

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23.01.2020

CORAM

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

S.A.No.1891 of 2000

1.Vajjiram
2.Varadaraj
3.Sivalingam

...Appellants/ Appellants/ Defendants
Vs.

1.Annadurai
2.Rama Gounder
3.Madhu
4.Ponnusami
5.Krishnan
6.Chennammal @ Sivagami
7.Subramani
8.P.S.Ganesan
9.P.S.Natarajan
10.Manickammal
11.Satheya Gounder
12.Subramani
13.Damodaran
14.Devaraj
15.Dhanapal

..1st respondent/ Respondent/Plaintiff

...Respondents 2 to 15/ Defendants 1 to 5, 9 to 17

Prayer :- This Second Appeal is filed under Section 100 of Civil Procedure Code against the judgment and decree dated 31.07.2000, in A.S.No.38 of 1998 on the file of the III Additional District Judge, Krishnagiri, confirming the decree and judgment dated 27.02.1998 in O.S.No.209 of 1990 on the file of the Sub Court, Krishnagiri.

For Appellants : M/s.V.Srimathi
For Respondents
For R1 & 3 : No Appearance
For R2, 4 to 15 : Dismissed

JUDGMENT

This second appeal is directed as against the judgment and decree dated 31.07.2000, in A.S.No.38 of 1998 on the file of the III Additional District Judge, Krishnagiri, confirming the decree and judgment dated 27.02.1998 in O.S.No.209 of 1990 on the file of the Sub Court, Krishnagiri.

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

3. The case of the plaintiff in brief is as follows :-

3.1. The suit is filed for partition. The suit properties are the ancestral property of the first defendant. The first defendant was allotted the suit property through partition. The first defendant is also an illiterate and drunkard. The plaintiff and the second defendant are the sons of the first defendant. The other three daughters of the first defendant were married long ago and are living separately. The first defendant is being an illiterate and addicted to liquor sold away his ancestral property for immoral purposes. The plaintiff and the second defendant are entitled to each 1/3 share in the ancestral property. The first defendant sold out the property admeasuring 2 acres out of 5.79 acres comprised in S.No.21/2. However, the fourth defendant taking advantage of the first defendant's position forged the extent of 3.24 acres in the sale deed dated 22.09.1971. But the fourth defendant is in possession and enjoyment of the property admeasuring only 2 acres. He also sold out a portion of the land to the fifth defendant and another portion to one, Muthu Gounder, the father of the defendants 6 to 8. The fifth defendant sold out the land purchased from the fourth defendant again to the said Muthu Gounder. The first defendant also permitted his brother, namely the third defendant to cultivate about 2.06 acres of land comprised in S.No.21/2. In fact, the third defendant has no title over the property. However, he also sold out the above said property in favour of Muthu Gounder. The defendants 6 to 8 have also trespassed into property comprised in S.No.21/2B to an extent of 2.50 acres.

3.2 Further, the first defendant had also mortgaged the suit item No.3 of the property to the ninth defendant for a sum of Rs.500/- under the registered mortgage deed dated 06.05.1972. Thereafter the ninth defendant sold out the same by putting the thumb impression of the first defendant to the tenth defendant. Item No.4 of the suit property looked after by the third defendant was also sold out in favour of the eleventh defendant, and in turn the eleventh defendant transferred the item No.4 of the suit schedule property in favour of his mother, namely the twelfth defendant. Thereafter, the twelfth defendant transferred the same to their sons, who are defendants 14 to 17. Therefore, the sale of the property to the fourth defendant on 22.09.1971 is not valid. The sale deeds by the first defendant and the subsequent sale deeds by the subsequent purchasers are not binding on the defendants. Further, submitted that the plaintiff is not a party to the sale deeds and he was a minor at the time of executing the sale deeds. After obtaining majority, now he filed the suit for partition claiming 1/3 share in the suit schedule property.

4. The second defendant filed written statement supporting the case of the plaintiff and claimed 1/3 share in the suit property.

