IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 03.06.2025

CORAM :

THE HON'BLE MR. JUSTICE SATHI KUMAR SUKUMARA KURUP

Second Appeal No.66 of 2018
and C.M.P.No.1466 of 2018

M. Selvaraju .. Appellant

Versus

1.K. Jayapal
2.Kalliammmal .. Respondents

Second Appeal filed under Section 100 of Code of Civil Procedure, 1908 to set aside the Judgment and Decree dated 20.07.2017 made in A.S. No. 76 of 2014 on the file of the learned Sub Judge, Namakkal reversing the judgment and decree dated 30.10.2014 made in O.S.No.280 of 2011 on the file of the Additional District Munsif Court, Namakkal.

For Appellant	:	Mr. R. Vivek for Mr. S. Senthil
For Respondents	:	Mr. S. Saravanakumar for Mr. I. Abrar Md. Abdullah

JUDGMENT

This Second Appeal is filed to set aside the Judgment and Decree dated 20.07.2017 made in A.S. No. 76 of 2014 on the file of the learned Sub Judge, Namakkal and to restore the Judgment and Decree dated 30.10.2014 passed by the learned Additional District Munsif, Namakkal in O.S. No. 280 of 2011.

2. The Plaintiff in O.S. No. 280 of 2011 on the file of the learned Additional District Munsif, Namakkal, is the Appellant in this Second Appeal.

3. The suit in O.S. No. 280 of 2011 was filed by the Plaintiff seeking the relief of declaration to declare that the sale deed executed by the first Defendant in favour of his wife/second Defendant on 22.12.2009 is a fraudulent sale deed and to direct the second Defendant not to alienate or encumber the property described in the plaint.

4. As per the plaint averments, the plaint schedule properties have devolved on the first Defendant through a Will dated 16.10.2000 executed by his father Karuppa Gounder. It was further stated that on 24.11.2004, the father of the first Defendant died and therefore, the Plaintiff has become the owner of the property and the Will dated 16.10.2000 has been acted upon. The Plaintiff further stated that on 14.08.2009, the first Defendant and one Muthiah have borrowed a sum of Rs.3,00,000/- (Rupees Three Lakhs) as loan from him for their business needs. However, after receipt of the amount, they have avoided and evaded to repay the loan. Therefore, the Plaintiff filed a suit for recovery of money in O.S. No. 109 of 2010 on the file of the learned Sub Judge, Namakkkal. According to the Plaintiff, to defeat the attachment

proceedings that is likely to be initiated by the Plaintiff, the first Defendant executed the sale deed dated 22.12.2009 whereby alienated the property in favour of his wife, the second Defendant. Therefore, the Plaintiff had filed the suit praying to declare that the sale deed dated 22.12.2009 executed by the first Defendant in favour of his wife/second Defendant is sham and nominal and will not bind the Plaintiff and his other creditors and to direct the second Defendant not to alienate or encumber the plaint schedule property in any manner.

5. On notice in the suit in O.S. No. 280 of 2011, the first and second Defendants, who are the husband and wife, filed separate written statement denying the plaint averments in detail.

6. On the pleadings of the parties to the dispute in the plaint and in the written statement, the learned Additional District Munsif had framed three issues which are as follows:

(i) Whether the Plaintiff is entitled for the relief of Declaration as prayed for?

(ii) Whether the Plaintiff is entitled for the relief of permanent injunction as prayed for?

(iii) To what other relief the Plaintiff is entitled to?

7. During trial, the Plaintiff examined himself as P.W-1 and also examined two other witness viz., Balamurugan and Mohanraj as P.W-2 and P.W-3 and marked documents under Ex.A-1 to Ex.A-3. The first Defendant had deposed evidence as D.W-1 and marked two documents under Ex.B-1 and Ex.B-2. The second Defendant avoided to enter the witness box.

8. After closing of evidence, after hearing the learned Counsel for the Plaintiff and the learned Counsel for the Defendants, the learned Additional District Munsif, Namakkal, by judgment dated 30.10.2014, had granted a decree of declaration in favour of the Plaintiff and also granted injunction in favour of the Plaintiff restraining the second Defendant from alienating the properties to third parties.

9. Aggrieved by the same, the second Defendant filed Appeal before the learned Sub Judge, Namakkal in A.S.No.76 of 2014. After hearing the Appellant and the Plaintiff as Respondent, the learned Sub Judge, Namakkal, by judgment dated 20.07.2017 reversed the Judgment and Decree passed by the learned Additional District Munsif, Namakkal, allowed the appeal and thereby dismissed the suit.

10. As against the judgment of the Appellate Court in A.S. No. 76 of 2014, the Plaintiff in O.S. No. 280 of 2011 had filed this Second Appeal.

11. The learned Counsel for the Appellant submitted that the findings recorded by the learned Additional District Munsif, Namakkal, was as per Section 53 of the Transfer of Property Act, 1882 and Sections 101 and 102 of the Indian Evidence Act regarding the onus of proof. However, the learned Sub Judge, by judgment in A.S. No. 76 of 2014, dated 20.07.2014 had ignored the provisions of Section 53 of the Transfer of Property Act, 1882 regarding fraudulent transaction and the discharge of burden of proof under Sections 102 and 103 of the Indian Evidence Act.

