



IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 01.02.2022
CORAM:

THE HON'BLE MR.JUSTICE M.GOVINDARAJ

S.A.No.418 of 2017 and
C.M.P.No.10117 of 2017

Madhaiyan (died)
2. Porkodi
3. Thamilarasi
4. Krishnan
5. Periyanan

... Appellants/3rd Respondent/
(Appellants 2 to 5 are impleaded as 3rd respondent
LR of the deceased 1st appellant vide
court order dated 09.04.2021 made
in C.M.P.No.1544 of 2021)

Versus

1. Narmadha
Ramani (Died)
2. Ramya
3. Kalaimani
4. Thangammal

...1st Respondent/Appellant/
Plaintiff

...Respondents 2,4 &5/
Respondents2,4 &5/
Defendants 2,4 & 5

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure to set aside the Judgment and Decree dated 28.04.2017 made in A.S.No.12 of 2011 on the file of the Sub Court, Dharmapuri reversing the Judgment and decree dated 29.11.2010 made in O.S.No.208 of 2008 on the file of the learned District Munsif, Dharmapuri by allowing this appeal.

For Appellants : Mr.N.Manokaran

For Respondents : Mr.A.Mohammed Nazer for R1, R3 & R4
Mr.R.Prabakar for R2

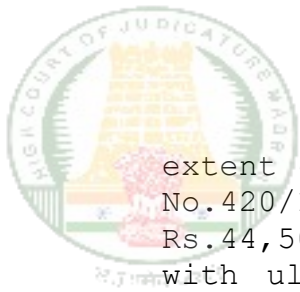
J U D G M E N T

Against the reversal of the decree granted by the trial court, the 3rd defendant has preferred the present Second Appeal.



2. The plaintiff is the 1st respondent, she filed a suit for partition. According to her, the suit properties are ancestral properties inherited by her father. The plaintiff and 1st defendant's father and 2nd defendant are having share in this property. The 1st defendant and 3rd defendant are friends. Taking advantage of the weakness of the 1st defendant, the 3rd defendant, created some shame and nominal records. Those records are not binding on the plaintiff. The plaintiff issued legal notice on 04.08.2008, it was received by the 1st defendant on 11.08.2008 and avoided by the 3rd defendant. Therefore, she issued another notice dated 29.08.2008 and it was acknowledged by the 3rd defendant on 01.09.2008, not replied till the date of filing of the suit. Since the 1st defendant is acting against the interest of the plaintiff in collusion with the 3rd defendant and that they cannot continue the joint possession, they sought for mediation with the help of some neutral parties. On 15.09.2008, the 1st defendant at the instance of the 3rd defendant refused to partition the property and 1st defendant is entitled to 1/3rd share, 2nd defendant's sister is entitled to 1/3rd share and therefore, she was also impleaded as a necessary party. Since it is alleged by the 3rd defendant that she had created certain documents, she was also made as a party to the suit. Taking cause of the action from the date of issuance of notice and refusal of partition by the 1st defendant, the 1st respondent filed the suit for partition. The 1st defendant remained ex-parte, the 3rd defendant filed written statement denying the averments in the plaint.

3. According to the 3rd defendant, the plaintiff and the 2nd defendant are daughters of 1st defendant and the 1st defendant was the kartha of the family. Since the 1st, 2nd defendants and plaintiff were minors, on 12.10.1998, the 1st defendant for himself and minors sold the property for clearing his debts and for family interest, for valuable consideration of Rs.8,500/- and handed over the possession to the 3rd defendant, ever since he was in possession. The National Highways Authority, for the purpose of laying a road acquired about 1,230 sq.mtrs and after enquiry, awarded Rs.15,038/- in his favour. Since the 1st defendant sold the property as a natural guardian and kartha of the family in favour of 3rd defendant on 12.10.1998 for a valid consideration, the sale made by the 1st respondent is binding on the family members of the joint family and the sale as a valid sale. After the sale, patta no.1440 was issued in the name of the 3rd defendant on 26.08.2003. Apart from this, the family of the 1st defendant owns other properties in Survey No.398/1 measuring an extent of 0.79.5 hectare, one house, valuing Rs.5 Lakhs and other properties. The 3rd defendant also sold an



