BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 29.11.2024

PRONOUNCED ON : 20.12.2024

CORAM:

THE HONOURABLE MR. JUSTICE V.SIVAGNANAM

S.A.(MD)No.506 of 2005

1.S.Rassiah(Died)
2.M.Rose Mary(Died)
3.R.Joe Thadeus
4.R.Antony Rose

5.R.George Selvan(Died)
6.R.Margaret Amutha
7.R.Delma

(Appellants 2 to 7 are brought on record as LRs of the deceased sole appellant vide order dated 26.07.2011 made in M.P(MD)No.2 of 2011 in SA(MD)No.506 of 2005)

8.Mary Sobhana
9.G.S.Imanto
10.G.S.Jebashini Rosalia

(Appellants 8 to 10 are brought on record as LRs of the deceased 5th Appellant vide Court order dated 06.08.2024 made in C.M.P(MD)No. 9913 of 2024 in S.A(MD)No.506 of 2005)

...Appellants

-Vs-

1.S.John Joseph(Died)
(Memo dated 05.10.2018 filed on 08.10.2008 in USR No.5267 is recorded as already died, and the appellants 3 to 7, who are already on record, are recorded as LRs of the deceased 2nd appellant vide Court order dated 14.02.2023 made in S.A(MD)No.506 of 2005.
2.S.Martin Thankaraj(Died)

3.Sr.Siriya Pushpam(Died)
(Memo dated 25.08.2022 in USR No.23794 is recorded, as 3rd respondent died, and the respondents 4 to 11, who are already on record, are recorded as LRs of the deceased 3rd respondent vide Court order dated 14.02.2023 made in SA(MD)No.506 of 2005.
4.Gnanaselvam
5.Jerald
(Memo presented before the Court dated 21.10.2024 is recorded as R5 died, RR4 & 6, who are already on record, are recorded as LRs of the deceased R5, vide Court order dated 21.10.2024 made in S.A.(MD)No.506 of 2005)
Order dt.21.10.2024 is recalled VCO dt.22.10.2024 in SA(MD)No.506/2005

6.Jermin
(Respondents 4 to 6 brought on record as the LRs of the deceased 2nd Respondents vide Court order dated 17.11.2016 made in CMP(MD)No.183 of 2011 in SA(MD)No.506 of 2005)

7.Rosammal
8.Sahayakumar Jose
9.Merlin Josey Hilda
10.Rejee
11.Ancen Rino

(Respondents 7 to 11 are brought on record as LRs of the deceased 1st respondent vide Court order dated 14.02.2023 made in CMP(MD)Nos. 9233, 9235 and 9237 of 2022 in SA(MD)No.506 of 2005)

... Respondents

Prayer : Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree in A.S.No.186 of 2004, dated 30.03.2005 on the file of Principal Sub Court, Nagercoil reversing the judgment and decree in O.S.No.916 of 1997, dated 07.07.2004 on the file of First Additional District Munsif Court, Nagercoil.

For Appellants : Mr.C.Godwin

For Respondents : Mr.K.P.Narayana Kumar
for R4 to R11
R1 to R3 - died

JUDGMENT

This Second Appeal has been filed against the judgment and decree in A.S.No.186 of 2004, dated 30.03.2005 on the file of Principal Sub Court, Nagercoil reversing the judgment and decree in O.S.No.916 of 1997, dated 07.07.2004 on the file of First Additional District Munsif Court, Nagercoil.

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

3. The defendant in O.S.No.916 of 1997 on the file of the learned I Additional District Munsif, Nagercoil is the appellant herein. The respondent are the plaintiffs.

4. The fact of the case is that the plaintiffs had filed a suit for setting aside the sale deed, dated 16.08.1123 M.E. in favour of the defendant as fraudulent one and not binding the plaintiffs and declaring the plaintiffs title over the suit property item No.1 and recovery of possession of the same from the defendant to the plaintiffs and claim the mesne profits at Rs.1,000/- per annum from the defendant, from the date of the suit till the date of recovery of the possession of the suit property item No.1 by the plaintiffs. The trial Court

has dismissed the suit with cost against which the plaintiffs filed an appeal in A.S.No.186 of 2004 on the file of the Principal Sub Court, Nagercoil. The first appellate Court by its judgment and decree dated 30.03.2005 allowed the appeal and decreed as prayed for. Aggrieved over the judgment of the first appellate Court, the defendant filed the Second Appeal before this Court.

