



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 27.07.2021

CORAM

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A. (MD)No.996 of 2007

and

M.P. (MD)No.1 of 2007

WEB COPY

1.S.Chitravelu (Died)
2.C.Parimala
3.C.Umarani
4.C.Ajitha
5.Deepa

... Appellants/Respondents/Defendants

(A3 to A5 are brought on record as LRs of
the deceased 1st appellant vide order dated
27.09.2019 made in C.M.P.(MD)No.12399 of
2018 in S.A.(MD)No.996 of 2007 by JNBJ)

Vs.

S.Rathinam

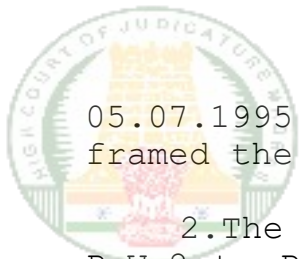
... Respondent/Appellant/Plaintiff

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree passed in A.S.No.1 of 2007 dated 27.07.2007 on the file of the Subordinate Court, Ramanathapuram, reversing and setting aside the judgment and decree passed in O.S.No.62 of 1997 dated 10.10.2006, on the file of the District Munsif Cum Judicial Magistrate, Thiruvadanai.

For Appellants : Mr.S.A.Ajmal Khan
For Mr.K.Sulthan Allowdin
for 2nd Appellant
Mr.S.A.Ajmal Khan for Appellants 3 to 5
For Respondent : Mr.R.Vijayakumar

JUDGEMENT

The defendants in O.S.No.62 of 1997 on the file of the District Munsif Court, Thiruvadanai are the appellants in this second appeal. During the pendency of this second appeal, the first appellant/Chitravelu passed away and his daughters have come on record. The suit was filed for partition. The plaintiff/Rathinam and the first defendant/Chitravelu are the brothers, being the sons of Sundarakone and the second defendant/Parimala is the wife of the first defendant. The case of the plaintiff is that the suit items that are six in number are joint family properties and that the plaintiff is entitled to half share in them. The defendants filed written statement controverting the plaint averments. According to the defendants, suit items 1 to 3 are the self acquired properties of Sundarakone and that they had already been sold in favour of the second defendant for valuable consideration vide sale deed dated



05.07.1995 (Ex.B7). Based on the rival pleadings, the trial court framed the necessary issues.

2.The plaintiff examined himself as P.W.1 and four others as P.W.2 to P.W.5. On his side, Exs.A1 to A12 were marked. The first defendant examined himself as D.W.1 and two others as D.W.2 and D.W.3 and Exs.B1 to B17 were marked.

3.By judgment and decree dated 10.10.2006, the trial court held that the plaintiff is entitled to half share in items 4 to 6 and dismissed the suit as regards items 1 to 3. Challenging the same, the plaintiff filed A.S.No.1 of 2007 before the Sub Court, Ramanathapuram. By the impugned judgment and decree dated 27.07.2007, the first appellate court allowed the appeal and held that the plaintiff was entitled to half share in items 1 to 3 also. Challenging the same, this second appeal came to be filed.

4.The second appeal was admitted on the following substantial questions of law:-

"a) Whether the lower appellate court has committed an error in law in not rendering any finding regarding the plea that items 1 to 3 of the suit properties were self-acquisitions of Sundarakone?

b) Whether the lower appellate court has rendered a perverse finding regarding the validity of Ex.B7 disregarding the admission made by P.Ws.2 to 4?

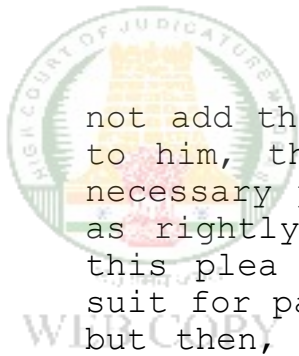
c) Whether the lower appellate court has committed an error in declaring Ex.B7 to be void in the absence of sufficient evidence on the side of the plaintiff to prove the vitiating factors?"

5.The learned counsel appearing for the appellants reiterated all the contentions set out in the memorandum of grounds and called upon this Court to answer the substantial questions of law in favour of the appellants and allow this second appeal by setting aside the impugned judgment and decree passed by the first appellate court.

6.Per contra, the learned counsel appearing for the respondent submitted that the impugned judgment does not call for any interference.

7.I carefully considered the rival contentions and went through the evidence on record.

8.The learned counsel for the appellants submitted that Sundarakone passed away on 25.09.1995 leaving behind two sons namely., Rathinam and Chitravelu and three daughters namely., Kaliasammal, Ponnalagu and Vasantha and one of the daughters had passed away and she left behind legal heirs. But the plaintiff did

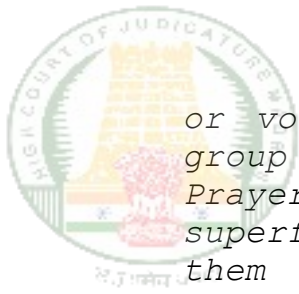


not add the other legal heirs of Sundarakone. Therefore, according to him, the suit ought to have been dismissed for non-joinder of necessary parties. I am unable to accept this contention, because as rightly pointed out by the learned counsel for the respondent, this plea was not raised before the Court below. Of course in a suit for partition, all the necessary parties will have to impleaded but then, having failed to raise this contention before the Court below, it is not open to the defendants to raise this contention in the second appeal.

9.The learned counsel for the appellants would submit that the scope of the second appeal is confined only to items 1 to 3. 6th item had also been partitioned between the two brothers and nothing survives for further consideration. He also did not dispute that the plaintiff is entitled to half share in items 4 and 5. That leaves us only with the items 1 to 3. According to the appellants, items 1 to 3 were alienated in favour of the second defendant/Parimala vide Ex.B7/sale deed dated 05.07.1995. Inasmuch as, the plaintiff failed to challenge Ex.B7/sale deed, the suit has to necessarily fail in respect of items 1 to 3.