extent of 0.65 cents in Survey No.418/2 and 0.11 cents in Survey No.420/1 in favour of one Ramamoorthy for a consideration of Rs.44,500/- on 03.11.2003. Suppressing all these properties, with ulterior motive, they filed a suit against this property alone, therefore, the suit is bad for partial partition. Since the plaintiff has not approached the Court with clean hands, she is not entitled to the relief sought for and since the property is not eligible for partition and it is in the possession of 3rd defendant, suit is not maintainable and plaintiff is not entitled to equity also, as the suit is not filed with bonafide intention.

4. The trial court framed appropriate issues and dismissed the suit with costs. On appeal, the First Appellate Court reversed the findings of the trial court and decreed the suit. Aggrieved over the same, the 3rd defendant preferred the present Second Appeal. On notice, the 1st respondent / plaintiff entered appearance and the learned counsels appearing on both sides have agreed to argue the Second Appeal on the Substantial Questions of Law raised in the memorandum on the grounds of Second Appeal:

"a) Whether the First Appellate Court is right in holding that the sale deed dated 12.10.1998 (Ex.B1) is void, particularly in the absence of any prayer in the suit for cancellation of the sale deed filed by the plaintiff within a period of 3 years from the date of attaining the age of majority?

b) Whether the First Appellate Court has committed an error in concluding that the sale deed executed by the father of the plaintiff is void for want of permission from the Court especially when Sections 8 and 11 of the Hindu Minority and Guardianship Act, 1956 apply to minor's separate property, not applicable to the minor's interest in the joint family property.

c) Whether the suit framed as such is maintainable in law for want of prayer for cancellation of the sale deed dated 12.10.1998 (Ex.B.1) in which the plaintiff was also an eo-nominee party, represented by his father / 1st defendant?

d) Whether the suit is barred by limitation under Article 60 of the Limitation Act, 1963?"

5. Heard the learned counsels appearing on either side and perused the documents placed on record.

6. The admitted fact remains that the suit property was sold on 12.10.1998 in favour of the 3rd defendant. The sale deed



was marked as Ex.B.1. The reading of the sale deed disclose that sale was made by the 1st defendant, father of the plaintiff and 2nd defendant showing them as minors in the capacity of guardian for the family necessity, to clear the debts and to purchase some other property. From the sale deed, it is seen that the plaintiff and the 2nd defendant are parties to the document. The sale was made by the 1st defendant on behalf of the plaintiff and the 2nd defendant describing as minors.

7. The 1st defendant sold the property in the capacity of kartha and natural guardian of his daughters. The sale was made for family expenses, to clear the debts and to purchase some other property. The recitals thus go to show that the property was alienated by the kartha of the family and on their behalf for the welfare and in the interest of the minors. In such circumstance, if the legal necessity is not true, this all the more necessary to file a suit to set aside the sale deed.

8. It is also imperative from the evidence of the plaintiff as P.W.1 wherein during cross examination she would depose that the property was sold in the year 1998, when she was residing in the very same house of her father. She would further depose that she was aware of the acquisition made by the National Highways Authority and the compensation was awarded in favour of the 3rd defendant and that she has not taken any action against such awarding of compensation in favour of the 3rd defendant. The further evidence would disclose that she was aware of the execution of the sale deed even before filing of the suit and that from the year 1998, the suit property is in possession of the 3rd defendant. However, she would admit that she had not pleaded the above facts in the plaint.

9. From the evidence of the plaintiff, it is very clear that she was very much aware of the sale made by her father as Kartha and that from 1998 onwards, the 3rd defendant is in possession of the property. In that event, as contented by the appellant/3rd defendant, the sale which was within the knowledge of the plaintiff, should have been challenged; and being a party to the sale deed, filing of suit for partition, without setting aside the sale is not sustainable.

