



IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 21.02.2023

PRONOUNCED ON : 02.03.2023

CORAM

THE HON'BLE MR. JUSTICE **G.K.ILANTHIRAIYAN**

C.R.P. No.579 of 2019

Gnanasekaran

Vs

Petitioner

1. Balasubramanian

Balaji (Deceased)

2. Pappa

....

Respondents

Prayer: Civil Revision Petition filed under Section 115 of the Code of Civil Procedure to set aside the fair and decreetal order dated 08.10.2018 passed in E.A.No.25 of 2012 in E.P.No.23 of 2011 in O.S.No.386 of 2000 on the file of the District Munsif-cum-Judicial Magistrate, Kattumannarkoil.

For Petitioner	: Mr.A.Muthukumar
For R1	: Mr.P.Valliappan, Senior Counsel for Mr.N.Loganathan
For R2	: Not ready in notice

ORDER

This Civil Revision Petition has been filed as against the fair and decreetal order dated 08.10.2018 passed in E.A.No.25 of 2012 in



E.P.No.23 of 2011 in O.S.No.386 of 2000 on the file of the District Munsif-cum-Judicial Magistrate, Kattumannarkoil, thereby dismissing the petition filed under Section 47 of CPC.

2. The petitioner is the defendant and respondents are the plaintiffs. The respondents filed a suit for declaration, recovery of possession and damages. In the said suit, the petitioner remained absent and he was set ex-parte. The Trial Court passed ex-parte decree by a Judgment and Decree dated 21.08.2002. In order to execute the said decree, the respondents filed execution petition in E.P.No.23 of 2011. The petitioner filed a counter and also filed an application under Section 47 of CPC to set aside the decree passed in O.S.No.386 of 2000. It was dismissed and aggrieved by the same the present Civil Revision Petition.

3. The learned counsel appearing for the petitioner would submit that the petition under Section 47 of CPC can be filed at any stage. Therefore, the Trial Court ought not to have dismissed the petition on the ground that it was filed four months after receipt of the notice. Admittedly, the sale deed executed by the mother of the respondents in favour of the



petitioner was not challenged by the respondents and no relief sought for cancellation of the said sale deed. Therefore, the decree for declaration, recovery of possession alone is not valid in law. When the property of the minor is sold by his mother he can file a suit within a period of three years after attaining majority to set aside the sale and for other reliefs. Therefore, without setting aside the sale deed, no decree for possession could be granted as the sale is voidable. Therefore, the Execution Court cannot execute the decree.

4. He further submitted that the third respondent is the mother of the deceased 2nd respondent and she has inherited an undivided half share in the suit property on his death. Therefore, the sale of an undivided half share of the suit property is binding on the decree holder and as such, the decree has become inexecutable. Though the transferor had no title to the property on the date of sale but she acquired title subsequently after death of her son. Therefore, the sale made by her is valid at the option of the transferee as per Section 43 of the Transfer of Property Act. Therefore, the Execution Court ought to have dismissed the execution petition and as the decree is inexecutable one. The Court below all along concluded in favour of



the petitioner, finally dismissed the petition, though the petitioner is entitled to have half share in the suit property.

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5. In support of his contention he relief upon the Judgment reported in **2019 (2) CTC 313** in the case of ***Tanu Ram Bora Vs. Promod Ch.Das (D) through LRs and others***, in which the Hon'ble Supreme Court of India held that Section 43 of the Transfer of Property Act provides that where a person fraudulently or erroneously represents that he is authorised to transfer certain immovable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operates on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists. Thus, if at the time of transfer, the vendor/transferor might have a defective title or have no title or no right or interest, however subsequently the transferor requires the right, title or interest and the contract of transfer subsists, in that case at the option of the transferee, such a transfer is valid. In such a situation, the transferor cannot be permitted to challenge the transfer or the transferor has no option to raise the dispute in making the transfer. The intention and objects behind Section 43 of Transfer of Property Act seems to



be based on the principal of estoppel as well as the equity. The intention and objects seems to be that after procuring the money and transferring the land, thereafter the transferor is estopped from saying that though he has sold/transferred the property on payment of sale consideration, still the transfer is not binding to him. Therefore, the intention of Section 43 of the Transfer of Property Act seems to be that no body can be permitted to take the benefits of his own wrong. In the facts and circumstances of the case, Section 43 of the Transfer of Property Act would come into play and protect the rights of the purchaser/transferor.