5. The substance of the plaintiffs case is that the plaintiffs are the children of Late. Thiru.Selvarayan who died on 23.01.1946. At the time of his death, 1st plaintiff was 5 years old and the 2nd plaintiff was 3 years old. The 3rd plaintiff was born 36 days after his death. The parents of the plaintiffs were teachers. Suit property Item No.1 belonged to deceased Selvarayan, the father of the plaintiffs. The defendant is the brother of plaintiff's mother. Immediately after the death of the plaintiff's father, there was some dispute caused by the brothers of the deceased Selvarayan over the enjoyment of the property by the plaintiff's mother. Taking advantages of that situation, the defendant influenced his sister, to transfer the said property in his name so that there would be no resistance for the enjoyment of the property. He also promised her as and when the plaintiffs were grown up, there would be no disturbance from the uncles of the plaintiffs and at that time, he would reconvey the said property to the plaintiffs but fails.

6. The defendant was a very cunning man. He did all that was possible to separate the plaintiffs from all the connections of their father's side relatives. To have a permanent feud, the defendant intentionally included suit schedule property Item No. 2 in Ex.A2 sale deed. Suit property Item No. 2 belonged to the brothers of the plaintiffs father. It was their living house and it was not the property of plaintiff's father. To keep the plaintiff's father's side relatives always from the plaintiffs permanently, the defendant purposely included the suit property Item No. 1 in Ex.A2 sale deed. The plaintiffs were totally cut off from the relatives of their father. Moreover the plaintiff's father's brothers were living about 3 km away from the residence of the plaintiffs.

7. The plaintiffs were totally in dark about these transactions done on their behalf by their mother during the period when they were minors. They were totally cut off from their father's side relatives. They were under the control of their mother and the powerful uncle, the defendant.

8. The family relationship between the plaintiffs and the defendant remained in the tact. The defendant was a bachelor till he was 37 years old and under the compulsion of the mother of the plaintiffs he got married in the year

1962 at the age of 37 and lived in the same house with the plaintiffs. In 1964, he put up a house in the suit property item No.1. This was going on till August 1994.

9. In the 1st week of August 1994 the I plaintiff came across and unacquainted person by name Asirvatham who introduced himself as a cousin of the plaintiff. He said that he was the son of plaintiff's father's elder brother Savari Muthu. During their conversation he asked the Ist plaintiff whether the plaint property item No.1 was given to the defendant and for that the Ist plaintiff replied him his ignorance about that and he told him that he would ask his mother about that and confirm that. The matter was confirmed from the plaintiffs mother and thus the Ist plaintiff got the knowledge of the sale deed and the reason for its execution. Plaintiffs mother told him that the defendant promised her to return the property to them in due course. She trusted her brother. She told the plaintiffs that for keeping the peace and harmony in the family she did not disclose any thing about the sale.

10. On 15.08.1994 when the defendant called on the aling mother of the plaintiffs, she told him in the presence of the plaintiffs 1 and 2 to return the suit property item No.1 to the plaintiffs and the defendant also promised her that he

would do so without fail. The plaintiffs also believed the words of the defendant who is none other than their own maternal uncle who was their defacto guardian throughout their life. Contrary to the defendants promise of return of the suit property item No. I to the plaintiffs, he protracted the matter till the death of the plaintiff's mother on 10.10.1996. Even after that he was not coming forward to return the property to the plaintiffs. Hence the suit was filed.