10. As admitted by the plaintiff, the sale was made in the year 1998, and the suit has been filed in the year 2008 after a period of ten years. Under Article 60 of the Limitation Act, 1963, the limitation period to set aside the transfer of property made by the guardian to the ward is three years. The age of the plaintiff at the time of filing of the suit was 28



years. Therefore, it is obvious that the suit was not filed within 3 years after attaining majority. An argument was advanced by the learned counsel appearing for the 1st respondent that the plaintiff was major at the time of execution of sale deed and that she was not aware of sale at all by the father. Therefore, according to the learned counsel for the 1st respondent, Article 64 of the Limitation Act alone will apply and that the period of limitation is 12 years from the date of disposal of property, as such, suit is within the limitation. Such argument would not be countenanced as it runs counter to the admission made by the plaintiff, as P.W.1 that she was aware of the sale deed and that she was not living away from the father when transfer was made, therefore, Article 64 of the Limitation Act will not apply.

11. A perusal of Ex.B.5, sale deed dated 05.11.2003 would show that the 1st defendant has sold the property in favour of one Ramamoorthy on 03.11.2003. The recitals would further reveal that the property belongs to the joint family and the property was inherited by the 1st defendant from her ancestor and it was sold for the benefit of family members. Eventhough the 2nd defendant avoided the witness box during trial, she let in evidence during the appellate stage and marked two documents. It is categorically admitted that apart from the suit property, there are other properties available to the joint family. One of the such property was sold on 03.11.2003 in favour of one Ramamoorthy.

12. It is well settled that when the suit for partition is filed, it will be filed for the entirety of the joint family property. It is true to state that if any of the property, which was left, that can be included during the final decree proceedings. But, to this, by any stretch of imagination can it be contended that the property alienated to 3rd parties can be included during final decree proceedings without impleading the alienates, as parties to the suit. It would apply when the sale was made depriving the minors showing them as parties to the documents, it is incumbent on them to file a suit to set aside the impugned sale, as per law. The Division Bench of this Court in the case of Sridharan and Others Vs. Arumugam and Others reported in (1993) 2 MLJ 428 at Paragraph Nos.5, 6 7 and 10, held as follows:

"5. Before taking upon the question of the binding nature of the alienations, we would discuss the maintainability of the suit without a. prayer for setting aside the alienations as well as the valuation of the suit. The sale deeds under Exs.B-22, B-1, B-6,



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B-10 and B-23 in the chronological order were executed by the first defendant for himself and as guardian of the minor children. In fact, in one of the documents, he has showed the minor daughter also as a party and he executed the sale deed as a guardian for her. There are five other documents under Exs.B-20, B-25, B-30, B-31 and B-27 which are executed by the 1st defendant alone. 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. Without such prayer, the suit is not sustainable in relation to those documents. The plaintiffs have also not paid the correct Court-fee on the plaint. They have chosen to affix the Court-fee under Section 37(2) of the Court-fees Act. The trial court has erroneously thought that the plaintiffs are in joint possession and the Court-fee paid is adequate. Nowhere in the plaint, the plaintiffs allege that they are in joint possession with the defendants. There is no allegation in the plaint that the alienees under the Various documents did not take possession. In fact, there is an allegation in the plaint that the plaintiffs were driven out of the family house. Some of the letters produced on the said of the plaintiffs show that the 5th plaintiff was living away from the 1st defendant with their children. Thus, there is ample evidence to show that the plaintiffs are not in joint possession. Even if the allegations on the plaint are taken without considering the evidence on record, it is clear that the plaintiffs cannot take shelter under Section 37(2) of the Court-fees Act. They ought to have paid Court-fee under Section 37(1) of the Act. They should have also prayed for setting aside the alienations. The law is well settled by a Full Bench of this Court in C.R. Ramaswami Ayyangar v. C.S. Rangachariar, I.L.R. 1940 Mad. 259:32 M.L.J. 477.