10.The question that first arises for consideration is whether the plaintiff should have asked for the relief of declaration in respect of Ex.B7. As rightly pointed out by the learned counsel for the respondent, since the plaintiff is not a party to Ex.B7, he is entitled to ignore the same and maintain a prayer for partition. The learned counsel for the respondent placed reliance on the decision reported in 1970 (1) MLJ 207 (**Kaka Hajee Md. Ishaque Sahib Vs. Kaka Md. Saddiq Sahib and Ors**). In the said decision, it has been held as follows:-

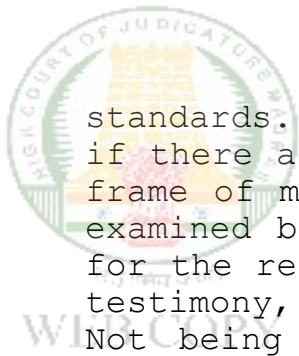
"9.The law on the subject of cancellation of instruments is thus fairly clear. Normally a transaction will bind a person if he or persons under whom he derives title are eo nomine parties to the same, and must be set aside before any relief is claimed thereunder. This, however, is subject to two important, exceptions : (1) Where the transaction is only a sham and nominal one, not intended to be given effect to; and (2) Where the transaction is void in law. It necessarily follows that (1) transactions to which a person or persons under whom the said persons derive title are not eo nomine parties; (2) transactions which are challenged as sham and nominal and (3) transactions which are void ab initio are not legally binding in character need not be cancelled and set aside, before any claim is made thereunder. The reason is fairly obvious. In the first group of cases, there can be no difficulty, as it is an elementary principle of law that transactions to which a person or persons under whom the said person derives title are not parties cannot bind them. In the case of sham and nominal



or void transactions comprised in the second and third group of cases, title has not passed to the transferees. Prayer for setting aside such transactions will be superfluous and the plaintiff will be entitled to ignore them altogether. The case is otherwise in respect of voidable transactions and benami transactions. In such cases the law will uphold the ostensible title conferred by those instruments; and the said title will prevail until the transactions are challenged with success by seeking appropriate reliefs declaratory or otherwise in Court of law."

11. Applying the aforesaid ratio, I sustain the contention of the learned counsel for the respondent that it is certainly open to the plaintiff to ignore Ex.B7/sale deed and maintain the instant suit for partition. But then, as rightly contended by the learned counsel for the respondent, when the defendants take shelter behind Ex.B7/sale deed and the plaintiff wants this Court to ignore the same as a void document, then proper foundation should have been laid in the pleadings. It is one thing to say that the plaintiff can ignore alienation and need not seek to set aside the same. But then, with the leave of the Court, the plaintiff ought to have filed a reply statement setting out the circumstances as to why Ex.B7 has to be ignored as a void document. Before this Court, the learned counsel for the respondent took me at length through the deposition of D.W.1 to canvass his contention that no consideration actually passed under Ex.B7/sale deed. But then, these are only arguments made across the bar, of course on the strength of the evidence but pleadings are wholly absent. If only the plaintiff had a reply statement after getting leave from the trial court and there are sufficient pleadings for attacking the validity of Ex.B7, then I would have been able to appreciate the contentions now urged before me by the learned counsel appearing for the respondent. As rightly pointed out by the learned counsel for the appellants, the trial court did not even frame an issue as regards the validity of Ex.B7. The defendants could not have been taken by surprise, when they were in the witness box.

12. I wanted to know if items 1 to 3 are the self acquired properties of Sundarakone or they are the joint family properties. My attention is drawn to the other alienations made by Sundarakone earlier in favour of the wife of the plaintiff. Ex.B2 dated 09.06.1977 is the sale deed executed by Sundarakone in favour of Damayanthi, wife of the plaintiff/Rathinam. In respect of Ex.B2, a rectification deed was also executed vide Ex.B1. Thus, it has been demonstrated that Sundarakone had been dealing with the properties that stood in his name. When a sale deed was executed in favour of his wife, the plaintiff found it a welcome development but when a sale was deed executed in favour of his brother's wife, the plaintiff found it unacceptable. This is a clear case of double



standards. I would have still accepted the plaintiff's contention, if there are pleadings to show that Sundarakone was not in a proper frame of mind when he executed Ex.B7. The attestors of Ex.B7 were examined by the plaintiff himself. Of course, the learned counsel for the respondent would draw my attention to those portions of the testimony, which say that Sundarakone was not in the pink of health. Not being in good physical condition is one thing but not in a position to execute a document is another. There is neither pleading nor evidence in support of such a contention. Therefore, I have to necessarily uphold Ex.B7. The trial court was justified in declining to grant decree in respect of items 1 to 3. The first appellate court did not take note of these aspects. The substantial questions of law are answered in favour of the appellants. The impugned judgment and decree passed by the first appellate court is set aside and the judgment and decree passed by the trial court is restored. The second appeal is allowed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS II)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

Note: In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To:

- 1.The Subordinate Court,
Ramanathapuram.
- 2.The District Munsif Cum Judicial Magistrate,
Thiruvadanai.

Copy to:

The Section Officer,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai. (2 Copies)

- +1 CC to M/s.R.VIJAYAKUMAR, Advocate (SR-24103[F] dated 28/07/2021)
+1 CC to M/s.S.A.AJMAL KHAN, Advocate (SR-24105[F] dated 28/07/2021)

S.A. (MD)No.996 of 2007

27.07.2021

RS (27.09.2021) 5P 7C

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