6. Per contra, the learned Senior Counsel appearing for the respondents would submit that they filed a suit for declaration and recovery of possession and damages in the year 2002 and obtained decree on 21.08.2002. Against the Judgment and Decree, the petitioner did not prefer any appeal suit so far. It became finality and the Execution Court cannot go behind the decree except executing the same.

7. In support of his contention, he relied upon the Judgment reported in **2007 (2) CTC 78** in the case of **Hardev Singh Vs. Gurmail**



Singh (Dead) by LRs, which is held that in order to get the benefits under

Section 43 of the Transfer of Property Act, the contract would be subsisting at the time when a claim for recovery of the property is made. The rule of estoppel by deed by the transferor would apply only when the transferee has been misled. The transferee must know or put on notice that the transferor does not possess the title which he represents that he has. When note in the sale deed had put the appellant on notice of limited right of the mother as guardian, as a reasonable prudent man the appellant is expected to enquire whether on her own the mother as guardian of minor son is competent to alienate the estate of the minor. When such acts were not done the first limb of Section 43 is not satisfied. It is obvious that it may be an erroneous representation and may not be fraudulent one made by the mother that she is entitled to alienate the estate of the minor. For the purpose of Section 43 it is not strong material for consideration. But on declaration that the sale is void, in the eye of law the contract is non est to the extent of the share of the minor from its inception. The second limb of Section 43 is that the contract must be a subsisting one at the time of the claim.



8. He also relied upon the Judgment reported in *AIR 1993*

Punjab and Hariyana 186 in the case of *Kartar Singh and others Vs.*

Harbans Kaur, in which the Hon'ble Punjab and Hariyana High Court held that the mother sold property belonging to her as also the half share of a minor son and the minor son on attaining majority challenged the alienation in respect of his share and obtained a decree. The mother inherited the property of her son on his death. When she claimed possession of the entire property by invoking under Section 43 of the Act, held, that after the suit filed by the son was decreed successfully challenging the sale of his share by her mother the contract originally entered or the sale deed effected did not subsist and the provisions of Section 43 could not be attracted to the case. The suit of vendee thus could not succeed in entirety.

9. Heard, Mr.A.Muthukumar, learned counsel appearing for the petitioner and Mr.P.Valliappan, learned Senior Counsel appearing for the first respondent and perused the materials available on record.

10. The first respondent and the deceased second respondent are the sons of the third respondent herein. The first respondent and the



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deceased second respondent had filed a suit for declaration, recovery of possession and damages in respect of the suit schedule property. They claimed in the suit that when they were minors, the properties were purchased in their names by three sale deeds dated 12.09.1988, 04.01.1990 and 13.04.1989 represented by their guardian viz., the third respondent herein and purchased the said properties. They were in possession and enjoyment of the same. Though the entire sale consideration borrowed by the third respondent herein, viz., the mother, the properties were purchased in the name of minor sons. The third respondent had borrowed money from various persons in order to run the family and thereafter, she could not repay the amounts with interest. Therefore, she had no other option to sell the properties. Accordingly, she had executed sale deed in favour of the petitioner on receipt of the entire sale consideration. The sale deed was executed for herself and as a guardian for her minor sons.

11. The recital of the sale deed also revealed that for discharging the debts, for education of the minor sons and for other family expenses. Thereafter, the minor sons attained majority and filed a suit in O.S.No.354 of 1997 on the file of the District Munsif Court, Chidambaram,



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stating that their mother had no right to sell the properties and as such, the sale itself is null and void and also for recovery of possession of the suit properties. Subsequently, the said suit was transferred and re-numbered as O.S.No.386 of 2000 on the file of the District Munsif-cum-Judicial Magistrate, Kattumannarkoil. Though the petitioner engaged counsel, he failed to file written statement and as such he was set ex-parte and an ex-parte decree was granted on 21.08.2002. The petitioner did not prefer any appeal suit and also did not take any steps to set aside the ex-parte decree. Therefore, the decree dated 21.08.2002 became final.

12. In the meanwhile, the second plaintiff, viz., the second respondent herein, died and as such, the third respondent herein has been impleaded as legal representatives and filed execution petition in order to execute the decree passed in O.S.No.386 of 2000. On receipt of the summons, the petitioner filed counter stating that he also filed an application under Section 47 of CPC to dismiss the execution petition on the ground that the decree is inexecutable one.



