

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 28.01.2019

Delivered on: 04.06.2019

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No.673 of 2018

&

C.M.P.No.20560 of 2018

B.Chitti Babu @ Devarajulu

...Defendant/Appellant/Appellant

Vs

1.C.Abilash

2.C.Karthick, (Minor aged 12 years)

...Plaintiff/Respondents/Respondents

PRAYER: Second Appeal is filed under Section 100 of the Code of Civil Procedure against the Judgement and Decree in A.S.No.19 of the 2017 on the file of the IV Additional District Judge, Ponneri dated 02.04.2018 confirming the Judgement and Decree dated 27.06.2017 in O.S.No.1 of 2002 passed by the Subordinate Judge, Ponneri.

For Appellant : Mr.V.Kannan

For Respondent 1 : Not Ready in Notice

For Respondent 2 : Mr.M.R.Khabali

J U D G E M E N T

The defendant/respondent in the final decree proceedings is the appellant before this Court. The parties are referred to in the same litigative status as in the Trial Court. The brief resume of the facts that have culminated in the filing of the above Second Appeal are as follows:

2.The plaintiff, minor son represented by his natural guardian, mother had filed the suit O.S.No.1 of 2002 on the file of the Subordinate Court, Ponneri, seeking for a partition of his half share in the suit schedule properties against the defendant, his father. It was the case of the plaintiff that the properties were ancestral properties of the plaintiff and the defendant and that the defendant had fallen into bad ways and had been spending money to meet his extravagant living style

and for which purpose he had started borrowing heavily and to settle these loans the defendant was alienating the ancestral properties in which the plaintiff also had a right.

3.It is the case of the plaintiff that the property had been allotted to the defendant under a compromise decree entered into in the suit O.S.No.334 of 1992 which was instituted by the sisters of the defendant against the defendant, his brother and mother for partition. Thereafter, the matter was compromised and under the compromise decree dated 29.04.1998. The suit schedule property had fallen into the share of the defendant. The plaintiff would contend that on 26.12.2001 he had issued a notice to the defendant and to the creditors warning them from entering into any transaction with reference to the suit schedule properties. Since there was no response the plaintiff was constrained to file the suit.

4.The said suit was resisted by the defendant inter alia contending that the mother of the plaintiff had deserted him and that due to this mental agony he was forced to give up his employment and that he was unemployed and in order to meet the expenses of maintaining the plaintiff and his mother, the defendant was constrained to sell the properties as Kartha of the Joint family.

5.The defendant would further contend that in the year 1988, he had sold an extent of 0.05 ½ cents to develop the family and that he had to alienate another portion to maintain the family. It is his case that since the alienation were being done in his capacity as a Kartha the plaintiff could not question the same. He therefore sought for the dismissal of the said suit.

6.By the Judgement and Decree dated 13.07.2005, the suit was decreed. The said decree was challenged by the defendant in A.S.No.42 of 2007 on the file of the District Court, Chengalpet. Since another son was born to the defendant and his wife, the learned Judge had modified the Judgement and Decree of the Trial Court by granting the 1/3rd share each to the two sons and the defendant.

7.Thereafter, the plaintiff along with his brother had filed I.A.No.408 of 2010 for passing a final decree on 08.03.2009. To this interlocutory application the defendant had contended that he was a practising Advocate and was maintaining the plaintiffs and their mother and the only intention of the mother was to grab the defendant's property. He would further contend that he had instituted proceedings for restitution of conjugal rights in H.M.O.P.No.72 of 2011. He therefore sought for the dismissal of the final decree proceedings.

8.The Court below had proceeded to appoint the Advocate Commissioner. After visiting the suit property the Advocate Commissioner had submitted his report dated 03.03.2017, thereafter the final decree was passed by the Judgement and Decree dated 27.06.2017, in and by which the minors were allotted their 2/3rd share in the suit schedule properties and the share was indicated with the Blue colour in the surveyor's sketch.

9.The said Judgement and Decree was passed after taking into account the objections that the defendant had taken which are as follows:

- a)The father's name of the defendant had been wrongly given;
- b)The Advocate Commissioner had not inspected the property on the given date;
- c)The length and breadth of each item was not mentioned;
- d)Possession was not noted.

10.The said contentions were overruled by the learned Judge by contending that the mistake in the father's name would not in any manner cause any grave prejudice to the defendant. As regards the Advocate Commissioner, the Court had observed that in the report submitted by the Advocate Commissioner, it has been clearly stated that the Commissioner had inspected the property on 18.02.2016, which was the date fixed for the inspection. The total measurement of the property had been given and therefore the non-mentioning of the length and breadth of each item was not fatal. It is the settled law that the Advocate Commissioner cannot speak on possession.