11. Defendant filed a written statement contested the suit. He denies all the allegations found in the plaint. According to him sale deed is a valid document for valuable consideration. No fraud was played by the defendant to get the suit property item No.1. He further states that for suit property item No. 2, he paid consideration but he did not take possession of that property which was more valuable than suit property item No.1. According to the defendant, plaintiffs knew the entire facts even during their younger days. Further, some properties were sold to the plaintiffs by their mother. Subsequently, the plaintiffs sold them to various persons. Therefore, the defendants are not entitled to get the benefits under Section 17 of the Limitation Act and he prayed to dismiss the suit.

12. Upon pleadings, the trial Court has framed the following issues:-

1.Whether the sale deed in favour of the defendant executed by the plaintiff's mother dated 23.03.1948 is a valid one and binding on the plaintiff's?

2.Whether this suit is not maintainable for the non-inclusion of other item of property in the sale deed, dated 23.03.1948?

3.Whether this suit is barred by limitation?

4.Whether the plaintiffs are entitled for the declaratory relief as prayed for?

5.Whether the plaintiff's are entitled for the other reliefs as prayed for?

6.What is the order as to costs?

<u>Additional issues also framed as follows:</u>

1.Whether the plaintiff's are entitled to recovery of possession of suit property from the defendant?

2.Whether the plaintiffs are entitled to past mesne profits?

13. Before the trial Court, on the side of the plaintiffs, 3 witnesses were examined as P.W.1 to P.W.3 and marked as Ex.A1 to Ex.A5, the defendant examined himself as D.W.1 and the documents were marked as Ex.B1 to Ex.B.71.

14. The trial Court upon considering the evidence on record dismissed the suit with cost. Aggrieved over the same, the plaintiffs filed an appeal in AS.No. 186 of 2004 on the file of the Principal Sub Court, Nagercoil. The first appellate Court allowed the appeal and decreed as prayed for. Aggrieved by this judgment and decree, the defendant has filed the Second Appeal before this Court.

15. This Court while admitting Second Appeal has framed the following substantial question of law:-

(i) Whether the Court below is justified in law in holding that the suit is saved under Section 17 of the Limitation Act in spite of Ex.B66 to B71 mortgage deed and sale deeds created by the plaintiffs?

(ii) Whether the plaintiffs are entitled to challenge (11) the contents of Ex.A2/B6 sale deed in derogation of Section 92 of the Indian Evidence Act?

(iii) Whether the plaintiffs are entitled to challenge Ex.A2, sale deed, in view of Section 35 of the Transfer of Property Act having elected to receive the benefits under Ex.B6, sale deed?

16. The learned Counsel for the appellant submits that the judgment of the first appellate Court is contrary to Law and unsustainable and against the evidence of record. The first appellate Court misapplied the provision under

Section 17 of limitation Act. It has no application to the fact of this case as the plaintiff had knowledge about the impugned sale deed as Ex.A2(Ex.B4), dated 16th Meenam 1123 M.E. and also had knowledge from the document Ex.B6 sale deed. There is no material on record for the fraud committed by the defendant in getting the sale deed. He further contended that the first appellate Court not considering the fact that the impugned sale deed Ex.A2 was exhibited in favour of the defendant for valuable consideration as evidence in document Ex.A2 and Ex.B5 receipt issued by the vendor for receiving sale consideration.

17. The plaintiffs have not challenged the sale deed Ex.B6 in favour of them, which was purchased from the sale consideration of Ex.A2 sale deed. The plaintiffs having elected to receive the benefits under Ex.B6 sale deed are incompetent to challenge the validity of Ex.A2 sale deed under Section 35 of the Transfer of Property Act. The fraud is not established by the plaintiffs. The trial Court without assigning any valid reason and without any evidence on record allowed the appeal. The finding by the first appellate Court is erroneous and liable to be set aside and thus he pleaded to allow the appeal.

18. The learned Counsel appearing for the respondents supported the judgment of the first appellate Court and further contended that the sale deed

Ex.A2 and Ex.B4 are one and the same. This document was executed on 23.03.1948 by the mother of the plaintiffs on behalf of the minors children, the plaintiff herein in favour of the defendant as document No.2123/1123 ME of Rajakkamangalam Sub Registrar's Office. The plaintiff's father died on 23.01.1946. The plaintiff's are his only legal heirs as per Travancore Christian Succession Regulation 1092 ME(the personal Law for the Christians in Kanyakumari District before 1956). The widow of the deceased husband was not entitled to any share over his property as per Section 24 of the said Act. She sold the property along with the shares by the minor plaintiffs to the defendant as their guardian. Therefore, it is illegal. The first appellate Court has rightly decided.

