relationship between the plaintiffs and the second defendant has become estranged and isolated in any manner and the second defendant had been indulging in immoral and illegal activities and not looking after the family, in such view of the matter, considering the entire evidence placed in this matter, it is found that the first appellate court is wholly justified in coming to the conclusion that only for the welfare of the minors and for the legal necessity, the suit property had come to be alienated by the second defendant in favour of the first defendant and accordingly, the suit property had been entrusted to the possession and enjoyment of the first defendant and hence, it is found that the first defendant is a bonafide purchaser of the suit property and his failure to enter into the witness box, by itself, would not in any manner affect his case considering the evidence of the subsequent purchaser D.W.1 as well as the facts and circumstances of the case in entirety. As abovenoted, the claim of the plaintiffs that the first defendant had obtained the abovesaid sale deed based on false promise and false representation using force, etc., had not been substantiated by the plaintiffs with acceptable materials and furthermore, the second defendant having not come forward challenging the case of the first defendant in any manner and top of it, the plaintiffs and the second defendant are found to be living under same roof, as rightly contended by the defendant's counsel, the plaintiffs cannot be allowed to feign ignorance of the abovesaid sale transaction and therefore, it is evident that the abovesaid sale deed is valid and binding upon the plaintiffs and in such view of

the matter, the first appellate court is justified in non suiting the plaintiffs' case by setting aside the judgment and decree of the trial court and I do not find any valid reason for interfering with the judgment and decree of the first appellate court.

13. For the reasons aforestated, the substantial questions of law formulated in this second appeal are accordingly answered against the plaintiffs and in favour of the first defendant. There is no merit in this second appeal and hence the second appeal fails and is accordingly dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

-s/d-

Assistant Registrar (CCC)

True Copy

Sub-Assistant Registrar

bga

Copy to

1. II Additional District Court, Salem
2. I Additional Subordinate Judge, Salem.
3. The Section officer, V.R. Section, High Court, Madras

+1 CC to Mr.P. Jagadeesan, Advocate sr 59435.

+1 CC to Mr.E.C. Ramesh, Advocate sr 59400.

S.A.No.153 of 2016

PM(CO)
SP(25/10/2019)

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