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13. The learned counsel for the petitioner mainly contended that the third respondent herein executed a sale deed dated 12.06.1991 in favour of the petitioner for herself and as guardian for her minor sons. It is binding upon them till it is set aside. The sale is not void as claimed by the petitioner. It is only voidable at the instance of the minors on attaining majority and also subject to proof of it is their separate property. Since it is a voidable alienation before seeking declaration of title and recovery of possession the respondents must seek the relief of setting aside the sale. Further contended that after demise of the second respondent herein, the third respondent viz., their mother who had executed the sale deed in favour of the petitioner herein steps into the shoes of the deceased second respondent as his legal representative and filed the present execution petition. Therefore, the third respondent has inherited the deceased son's half share, the third respondent as transferor, for herself and as guardian for her sons representing that she has authority to sell the properties. Even assuming that she falsely represented about her power to sell the properties and she herself had no direct title to the property, subsequent to the ex-parte decree on the death of the second son she has acquired title to the half share in the suit properties. Therefore, the petitioner is entitled to that half share



which the third respondent had inherited after the decree, since the sale is for consideration, the transfer or sale by the third respondent will operate on the right or title and interest of the third respondent which she had subsequently acquired in the property which was already sold out. Therefore, the petitioner is entitled to the right and title of half share in the suit properties.

14. In order to invoke the benefits of the provision under Section 43 of Transfer of Property Act, two conditions have to be satisfied as follows :

- (i) the contract of transfer was made by a person who was competent to contract ; and
- (ii) the contract would be subsisting at the time when a claim for recovery of the property is made.

It is also relevant to the provision under Section 43 of Transfer of Property Act. The first respondent and the deceased second respondent filed a suit for declaration and recovery of possession with damages in respect of the suit properties. The sale deed executed in favour of the petitioner by the third respondent herein declared as null and void and the suit property



declared in favour of the first respondent and the deceased second respondent herein by a Judgment and Decree dated 21.08.2002. Therefore at the time of claiming the suit property, there was no contract subsisting between the third respondent and the petitioner herein. In order to claim the benefits under Section 43 of Transfer of Property Act.

15. Thus it is clear that whenever a person transfers property to which he has no title on a representation that he has at present a transferable interest therein and acting on that representation the transferee takes a transfer for consideration, if thereafter the transferor acquires the property, the transferee becomes entitled to it, if the transfer has not in the meantime been thrown up or cancelled and is subsisting. In the case on hand, the transfer has been cancelled by a Judgment and Decree passed in O.S.No.386 of 2000 dated 21.08.2002. Thereafter, one of the plaintiff viz., the second respondent died, the third respondent who is the transferor impleaded as legal representative of her deceased son. Further no permission of the Court was sought by the third respondent herein before executing the sale deed in favour of the petitioner for selling the property of the minor sons. Therefore, the sale deed executed by the third respondent



was void. The third respondent had acted as guardian of her minor sons there was no question of any fraudulent representation being made by her at the time of execution of sale deed. After declaration made the sale deed executed by the third respondent in favour of the petitioner did not subsist and the provisions of Section 43 of Transfer of Property Act could not be attracted to the case in hand.

16. While executing the decree, the Execution Court cannot go behind the decree between the parties or their representatives it must take the decree according to its tenor, and cannot entertain any objection that the decree was incorrect in law or on facts. Until it is set aside by an appropriate proceeding in appeal or revision, a decree even if it be erroneous is still binding between the parties.

17. In the case on hand, admittedly, the decree has become final and only after declaration in favour of the minor sons their mother steps into the shoes of the deceased sons and had inherited his half share of the suit properties. Therefore, at the time of claim, there was no sale deed exist between the third respondent and the petitioner herein. Therefore, the



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petitioner also cannot claim share of the third respondent herein. Hence, the

Court below rightly dismissed the petition.

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18. In view of the above, this Court finds no infirmity or illegality in the order dated 08.10.2018 passed in E.A.No.25 of 2012 in E.P.No.23 of 2011 in O.S.No.386 of 2000 on the file of the District Munsif-cum-Judicial Magistrate, Kattumannarkoil. Accordingly, this Civil Revision Petition stands dismissed.

02.03.2023.

Speaking/Non-speaking order

Index : Yes/No

Neutral Citation : Yes/No

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To

The District Munsif-cum-Judicial Magistrate,
Kattumannarkoil.

G.K.ILANTHIRAIYAN,J.



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Pre-delivery order in
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