19. The learned Counsel for the respondents further contended that there is no legal necessity existed at the time of execution of Ex.A2 sale deed to the family of the plaintiffs to to sell the property. No amount was paid as per the sale deed Ex.A2. It was secretly executed and registered at Rajakkamangalam registration office which had no jurisdiction over the property. Nagercoil registration office alone had jurisdiction over the property. Ex.B5 is a money receipt and it is also a document created to legalise the illegal Ex.A2 document. The properties contain in Ex.B6 sale deed belong to mother of the plaintiff.

20. There is no reason to sell her property to her minor children for consideration. It has designed to show that immovable property was purchased for the minor children from the amount due from the defendant to support their recitals found in Ex.A2 sale deed. The sale deed was created by the defendant fraudulently in his favour. All the documents were in the custody of the defendant through one Asiravatham(P.W.2) the cousin of the plaintiff. The plaintiff had knowledge about the status of the plaint schedule property item No.1 only in August 1994 and after they confirmed the same from their mother. Thereafter, the plaintiff discovered the fraud played by the defendant. Therefore, they are entitled to invoke Section 17 of the Limitation Act. The suit is filed on 24.03.1997 within three years from the date of knowledge of fraud played by the defendant. The first appellate Court has rightly appreciated this. There is no ground for interference in the findings of the first appellate Court and pleaded to dismiss the Second Appeal as it has no merits.

21. To support his arguments, he relied upon the following judgments:-

1)Yeshwant Deorao Vs. Walchand Ramchand reported in AIR 1951 SC 16;

2)Kewel Krishnan Vs. Rajesh Kumar and other etc. reported in AIR 2002 (SC) 564;

3)Kaliaperumal Vs. Rajagopal and another reported in 2009(4) SCC 193.

22. I have considered the matter in the light of the submissions made by the learned counsel on both sides and perused the materials available on records.

23. On perusal of the records, it is seen that the plaintiffs are children of the Thiru.Selvarayan who died on 23.01.1946. At the time of his death, the plaintiffs were minors. The parents of the plaintiffs were teachers. The suit property item No.1 belonged to the deceased Selvarayan, the father of the plaintiffs. The defendant is the brother of the plaintiff's mother. This fact is not disputed by the parties and admitted by them.

24. On perusal of the records, it is further seen that the sale deed Ex.A2 and Ex.B4 are one and the same. This document was executed on 23.03.1948 by the mother of the plaintiffs on behalf of the minor children, the plaintiffs herein in favour of the defendant as document No.2123/1123 ME, Rajakkamangalam, Sub Registrar office. The plaintiff's father died on 23.01.1946. It is an admitted fact.

25. In the suit, the plaintiff challenged the sale deed Ex.A2 and Ex.B4 on the ground that there was no legal necessity existed at the time of execution of the documents to sell the property. The defendant being the brother of the plaintiff's mother fraudulently created the sale deed Ex.A2 in his favour by owned the competence of the plaintiff's mother.

26. I have gone through the sale deed of Ex.A2 certified copy and Ex.B4 original copy. On perusal of the records, it is seen that the sale deed contains two items of properties. The suit is filed to recover the possession of one item of the properties only. With regard to other items, the plaintiffs did not seek recovery of possession. There is no pleadings why the plaintiffs left the item of property. The prayer is to set aside the entire sale deed on the ground of fraud. It shows that the plaintiffs are not bonafide on their part.

27. On perusal of the records further reveals that the sale deed is supported by consideration. The consideration is fixed for Rs.10,500/-. On the date of registration Rs.2,500/- was paid and the balance amount of Rs.8,000/- was paid on 01.10.1957. It is evidence by Ex.B5. Further, it is seen that another property was purchased in the name of the minor. It is evident by Ex.B6, the sale deed dated 23.12.1957.