4.1 Resisting the plaintiff's case, the defendants 6 and 7 filed written statement and stated that it is true that the suit properties described in the plaint schedule were ancestral property of the first defendant. The first defendant is leading a normal life and the plaintiff and the second defendant are living along with the first defendant under the same roof. The first defendant had enough source to maintain his entire family and he is a man of good character and he is not addicted to drinks or any other evils. The first defendant being the Karta of the family was entitled to sell their joint family property to discharge antecedent debts and for the family necessity. They also denied that the first defendant sold only two acres in Survey No.21/2 in favour of the fourth defendant, but the fourth defendant forged to include 3.24 acres. In fact, the sale deed dated 22.09.1971 is valid and binding on the plaintiff and the second defendant, as it was effected for discharging the antecedent debts. In fact, the first defendant sold the property covered under the sale deed for discharging the mortgage deed dated 13.09.1968. After purchasing the same, patta has also been granted and they are in possession and enjoyment of the said property. In fact, the plaintiff was not born on the date when the third defendant sold the suit properties to the father of the defendants 6 to 8 and as such he cannot question the alienation now, and further the suit is also barred by limitation. Therefore, the plaintiff is not entitled to any relief sought for in the suit and prayed for dismissal of the suit.

4.2 The defendants 10 and 11 also adopted the counter filed by the defendants 12 to 17 and stated that the first defendant is a village henchman for more than 15 years. It is also false to state that the first defendant alienated the ancestral property for immoral purposes. The entire alienation was made for the purpose of discharging his antecedent debts and to improve his lands. In fact, he mortgaged the item 3 of the suit schedule property with the ninth defendant for a sum of Rs.500/- under the registered mortgage deed dated 06.05.1972. As such, the first defendant had sold the suit item No.3 of the property to the tenth defendant to discharge the said mortgage. In fact, he sold out the property for himself and on behalf of his minor sons. Therefore, the sale is valid and binding on the plaintiffs. Further stated that the defendants 12 to 17 are unnecessary parties and the suit is liable to be dismissed and as such the plaintiff is not entitled for 1/3 share and sought for dismissal of the suit.

5. In support of the plaintiff's case, P.W.1 and P.W.2 were examined and ten documents were marked as Ex.A.1 to

Ex.A.10. On the side of the defendants, D.W.1 to D.W.6 were examined and Ex.B.1 to Ex.B.15 were marked. On considering the oral and documentary evidences adduced by the respective parties and the submission made by the learned counsel, the trial Court decreed the suit in favour of the plaintiff and passed preliminary decree and allotted 1/3 share in the suit property in favour of the plaintiff. Aggrieved over the judgment and decree of the trial Court, the defendants 6 to 8 preferred an appeal suit in A.S.No.38 of 1998 before the III Additional District Judge, Krishnagiri,. The first appellate Court on appreciating the materials placed on records, dismissed the appeal by confirming the judgement and decree passed by the trial Court. Challenging the same, the defendants 6 to 8 have come forward with the present second appeal.

6. At the time of admission of the second appeal, the following substantial questions of law were framed :-

a) Whether the courts below ought not to have dismissed the suit as barred by limitation when the rights of the second defendant is barred?

b) Whether the order of the courts below are not against the settled principle of law enunciated in See.84 LW 766, 1973 ker 172, 1953 Mad 894, 86 LW 718, 1941 Bom 1941 Bom 197. 1986 Bom 122. 1939 Mad 907, 1941 Mad 678, 38 Mad 118 (Full Bench) 30 Mad 169, 38 Mad 321?

7. The learned counsel appearing for the appellants submitted that the suit itself is barred by limitation and it is liable to be dismissed. Further submitted that when the plaintiff disputed the sale of the ancestral properties by the Manager or Karta of the family, the plaintiff ought to have challenged the sale deeds executed by the Manager or Karta. She also cited the following judgments to substantiate her contention.

a) Sneh Gupta Vs. Devi Sarup & Ors. in Civil Appeal No.1085 of 2009.

b) Venkusah Vs. Baskaran and Ors. reported in MANU/TN/7515/2019.