6..... It is the common feature in such cases that the father who is responsible for the litigation, who though is living with the minor, keeps himself safely outside the witness-box. He can easily be presumed to be a person who is encouraging this litigation as a sutradari. It would not be unreasonable to presume that the hand of the father is always there in this litigation and he just brings into the witness box his brother's sons, minor children and others so as to gamble in litigation, by challenging his own alienations through them. It is this conduct of the parents which is condemned in the following lines



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in Masit-Ullah v. Damodar Prasad, 51 M.L.J. 792.

The learned Law Lords state that:

The only sum that was left unaccounted for was Rs. 2,000 odd, as found by the Subordinate Judge, Janki Prasad, the plaintiffs father, admittedly received the whole consideration, and was the man who used the largest pan of the money for the discharge, of the ancestral debts. He could have told in his evidence how the sum of Rs. 2,000 was applied. There is no evidence that it was used for immoral or unauthorised purposes. His testimony was therefore most material in the case...Efforts were made to get him into the witness box, but he studiously avoided appearing in court.

We shall now state the general principle which apply under such circumstances as was spoken to by the Privy Council and the other decision of the Supreme Court as well. In Jagannath v. Shri Nath, 66 M.L.J. 321. An old father alienated certain family properties and the sale deed was attested by the eldest members of the family. In a suit brought by the minors challenging such alienations, the Privy Council said that the attestors who were the eldest members of the family and who were intimately connected with it were in a better position than anyone else to say whether the money was applied for the necessary purposes of the family. They had allowed their children to figure as plaintiffs and got themselves impleaded as defendants. The suit was a collusive suit and the conduct of the elders afforded ample corroboration of the other evidence that the same was effected for necessary family purposes.

7. A Division Bench of the Oudh High Court in Sant Baksh v. Lachman Prasad, I.L.R.: 1946 Oudh. 92, observed that:

Where the father executes a sale-deed by which he alienates joint family property to satisfy his previous liabilities and his son, on attaining majority, files a suit to set aside the sale deed on the ground that it was executed without any legal necessity in pleading the father as defendant and the father does not come forward to give evidence whether all or any of the debts borrowed by him were not for legal necessity, it must be held that the suit is a collusive suit filed at the instance of the father and the failure of the father to come into the witness box and to state the real facts raises a presumption against the plaintiff



that the money must have been needed for legal necessity.

10. P.W.2 is a person who was living previously in Nangoor. He speaks only about the yield from the lands. According to him, kuruvai crop yield would be 20 kalams per mah and samba crop yield would be 15 kalams per mah. In the cross-examination, he pleads ignorance to several of the questions put by counsel. He does not say anything about the bad habits of the 1st defendant."

13. It is well settled by the above said judgment that the suit is not maintainable without the prayer for setting aside the alienation and it shall be valued under Section 40 of the Court Fees Act. In the instant case, the plaintiff and the 2nd defendant were shown as parties to the document and the sale was executed by the 1st defendant for himself and the guardian of the minor children. In such circumstance, the plaintiff is bound to pray for setting aside the said sale made by their father, therefore, when she claims that the sale was made after she attained majority, in that event, the suit should be valued under Section 40 of the Court Fees Act. From this, it is an admitted case that the property was alienated with the knowledge of the plaintiff in the year 1998 itself and the 3rd defendant is in possession. He was awarded with compensation on acquisition of the property. Hence it is very clear that the plaintiff was not in possession of the property. In such circumstances, the court fee paid under Section 32 of the Court Fees Act is erroneous. The pleading that the plaintiff was in joint possession and seeking for separate possession is apparently false and not sustainable.

14. It is also important to note that the 1st defendant in the capacity of kartha of the family had executed the document in favour of the 3rd defendant for himself and her guardian for the minor children of the family necessity and to purchase some other property. In that event, he should have entered the witness box to explain the sale made in favour of the 3rd defendant. But he conveniently remained exparte. Therefore, as rightly observed by the Hon'ble Division Bench, 'in such cases, the father, who is responsible for litigation, though he is living with the minor, keeps himself safely outside the witness box. He can easily be presumed to be a person, who is encouraging the litigation as a suthradhary.'

