

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.09.2019

CORAM:

THE HON'BLE MR.JUSTICE R.SUBRAMANIAN

S.A.No.219 of 2014 and

M.P.Nos.1 and 2 of 2014

Venkusah

..Appellant/Appellant/
4th defendant

Vs.

1. Baskaran

...1st respondent/1st respondent/
Plaintiff

2. Ganesan

3. Murugesan

4. Selvam

..Respondents 2 to 4/

Respondents 2 to 4/Defendants 1 to 3

PRAYER: Second Appeal filed under Section 100 of C.P.C., to set aside the judgment and decree of the learned Sub Judge, Cheyyar, dated 22.11.2013 in A.S.No.27 of 2012, confirming the judgment and decree of the learned Principal District Munsif, Cheyyar, dated 11.07.2012 in O.S.No.153 of 2008.

For Appellant : Mr.S.Parthasarathy,
Senior Counsel for
Mr.K.Vimal Kumar

For Respondent (R1) : Mr.A.Tamilvanan

For Respondents No.2: Mr.S.Mahesh
Respondents 3 & 4 : No Appearance

J U D G M E N T

The 4th defendant who suffered a decree for partition and separate possession of the plaintiff's 1/3rd share in the 'B' Schedule Property in O.S.No.153 of 2008, on its confirmation in A.S.No.27 of 2012 has come forward with this appeal.

2. The suit was laid by the plaintiff claiming that the suit B Schedule properties were ancestral properties having been allotted to his father, 2nd defendant namely Murugesan at a partition that took place between Kiliyappa Naicker, Ganesan, the 1st defendant and Murugesan, the 2nd defendant on 19.02.1988. Therefore, being the property allotted to a coparcener at the

partition, the same will be held by him as coparcenary property and his children would acquire a right by birth. Thus, the plaintiff would claim 1/3rd share in the property. The 2nd defendant had sold the property to the 4th defendant on 21.12.1992. Hence, the 4th defendant was also made a party to the suit. As regards 'A' Schedule property, it was the case of the plaintiff that the same was allotted to Kiliyappa naicker and on his death, it devolved on his heirs. Therefore, he is entitled to 1/6th share in the suit 'A' Schedule property.

3. Expectedly, the defendants 1 to 3 who are the paternal uncle, father and brother of the plaintiff remained exparte. The 4th defendant purchaser contested the suit contending that the suit is not maintainable. It was also claimed that the suit is barred by limitation. While admitting the fact that the suit 'B' Schedule Property was allotted to the 2nd defendant at the partition Deed dated 19.02.1988, the 4th defendant would contend that the suit filed after a lapse of three years from the date on which the plaintiff attained majority is barred by limitation.

4. The Courts below held that the sale by the 2nd defendant without permission of the Court is void, as he sought to convey the interest of the minors in coparcenary property. The Courts below also rejected the plea of the 4th defendant on limitation on the ground that the plaintiff has not sought for setting aside the sale and therefore, the suit is not barred by limitation. On the above findings, the Courts below had granted a decree with reference to 'B' Schedule Property in favour of the plaintiff, declaring 1/3rd share to the plaintiff.

5. Aggrieved, the 4th defendant is on appeal.

6. I have heard Mr.S.Parthasarathy, learned Senior Counsel for appellant and Mr.A.Tamilvanan, learned counsel for 1st respondent/plaintiff and Mr.S.Mahesh, learned counsel for 2nd respondent. Respondents 3 and 4 though served, they are not appearing either in person or through counsel.

7. The following questions of law were framed at the time of admission:

1. Whether the concurrent finding of both the Courts below that Ex.B5 sale deed not binding on the respondents is valid?
2. When Article 60 of the Limitation Act, 1963 mandates a minor to set aside the sale within 3 years on attaining majority, whether the Judgment and Decree of the Courts below in over riding the

provisions of the Limitation Act is sustainable in law?

3. When it is settled proposition of law that with respect to joint family property, the Section 8 (2) of Hindu Minority and Guardianship Act is not applicable, whether the Judgment and Decree of the Courts below mandating the permission of the Court is right in law?

8. Upon hearing the counsels, the following additional question of law is framed:

Whether the suit framed without seeking to set aside the Sale Deed dated 21.12.1992 is maintainable?

9. I have heard the counsel on the question of law framed above.

10. Mr.S.Parthasarathy, the learned Senior Counsel appearing for the appellant would contend that in view of the decision of the Full Bench of this Court in Sankaranarayana Pillai and another V. Kandasamia Pillai reported in 69 LW 686, the suit without a prayer to set aside the alienation made by the Kartha of the joint family is not maintainable.

11. The learned counsel would also contend that once the minors are *eo nomine*, parties to a Sale Deed, they are bound to seek to set aside the sale, within three years from attaining majority.

12. Mr.S.Parthasarathy, the learned senior Counsel would also invite my attention to the Judgment of the Hon'ble Division Bench of this Court in P.B.Ramjee and two others Vs.P.B.Lakshmanaswamy Naidu & ten others reported in 1996 (I) CTC 661. The Division Bench had held that though the original suit was filed for partition and separate possession within a period of three years and an amendment was subsequently sought for, after expiry of the three years period, there is no justification for allowing such amendment. In doing so, the Division Bench observed as follows:

"18. On the other hand, the subsequent Full Bench judgment in Sankaranarayana Pillai and another V. Kandasamia Pilla, 1956 (2) M.L.J.411: A.I.R. 1956 Mad.670, 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 nomine* a 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 whatever 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 & Otehrs v. Arunachalam & others, 1976 (2) M.L.J.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 & Others v. Arumugham & others, 1993 (2) M.L.J. 428 and it has held that in so far 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 not maintainable in the absence of a prayer to set aside the alienations, is correct."