11.With these observations, the learned Judge had overruled the objections raised by the defendant and had proceeded to pass the Judgement in the final decree proceedings. Since the defendant had refused to handover the possession, the plaintiffs were constrained to file E.P.No.33 of 2017. After the Execution Proceedings were filed, the defendant has filed A.S.No.19 of 2017 on the file of the IV Additional District Judge, Ponneri.

12.For the first time in the appeal against the final decree the defendant had come forward with a contention that the plaintiffs had no right over the suit property in view of Section 8 of the Hindu Succession Act. The property had been allotted to the defendant under a partition and had therefore lost the character of coparcenary property and became the self acquired property of the defendant. Therefore it was the contention of the defendant that the decree in O.S.No.1 of 2002 was a nullity.

13.The learned IV Additional Judge, Ponneri, passed the Judgement and Decree dated 02.04.2018, dismissing the appeal and

confirming the final decree that was passed by the Trial Court. It is challenging this Judgement and Decree that the defendant is before this Court.

14. Since, the plaintiff had entered caveat, the appeal was heard finally by this Court.

15. Mr. V. Kannan, learned counsel who had entered appearance for the defendant/appellant would contend that the decree which is obtained in O.S.No.1 of 2002 is nullity, since the plaintiffs have no right to the property as the same is the self acquired property of the defendant. He would argue that on the date of the filing of the suit, the plaintiff did not have a cause of action for claiming the share in the suit property. In support of his arguments the counsel would rely upon the following Judgements:

1. The Additional Commissioner of Income-tax, Madras - 1 Vs. P.L. Karuppan Chettiar reported in AIR 1979 Madras 1

2. Prem Singh and others Vs. Birbal and others reported in (2006) 5 SCC 353

3. M.V. Janardhan Reddy Vs. Vijaya Bank and another reported in 2008-4-L.W.897

4. Sarup Singh and another Vs. Union of India and another reported in 2011 (2) CTC 340

5. Arunagiri Vs. Ayyar Muthuraja and others reported in 2014 (1) CTC 73

6. M. Krishnamoorthy Vs. K. Pondeepankar reported in 2017 (3) CTC 170

7. C. Venkata Swamy Vs. H.N. Shivanna (Dead) By Legal Representative and another reported in (2018) 1 SCC 604.

8. Ilavarasi Ramanathan Vs. Mehamala reported in 2018-5-L.W.716

9. Rajesh Lakshmi Chand Vs. E. Maheswari and others reported in (2018) 3 MLJ 162

16. Per contra, Mr. M.R. Khabali, learned counsel who has entered caveat for the plaintiff/respondent would submit that the decree obtained in O.S.No.1 of 2002 cannot be termed a nullity and at best could only be treated as erroneous if the defendant is able to prove that the property is his self acquired property. He would rely upon the Judgement in Hiralal Moolchand Doshi Vs. Barot Raman Lal Ranchhodas (Dead) by Lrs. reported in 1993 (2) SCC 458.

17. He would argue that since the decree can at best be termed an erroneous decree the same will not be a nullity. He would also draw the attention of this Court to the Judgement in Balvant N. Viswamitra and others Vs. Yadav Sadashiv Mule (Dead) through Lrs. and others reported in 2004 (8) SCC 706, where the Honourable Supreme Court had considered the distinction between

the void and illegal, incorrect and irregular decrees.

18.He would also rely on the Judgements in M.Yogendra and others Vs. Leelamma and others reported in 2009 (15) SCC 184 and Rohit Chauhan Vs. Surinder Singh and others reported in 2013 (9) SCC 419 in support of his arguments that the property which is inherited by a sole coparcener will be separate property but it shall be revived as coparcenary property when a son is born.

19.He would further argue that the defendant had not challenged the preliminary decree in time and that he had filed the Second Appeal challenging the preliminary decree in A.S.No.42 of 2006 only in the year 2013, much after the filing of the final decree proceedings and after the filing of the counter in the said proceedings by the defendant. He would further contend that the application filed for condoning the delay of five years in M.P.No.1 of 2013 in S.A.S.R.No.18538 of 2013 was dismissed by the orders of this Court and while dismissing the said petition the learned Judge had observed as follows:

"the petitioner, being father of the minor respondent, all fairness should have given a share in the property to his minor son. However, after nearly a delay of five years, he has come challenging the Judgements and Decrees of the Courts below"

20.Therefore the counsel would contend that since the preliminary decree remains unchallenged the defendant is estopped from raising this plea for the first time in the final decree proceedings.