15. The Hon'ble Full Bench of this Court reported in 1969 Vol.69 L.W.687 [Sakaranarayana Pillai and another Vs. Kandasamia pillai], it is laid down as under:



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"8. If the matter is looked at in this way there is no difficulty in reconciling the various cases and we do not propose to analyse at length the large body of case-law cited at the Bar. The distinction between a void and voidable transaction has been brought out in a number of cases and we need only refer to a few of them : Chingacham Vitil Sankaran Nair v. Chingacham Vitil Gopala Menon (1906) I.L.R. 30 Mad. 18, Bijoy Gopal Mukerji v. Krishna Mahishi Debi (1907) 17 M.L.J. 154 : L.R. 34 I.A. 87 : I.L.R. 34 Cal. 339 (P.C.), Fakirappa Limman v. Lumanna Bin Mahadu (1919) I.L.R. 44 Bom. 742, Bali Reddi v. Khatipulal Sab (1935) 69 M.L.J. 458, Ankamma v. Kameswaramma (1935) 70 M.L.J. 352, Raja Ramaswami v. Govindammal (1928) 56 M.L.J. 332 and Vallabhacharyulu v. Rangacharyulu A.I.R. 1937 Mad. 449. There is no doubt whatever that a transaction entered into by a guardian relating to the minor's properties is not void and if the minor does not sue to set it aside within three years of his attaining majority it becomes valid under Article 44 of the Limitation Act. In such a case the minor is deemed to be a party to the transaction. But where the document is executed by a manager of the family and it is not binding on the family, the minor or any other member can ignore the transaction and recover possession of the property. To such a case Section 7(v) of the Court-fees Act will apply. We are here not concerned with decrees to which the minor is eo nomine a party. 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.

That apart, the Hon'ble Division Bench of this Court reported in 2005 (1) L.W. 628 [Pandiarajan and others Vs. Korangi Thyagarajan and others] it categorically held while dealing with the alienation of property by natural guardian making the minor as normal party it is opined as under:-

"13. In the present case, as stated already, the 1st defendant/Srinivasa Pillai is also a vendor to the said sale deeds. Without showing the minors as vendors,



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then the said sale deeds executed by the said Srinivasa Pillai alone is valid in law. There is no dispute in this case with respect to the purpose for which the sale deeds were effected, as the sale was done for the family necessity. So, merely because the minors have been included as co-vendors, the contention that unless they were represented by natural guardian, the above said sale deeds do not bind the minors, cannot be countenanced. Admittedly, in this case, the minors are represented by the maternal grandfather.

14. While dealing with similar transaction, the Apex Court in the decision in Radhakrishnadas v. Kaluram , AIR 1967 S.C. 574, held as follows:-

"Even where such a transaction has been entered into solely by a manager it would be deemed to be on behalf of the family and binding on it. The position is not worsened by the fact that a junior member joins in the transaction and certainly not so when the joining in by such junior member proves abortive by reason of the fact that member has no capacity to enter into the transaction because of his minority. In this connection we may make a mention of three decisions Gharib Ullah v. Khalak Singh , (1903) ILR 25 All 407 at p. 415 (PC); Kanti Chunder Goswami v. Bisheswar Goswami , (1898) ILR 25 Cal 585 (FB); Bijraj Nopani v. Pura Sundary Dasee , ILR 42 Cal 56; (AIR 1914 PC 92); each of which proceeds upon the principle that if one of the executants to a sale deed or mortgage deed has the capacity to bind the whole estate the transaction will bind the interest of all persons who have interest in that estate."