13. The Division Bench further observed that the attempt of the appellant in the said appeal seeking to introduce a prayer for setting aside the alienation made in the appeal, cannot be allowed and the same would be barred by limitation. While doing so, the Division Bench has observed as follows:

"We do not think it proper to grant the prayer for amendment of the plaint at this distance of time. Even in the written statement of the defendants 3 and 4 filed on 22.01.1979 and 07.07.1979 respectively a plea was raised that the suit was not maintainable without a prayer for setting aside the alienations. The suit was disposed of only on 24.09.1982. The plaintiff did not seek to amend the plaint and include such a prayer even after filing of the written statements. Even though the appeal was filed in 1985 and the learned judge has given a definite finding that the suit was not maintainable in the absence of a prayer to set aside the alienations, the plaintiff has not chosen to seek

amendment of the plaint till 1994 he filed this C.M.P.on 20.01.1994.

There is no doubt whatever that on date on which amendment was prayed for, the suit was very much barred by limitation with reference to the prayer for setting aside the alienation. Hence was dismiss C.M.P.No.2786 of 1994."

14. Mr.A.Tamilvanan, learned counsel appearing for the respondents would however contend that the plea relating to requirement of the prayer setting aside the sale deed was not raised before the Courts below and the same is raised only before this Court. This Court has consistently held that the minor coparcener who is made as 'eo nomine' a party to the sale deed executed by the Kartha cannot be maintain a suit for partition without a prayer for setting aside the alienation.

15. This view is based on the well settled principles of law that the Kartha /manager of the Hindu Joint Family has a right to alienate the suit property for legal necessity. If a member of the joint family impugns the alienation by the Kartha, he has to plead and prove that the alienation is not for legal necessity. Unless, he seeks to set aside the document, the relief of partition cannot be granted. I am therefore of the considered opinion that the additional question of law framed will have to be answered in favour of the appellant.

16. In view of the answer to the additional question of law framed, I do not think it is necessary to answer other questions of law framed at the time of admission, as they will not strictly arise. The suit will have to fail insofar as it relates to the 'B' Schedule Property on the sole ground that the plaintiff has not sought for setting aside the alienation.

17. In the light of the conclusions arrived, the second appeal is allowed. The Judgment and Decree of the Courts below with reference to the 'B' Schedule Property is alone is set aside and the suit in O.S.No.153 of 2008 will stand dismissed in respect of the 'B' Schedule Property alone and the decree for partition of suit 'A' Schedule properties is confirmed.

18. Consequently, connected Miscellaneous Petitions are closed. No costs.

Sd/-
Asst.Registrar (CCC)

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Sub Asst. Registrar

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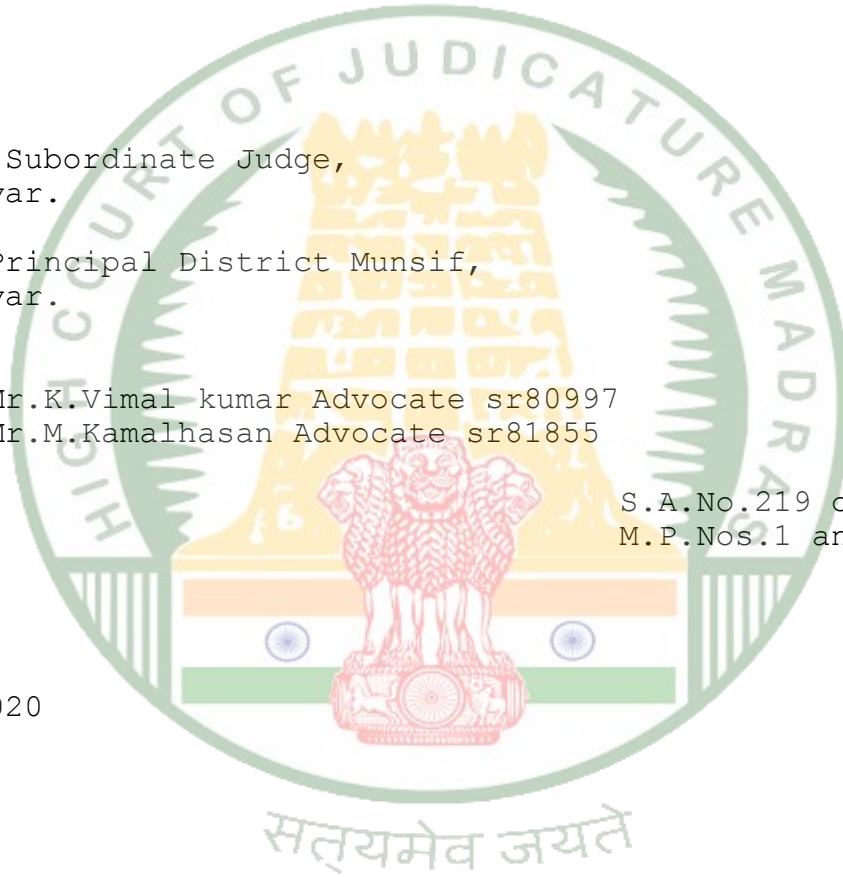
To

1. The Subordinate Judge,
Cheyyar.
2. The Principal District Munsif,
Cheyyar.

+1 cc to Mr.K.Vimal kumar Advocate sr80997
+1 cc to Mr.M.Kamalhasan Advocate sr81855

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