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IN THE HIGH COURT OF JUDICATURE AT MADRAS

ORDERS RESERVED ON : 21.03.2022

PRONOUNCING ORDERS ON : 23.03.2022

CORAM:

THE HONOURABLE JUSTICE MR.N.ANAND VENKATESH

SECOND APPEAL NO.190 OF 2012
AND MP.NOS.1 & 2 OF 2012

Selvaraj

..Appellant/Appellant
/Respondent/Defendant

..Vs..

1.R.Murugesan
2.Major Malarvizhi
3.Major Nirmaladevi

..Respondents/Respondents/
Cross Objectors/Plaintiffs

[RR 2 & 3 declared as majors and their father
R1(R.Murugesan) discharged from
guardianship vide Court order dt.2.7.2021
made in CMPS.9822,9826,9828,9829/2016
in SA.No.190/2012]

Prayer:

Second Appeal filed Under Section 100 of the Code of Civil Procedure against the Judgment and Decree dated 23.03.2011 made in A.S.No.52 of 2010 and Cross Appeal in A.S.No.52 of 2010 on the file of the Principal Sub Court, Erode confirming the judgment and decree dated 23.04.2010 made in O.S.No.207 of 2009 on the file of the Principal District Munsif Court, Erode .

For Appellant : Mr.N.Manoharan

For Respondents : Mr.V.P.Sengottuvel

J U D G M E N T

The defendant is the appellant in this Second Appeal.



2.The respondent/plaintiff filed a suit seeking for the relief of partition and for allotment of 4/9th share to the plaintiffs in the suit properties.

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3.The case of the plaintiff is that the suit properties are part of a larger extent of ancestral properties and by virtue of the partition deed dated 25.6.1979, 1/3rd share was allotted in favour of Ponnusamy Gounder. The said Ponnusamy Gounder died intestate on 30.8.1987 leaving behind his wife Saroja, his son Shekhar and his daughter Gomathi. The 1st plaintiff is the husband of Gomathi and the 2nd and 3rd plaintiffs are her children. The further case of the plaintiff is that the son Shekhar died as a bachelor leaving behind his mother Saroja as his legal heir. The daughter Gomathi also died on 2.12.2001 leaving behind the plaintiffs as her legal heirs. The mother Saroja died on 25.3.2009 and according to the plaintiff, on her death, the entire suit property came into their possession and enjoyment.

4.The grievance of the plaintiff is that the defendant approached the plaintiff during the first week of April 2009 and demanded the plaintiff to vacate the suit property on the ground that he has purchased the suit property from the mother Saroja, who on her behalf and as the guardian of the 2nd and 3rd plaintiffs, sold the property through a sale deed dated 3.3.2004, marked as Ex.A3/Ex.B1. According to the plaintiff, the said Saroja is not entitled to deal with the share of the 2nd and 3rd plaintiffs since she is not the natural guardian while the 1st plaintiff father is alive. Hence the sale deed, insofar as the shares of the 2nd and 3rd plaintiffs are concerned, is not binding on them. Accordingly, the plaintiffs filed the suit for partition claiming 4/9th share and according to the plaintiff, the defendant will be entitled only to 5/9th share which was purchased from Saroja and they are not entitled for the entire property.

5.The case of the defendant is that the 2nd and 3rd plaintiffs were in the care and custody of their grandmother Saroja since the 1st plaintiff contracted a second marriage with one Revathi and he had a male child through the said wedlock. Hence according to the defendant, the said Saroja was the de facto guardian and she had executed the sale deed for herself and on behalf of their minor daughters. The sale deed was also acted upon and the revenue records were also mutated. On this ground, the defendant sought for the dismissal of the suit.



6.The Trial Court on consideration of facts and circumstances of the case and on appreciation of oral and documentary evidence, came to a conclusion that the plaintiffs are entitled for 3/12 shares in the suit property and that the defendant was entitled for 9/12 shares. Aggrieved by the same, the defendant preferred an appeal in A.S. No. 52/2010 and the plaintiff filed a cross-appeal on the ground that they are entitled for 4/9 shares and they have been given a lesser share of 3/12th share by the Trial Court.

7.The Lower Appellate Court on re-appreciation of the oral and documentary evidence and on considering the findings of the Trial Court, dismissed the appeal filed by the defendant and allowed the cross-appeal filed by the plaintiffs and thereby decreed the suit as prayed for granting 4/9 shares to the plaintiff, through a judgment and decree dated 23.3.2011. Aggrieved by the same, the defendant has filed this Second Appeal.

8. Heard Mr.N.Manoharan, learned for the appellant and Mr.V.P.Sengottuvel, learned for the respondents.

9.The main ground that has been raised by the learned counsel for the appellant is that both the Courts below did not properly consider Ex.B13 which was the marriage invitation of the 1st plaintiff whereby the 1st plaintiff had married one Revathi after the demise of his first wife Gomathi and thereafter his children were under the care and custody of the grandmother Saroja. As a consequence, she became the de facto guardian of the granddaughters viz., the 2nd and 3rd plaintiffs. Hence, the sale deed executed by her for herself and on behalf of the granddaughters is perfectly valid and even without challenging the same, the plaintiffs will not be entitled for the relief of partition sought for by them. Both the Courts below have dealt with this issue and they have rendered a finding to the effect that the defendant has not proved the second marriage of the 1st plaintiff. It was concurrently held that the second marriage cannot be assumed merely by filing a marriage invitation, in the absence of any other evidence to substantiate the same. This Court does not find any ground to interfere with this finding since the onus of proof to prove the second marriage of the 1st plaintiff was on the shoulders of the defendant. Unfortunately, Ex.B13 was not even put to PW1 (1st plaintiff) during cross examination and he was not even confronted with this document. The defendant did not even



attempt to prove this fact through some independent witness who was aware of the second marriage of the 1st plaintiff.