The said finding was given by the Apex Court to reject the argument that as one of the appellants was found to be a minor on the date of transaction, that transaction cannot bind his interest. During the course of the argument, it was also admitted that the sale deed had been executed by the father of the appellant who was manager of the family. One of the appellants though factually a minor, he was shown as major and not represented by guardian. While considering the said fact, the Apex Court has come to such conclusion. The said decision would squarely apply to the facts of the present case to decide the issue raised in this case on the basis of the above said decision of the Apex Court.

15. While considering the case where the Kartha of the family executed the sale deeds, taking with him the two wives for themselves as guardian of the minors as



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supporting executors, the Apex Court in the decision in Sri Narayan Bal v. Sridhar Sutar , AIR 1996 S.C. 2371, found that a joint Hindu family by itself is a legal entity capable of acting through its Karta and other adult members of the family in management of the joint Hindu family property and when the minors are not having any divided interest in the joint Hindu family property, the sale by Karta, though the minors are represented by his two widows is valid in law and the said sale binds the minors.

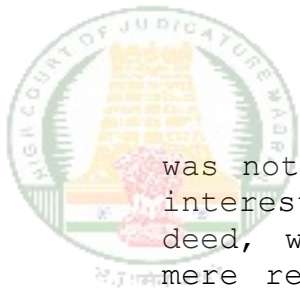
16. In view of the above, it is clear that when the Kartha of the family executing the said sale deeds, merely because he takes the minors along with him as covendors represented by the persons other than the natural guardian, it cannot be said that the said sale deeds cannot bind the interest of the minors also, especially when the sale deeds executed by the Kartha without even impleading the minors as co-vendors bind the minors, as held in the above said decisions of the Apex Court."

16. In such circumstances, it shall be construed that the suit is a collusive one, at the instance of the father and it raises the presumption that the valid sale for the family necessity and the interest of the minors, as held by the Hon'ble Division Bench, suit itself is not maintainable on three reasons:-

- (i) The collusive litigation instigated by the father
- (ii) For not praying to set aside the sale deed.
- (ii) For improper valuation.

17. When an argument was advanced by the learned counsel for the plaintiff / 1st respondent that the sale, which is made when she was a minor is without her knowledge, will not be binding and therefore, the suit need not be filed to set aside the document and that the suit is within limitation from the date of knowledge. I am unable to accept the contention. There is no pleading as to the sale deed made in favour of the 3rd defendant dated 12.10.1998 and that she was a minor when it was made without her knowledge. Further, it is well established that she was aware of the sale and that she has not chosen to challenge the same within a period of 3 years, the filing of a suit after a period of 10 years, is hopelessly barred by limitation.

18. The First Appellate Court had erroneously presumed so many aspects without any pleadings and without considering the evidence in proper perspective. The finding that the sale deed as Ex.B.1 is not valid as it was executed by the purchaser, who



was not vigilant to verify as to whether it was executed in the interest of the minor, family welfare and party to the sale deed, who at that point attained majority or not? Therefore, mere recitals in the sale deed, which was made for the family welfare is not enough and therefore, the sale, vide Ex.B1, executed by the 1st defendant without any such evidence is not sustainable in law.

19. I fail to understand that no such issue was raised or tried in the suit. The very prayer itself is only for partition and the contention of the defendant is that the suit is bad for not praying to set aside the sale deed. The judgment of the First Appellate Court is totally on erroneous assumption and beyond the scope of the pleadings, therefore, the findings of the First Appellate Court is erroneous. The questions of law are answered in favour of the appellant.

In fine, the Second Appeal stands allowed and the order passed by the Lower Appellate Court in A.S.No.12 of 2011 dated 28.04.2017 is set aside and the order passed by the trial court in O.S.No.208 of 2008 dated 29.11.2010 stands confirmed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS II)

//True Copy//

Sub Assistant Registrar

ssd

To

1. The Subordinate Court,
Dharmapuri

2. The District Munsif,
Dharmapuri

+1 cc to M/s.N.Manokaran Advocate sr6066

+1 cc to M/s.R.Prabakar Advocate sr6341

S.A.No.418 of 2017 and
C.M.P.No.10117 of 2017

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