8. Heard, M/s.V.Srimathi, the learned counsel appearing for the defendants 6 to 8.

9. This Court considered the rival submission made by the learned counsel for the defendants 6 to 8.

10. Admittedly, the properties are ancestral properties. The plaintiff and the second defendant are the sons of the first defendant. When the plaintiff and the second defendant were minor, the first defendant sold out the suit properties in favour of other defendants by various sale deeds and also

mortgaged the suit properties. While being so, the plaintiff filed the suit for partition claiming 1/3 share in the suit schedule property without challenging the sale deeds executed by the first defendant as Karta in favour of other defendants. Therefore, the only question has to be considered is whether the suit is maintainable without challenging the sale deeds executed by the first defendant. Upon hearing the learned counsel for appellants, the following additional question of law is framed.

a) Whether the suit is maintainable without seeking to set aside the sale deeds executed by the first defendant in favour of the fourth defendant dated 03.07.1972 and subsequent sale deeds marked as Ex.B3, Ex.B.4, Ex.B.5, Ex.B.13, Ex.B.14 and Ex.B.15.

11. In this regard, the learned counsel appearing for the appellants / defendants 6 to 8 cited the judgment in the case of Venkusah Vs. Baskaran and Ors. reported in MANU/TN/7515/2019, wherein it is held as follows:

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

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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 dismissed C.M.P.No.2786 of 1994."

12. This Court relied upon the judgment of the Hon'ble Division Bench of this Court and the Division Bench has held 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 documents under Section 7 (iv-A) of the Court Fees Act and it is not enough if he applies for possession under Section 7. Further held that whether 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. Therefore, the suit is not maintainable in the absence of a prayer to set aside the alienations.

13. In the case on hand, admittedly, when the plaintiff and the second defendant were minor, the first defendant executed sale deeds in favour of the other defendants. In the suit, the first defendant, namely the father of the plaintiff and the second defendant was conveniently absent and remained *exparte*. Though the second defendant supported the case of the plaintiff, categorically stated that the first defendant sold out the properties for immoral purposes and as such those sale are not binding upon the second defendant. Whereas the defendants 6 and 7 categorically mentioned in the written statement that the suit schedule properties are the ancestral properties of the first defendant and it was sold out in the capacity of Manager of the entire family. The entire property was sold out only to discharge the antecedent debts and for family necessity. Admittedly, the plaintiff and the second defendant are the shareholders of the ancestral property, which was sold out by the first defendant.

14. As held by the Hon'ble Supreme Court of India and this Court repeatedly that the minor coparcener who is made as eo nomine a party to the sale deed executed by the Karta cannot maintain a suit for partition without the prayer for setting aside the alienation. In the case on hand, on behalf of the plaintiff and the second defendant, when they were minor, the first defendant executed the sale deeds on his behalf and also on behalf of the plaintiff and the second defendant. Therefore, the plaintiff necessarily ought to have

challenged those sale deeds while seeking for partition. On the well settled principles of law that the karta/ manager of the hindu manager family has a right to alienate the suit property for legal necessity. If a member of the joint family challenges the alienation by the karta, he has to plead and prove that the alienation is not for legal necessity. Unless he seeks to set aside those sale deeds, the relief of partition cannot be granted.

15. In view of the above discussion, the reasonings and findings rendered by the courts below have necessarily to be interfered with and the additional substantial question of law framed in this second appeal is answered as against the plaintiff. When the same is answered as against the plaintiff, the substantial questions of law formulated by this Court at the time of admission need not to be answered since the suit filed by the plaintiff itself is liable to be dismissed as not maintainable.

16. In fine, this Second Appeal is allowed. Accordingly, the judgment and decree dated 31.07.2000 passed in A.S.No.38 of 1998 on the file of the III Additional District Judge, Krishnagiri, and the judgment and decree dated 27.02.1998 passed in O.S.No.209 of 1990 on the file of the Sub Court, Krishnagiri are hereby set aside and consequently the suit filed by the plaintiff in O.S.No.209 of 1990 is dismissed. There is no order as to costs.

Sd/-
Assistant Registrar(CO MDU)

//True Copy//

Sub Assistant Registrar

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To

1. The III Additional District Judge,
Krishnagiri

2. The Judge, Sub Court,
Krishnagiri.

Copy to:

The Section Officer, VR Section, High Court, Madras.

+2ccs to Mr.V.Raghavachari , Advocate SR.No. 4977,3359

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A.SK(04/09/2020)