28. According to the plaintiffs, the defendant obtained the impugned sale deed Ex.A2 by playing fraud upon their mother. On perusal of the evidence, it is seen that the plaintiffs mother is the elder sister of the defendant. At the time of execution of the sale deed. His age was mentioned in the sale deed as 23 years and 14 years younger to her sister. Further, the plaintiff's mother was working as Teacher. In the said circumstances, the allegation that the defendant at the age of 23 years, unduly influenced his elder sister and fraudulently obtained the sale deed is improbable, not acceptable one.

29. Further, on perusal of oral evidence on record, it is seen that the defendant was with plaintiff's family after the death of the plaintiff for a long period. The plaintiffs also deposed that there is no enmity between the plaintiffs and the defendant.

30. On perusal of the plaint, it is seen that the plaintiffs pleaded that the fact of impugned sale deed Ex.A2 came to knowledge through one Asirvatham(Ex.PW.2). He is the son of the plaintiff father's elder brother. Thereafter, the plaintiff's mother confirmed the same. P.W.1 deposed before the Court, that plaintiffs' mother till her death, not stated anything about Ex.A2 sale

deed. Her evidence is re-produced here:-

> “பிரதிவாதி எங்களை ஏமாற்றிவிட்டார் என, என் தாயார் இறக்கும் வரை எங்களிடம் ஒன்றும் சொல்லவில்லை.”

31. Therefore, the alleged ground of fraud undue influence become false. There is no evidence on record to show that the defendant played fraud upon the plaintiff's mother for getting impugned sale deed Ex.A2(Ex.B4). Therefore, the finding of fact by the trial Court did not result from the misconception of the document Ex.A2 or misapplication of law or procedure upon the oral evidence.

32. Fraudulent motive or design is not capable of direct proof in most cases; it can only be inferred. In the very nature of things, fraud is secret in its origin or inception and in the means adopted for success. Each circumstance by itself may not mean much, but taking all of them together, they may reveal a fraudulent or dishonest plan.

33. In our case, the proved fact is that the defendant at the time of purchasing the property by way of Ex.A2, his vendor was more than 14 years elder than the defendant. Admittedly the plaintiff's mother is the own sister of the defendant and also admittedly, working as Teacher in his school. Under these circumstances, a person younger than 14 years of vendor, by undue

influence obtained the sale deed by playing fraud is improbable. Therefore, the proved fact did not make out the case of fraud within the meaning of Section 17 of the limitation Act. Therefore, the trial Court rightly rejected the case of the plaintiffs. The pleadings of the plaintiffs with regard to when the fraud was discovered by them is also false, by their own evidence as stated supra.

34. The word 'Fraud' was defined as an act of deliberate deception with the design of securing something by taking unfair advantage of another. No doubt, the burden is on plaintiff to make out the case of fraud on the part of the defendant. But in this case, the plaintiff's extremely failed, and allegation of fraud, like any other charge of a criminal case, whether made in a civil or criminal proceedings, must be established by sufficient evidence, fraud cannot be based on mere suspicion and conjecture.

35. The findings of the first appellate Court is based on mis-reading of evidence by erroneous approach. Hence it is liable to set aside. Accordingly, the judgment and decree of the trial Court is restored and the suit is dismissed. The substantial questions of law are answered accordingly.

36. In the result, the judgment and decree of the first appellate Court is hereby set aside and the judgment and decree of the trial Court is restored. The suit is dismissed. Accordingly, the second appeal is allowed. No costs.

20.12.2024

NCC : Yes/No
Index : Yes/No
Internet: Yes/No
RJR

V.SIVAGNANAM . J,

RJR

To

1.The First Additional District Munsif Court, Nagercoil.

2.The Principal Sub Court, Nagercoil.

3.The Section Officer,

V.R.Section,

Madurai Bench of Madras High Court, Madurai.

Pre-delivery judgment made in
S.A.(MD)No.506 of 2005

20.12.2024