10. The learned counsel for the appellant further submitted that the plaintiffs cannot disregard the sale deed executed in favour of the defendant and that the sale deed ought to have been put to challenge by the plaintiff. In order to substantiate the said argument, the learned counsel relied upon Board of Trustees of Port of Kandla .v. Hargovind Jasraj and Another reported in 2013 (3) SCC 182.

11. While dealing with this issue, both the Courts below gave a categorical finding to the effect that the grandmother Saroja cannot be considered to be the de facto guardian of the 2nd and 3rd plaintiffs while their father viz., the 1st plaintiff is alive. Therefore, it was held that the sale deed executed by Saroja by including the share belonging to the 2nd and 3rd plaintiffs will not bind them and the same can be disregarded by them. Accordingly, it was held that there was no requirement for them to challenge the sale deed to the extent it covered the share of the 2nd and 3rd plaintiffs. This Court does not find any ground to interfere with this finding. Section 6 of the Hindu Minority and Guardianship Act, 1956, specifically provides that the father viz., the 1st plaintiff is the natural guardian of the 2nd and 3rd plaintiffs. Section 11 of the said Act, also makes it clear that even a de facto guardian cannot deal with the minor's property. Hence, even if the grandmother Saroja is taken to be the de facto guardian, she was not entitled to deal with the share of the 2nd and 3rd plaintiffs. Further Section 8 of the Act, also contemplates obtaining prior permission from Court before dealing with the shares of the minor. A close reading of the sale deed marked as Ex.A3/Ex.B1 does not anywhere state that the sale was done for the welfare of the 2nd and 3rd plaintiffs owing to any legal necessity. In view of the same, the sale deed is void ab initio insofar as it has dealt with the shares of the 2nd and 3rd plaintiffs and it is not necessary for the plaintiffs to seek for cancellation of the document. The judgment relied upon by the learned Counsel for the appellant will not apply to the facts of the present case since the main purport of the judgment cited was focussed on orders passed which cannot be ignored without challenging the same before a Competent Court even if it considered to be a void order. The facts of this case is covered by the judgment of the Hon'ble Supreme Court in Dhurandhar Prasad Singh .v. Jai Prakash University reported in (2001) 6 SCC 534. The relevant portion is extracted hereunder:



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22. Thus the expressions "void and voidable" have been the subject-matter of consideration on innumerable occasions by courts. The expression "void" has several facets. One type of void acts, transactions, decrees are those which are wholly without jurisdiction, ab initio void and for avoiding the same no declaration is necessary, law does not take any notice of the same and it can be disregarded in collateral proceeding or otherwise. The other type of void act, e.g., may be transaction against a minor without being represented by a next friend. Such a transaction is a good transaction against the whole world. So far as the minor is concerned, if he decides to avoid the same and succeeds in avoiding it by taking recourse to appropriate proceeding the transaction becomes void from the very beginning. Another type of void act may be which is not a nullity but for avoiding the same a declaration has to be made. Voidable act is that which is a good act unless avoided, e.g., if a suit is filed for a declaration that a document is fraudulent and/or forged and fabricated, it is voidable as the apparent state of affairs is the real state of affairs and a party who alleges otherwise is obliged to prove it. If it is proved that the document is forged and fabricated and a declaration to that effect is given, a transaction becomes void from the very beginning. There may be a voidable transaction which is required to be set aside and the same is avoided from the day it is so set aside and not any day prior to it. In cases where legal effect of a document cannot be taken away without setting aside the same, it cannot be treated to be void but would be obviously voidable.

12. The other issue that was urged by the Learned Counsel for the appellant is that the 1st plaintiff will not be entitled for any share since admittedly the right was spaced by his wife from the property belonging to her father and hence it was submitted that the facts of the present case will fall under Section 15(2)(a) of the Hindu Succession Act 1956. The Lower Appellate Court has held that the present case will fall under Section 15(1)(a) of the Hindu Succession Act 1956. This Court does not find any perversity in the said finding. This issue has been dealt with by the Hon'ble Supreme Court in Arunachala Gounder (dead) by L.Rs. .v. Ponnusamy and Others reported in



71. The scheme of sub-Section (1) of Section 15 goes to show that property of Hindu females dying intestate is to devolve on her own heirs, the list whereof is enumerated in Clauses (a) to (e) of Section 15 (1). Sub-Section (2) of Section 15 carves out exceptions only with regard to property acquired through inheritance and further, the exception is confined to the property inherited by a Hindu female either from her father or mother, or from her husband, or from her father-in-law. The exceptions carved out by sub-Section (2) shall operate only in the event of the Hindu female dies without leaving any direct heirs, i.e., her son or daughter or children of the pre-deceased son or daughter.

13. It is clear from the above judgment that where a female hindu dies leaving behind her husband and children and the properties left behind are the properties inherited by her from her parents, it would devolve simultaneously upon her husband and her children as provided under Section 15(1)(a) of the Hindu Succession Act 1956.

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substantial questions of law involved in this Second Appeal.

15. In the result, the Second Appeal stands dismissed. Considering the facts and circumstances of the case, there shall be no order as to cost. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

KP

To

1. Principal Subordinate Judge, Erode
2. Principal District Munsif, Erode
3. The Section Officer
V.R. Section, High Court, Madras.

+1cc to Mr. N. Manoharan, Advocate, S.R.No.19701
+1cc to Mr. V. P. Sengottuvel, Advocate, S.R.No.19380

Second Appeal No.190 of 2012

BR (CO)
PM/05/04/2022