21.Heard the counsels and perused the records and Judgements. The defendant had taken a stand right from the reply notice Ex.B.1, that the properties were joint family properties and that he was dealing with the same as a Kartha and the sale of the properties was being effected only for the benefit of the minors and the wife, therefore right through from the legal notice, preliminary decree and right till the passing of the final decree the defendant had taken out a very clear defense that the properties were joint family properties and that he was dealing with the same as a Kartha.

22.When the third parties had attempted to trespass in the suit third item of the property he had instituted the suit O.S.No.298 of 2003, on the file of the District Munsif, Chengalpet, as Kartha of the family.

23.In the light of such a categoric defense being taken it

does not lie in the mouth of the defendant to now contend that the suit property is his self acquired property and therefore the plaintiff did not have the cause of action for filing the suit for partition. The defendant had taken a plea that the property being ancestral he as Kartha was dealing with the same in his reply notice Ex.B.1, written statement and the oral evidence. It is only in the appeal, subject matter of challenge in the Second Appeal that the defendant for the first time has taken this plea. Be that as it may, having not challenged the preliminary decree the defendant cannot question the decree that has been passed in O.S.No.1 of 2002. In the Judgement in Venkatrao Anantdeo Joshi and others Vs. Sau. Malatibai and others reported in AIR 2003 SC 267, the Honourable Supreme Court has held as follows:

"9.Further, in a suit for partition where preliminary decree is passed, at the time of passing of the final decree it was not open to the respondent to raise the contention that he was a tenant of the suit premises. Section 97 of the CPC specifically provides that where any party aggrieved by the preliminary decree does not appeal from the said decree, he is precluded from disputing its correctness in any appeal which may be preferred from the final decree. (Ref. Mool Chand and others V. Dy. Director, Consolidation and others, ((1995) 5 SCC 631)."

24.Therefore the defendant is clearly estopped from now contending that the preliminary decree is nullity.

25.As rightly pointed out by the counsel for the plaintiff the preliminary decree obtained cannot be termed as nullity, since it is not a case where the Court that passed the Judgement did not have the inherent Jurisdiction to try the suit. The defendant's case is that being a self acquired property the plaintiff did not have a cause of action to institute the said suit, which in the considered view of this Court, can only be termed at best an erroneous Judgement.

26.Considering the fact that the defendant had gone on record to state that the property was a joint family property and he was a Kartha, there is no question of the learned Subordinate having committed any error in passing the preliminary decree. In the Judgement in Hiralal Moolchand Doshi Vs. Barot Raman Lal Ranchhoddas (Dead) by Lrs. reported in 1993 2 SCC 458, the Honourable Supreme Court has held as follows:

"a decree is said to be nullity if it is passed by the Court having no jurisdiction. Merely because of the Court erroneously passed a decree or there is an error while passing the decree, the decree cannot be called nullity. The decree to be called a nullity is to be understood in

the sense that it is ultra vires the power of the Court passing the decree and not merely voidable decree."

27. There is no quarrel on the proposition that the defect of jurisdiction of the court goes to the root of the matter and strikes at the very authority of the court to pass a decree or make an order. However in cases where the Courts having an inherent jurisdiction has passed an erroneous order the same is not void and the same can only be challenged as an erroneous or illegal decision. If it is not void it cannot be objected to either in an execution proceedings or in any other collateral proceedings. This is the dicta that has been laid down by the Honourable Supreme Court in its Judgement in Balvant N. Viswamitra and others Vs. Yadav Sadashiv Mule (Dead) through Lrs. and others reported in 2004 8 SCC 706.

28. Therefore considering the fact that the defendant had all along gone on record to state that the property in question is joint family property and that he was dealing with the same as a Kartha and also considering that the preliminary decree has not been challenged, the stand now taken by the defendant questioning the jurisdiction of the Court that passed the preliminary decree cannot be countenanced. I find no error in the Judgement and Decree of the Courts below and the appellant has not made out any question of law much less a substantial question of law.

The Second Appeal therefore dismissed. There shall be no order as to costs. Consequently, connected Civil Miscellaneous Petition is also closed.

Sd/-

Assistant Registrar (CCC)

//True Copy//

Sub Assistant Registrar

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To,

1. The IV Additional District Judge, Ponneri.
2. The Subordinate Judge, Ponneri.

+4cc to Mr. V. Kannan, Advocate, S.R.No. 44910, 45206
+1cc to Mr. M. R. Kapali, Advocate, S.R.No. 44894

S.A.No.673 of 2018 &
C.M.P.No.20560 of 2018

PVS (CO)
GN(10/06/2019)