12. The learned Counsel for the Plaintiff/Appellant invited the attention of this Court to the recitals in sale deed dated 22.12.2009 executed by the first Defendant in favour of the second Defendant, who is none other than his wife. As per the recitals in the sale deed, he executes the sale deed to settle the debts that he owes to various parties. The learned Counsel for the Appellant also invited the attention of this Court to the averments in the plaint in O.S. No. 280 of 2011 and written statement filed by the first and second

Defendant separately in O.S. No. 280 of 2011 as well as the proof affidavit of D.W-1 and the cross-examination P.W-1. In the cross-examination D.W-1 the first Defendant admits that he had not received any amount from his wife/second Defendant as consideration for executing the sale in her favour. Also he admits in his cross-examination that his wife does not have independent source of income to purchase the property. It is, therefore, the contention of the learned Counsel for the Appellant that the learned Appellate Judge failed to appreciate the evidence available and thereby erred in setting aside the well reasoned judgment of the trial Court in O.S.No.280 of 2011, dated 30.10.2014.

13. The learned Counsel for the Appellant invited the attention of this Court to the discussion of the learned Additional District Munsif, Namakkal in paragraphs 7 to 11. However, in the judgment of the Appellate Court in A.S. No. 76 of 2014 from paragraph 13 to 27 the learned Appellate Judge had misdirected himself and arrived at an erroneous conclusion which are contrary to the evidence. When the learned Additional District Munsif, Namakkal had given a clear finding in favour of the Plaintiff/Appellant herein, the Judgment and Decree passed by the Appellate Court, contrary to the material evidence, cannot be sustained.

14. The learned Counsel for the Appellant submitted that the conduct of the first Defendant in executing the sale deed in favour of the second Defendant is hit by Section 120 of the Indian Evidence Act. The Appellate Court failed to consider that the second Defendant did not enter the witness box. Therefore, it is a fraudulent conduct on the part of the first Defendant in executing a sale deed in favour of the second Defendant to wriggle out of the attachment, if any, made against the suit property. The earlier suit in O.S. No. 109 of 2010 filed by the Plaintiff was dismissed for default. Now the petition is pending for restoration of the suit in O.S. No. 109 of 2010.

15. In support of his contentions, the learned Counsel for the Plaintiff/Appellant relied on the decision of the Kerala High Court in the case of ***Laila vs. Soosamma Chacko and another*** reported in ***2017 SCC OnLine Kerala 11852*** wherein it is observed as follows:

> "7. Going by the 4th part of Section 53(1) of the T.P.Act, it is clear that a suit under Section 53 of the T.P. Act shall be instituted on behalf of, or for the benefit of, all the creditors. The present suit was instituted by the plaintiff in her personal capacity. It is not a suit either filed in a representative capacity or on behalf of some other persons. In order to bring a suit under Section 53 of the T.P. Act, the plaintiff must show, aver and plead that the suit was instituted for himself/herself and also for and on behalf of all the creditors. It should be a representative suit for the creditors. In a representative suit leave of the court has to be obtained by complying with the requirement under Order I Rule 8 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'the C.P.C.'). In other words, when a suit under

> Section 53 of the T.P.Act is filed (other than a claim under Rule 58 of Order XXI of the C.P.C.) it must be for and on behalf of the creditors and it is the duty of the plaintiff to comply with the requirement under Order I Rule 8 of the C.P.C. so as to enable all the creditors to join as a party to the suit. It is not at all necessary that the plaintiff should know about the details of all the creditors or whether any other creditor is available or not while instituting such a suit. But the mandate under Order I Rule 8 of the C.P.C. has to be complied with. In other words, it is not at all permissible to incorporate such a prayer in a suit for recovery of money filed by the plaintiff in her personal capacity. Hence, the order passed by the lower court allowing amendment of the plaint and impleading additional second Defendant does not reflect proper application of the law in force. Hence the impugned order is liable to be set aside and I do so but without prejudice to the right of the plaintiff to institute a proper suit as per *Lex fori Lex Loci*."

16. The learned Counsel for the Appellant also relied on yet another decision of the Kerala High Court in the case of **Rajan @ Rajan Gopinathan vs. Dr.D.Jayashree Nayar and another** in **RFA No. 506 of 2008 dated 02.12.2009** wherein it has been observed as follows:

> "22. ... When the court allows a claim to the property attached before judgment, on the ground that the transfer took place before the order of attachment, that would not preclude the attaching creditor from contending that the transfer is hit by Section 53 of the Transfer of Property Act in appropriate proceedings. We are of the view, such a contention of fraudulent transfer would not attract Explanation IV of Section 11 of the Code of Civil Procedure so as to bar the attaching creditor from raising the question in appropriate proceedings."

17. By pointing out the above decisions, the learned counsel for the Appellant prayed for dismissal of the Judgment and Decree passed by the appellate Court and to restore the Judgment and decree of the trial Court.

18. On the other hand, the learned Counsel for the Defendants/Respondents invited the attention of this Court to the cause of action paragraph in the plaint and recitals in paragraph 6 in the sale deed executed by the first Defendant in favour of the second Defendant. The first and second Defendants filed separate written statement and opposed the plaint averments. The second Defendant is not a party to the sale. The Plaintiff had filed the suit after 17 months of the execution of the sale deed dated 22.12.2009 in favour of the second Defendant. The learned Counsel for the Defendants/Respondents invited the attention of this Court to page 19 of the typed set and submitted that the creditor Muthiah who is claimed to have received the loan along with the first first Defendant had not been impleaded as a party to the suit for reasons best known to the Plaintiff. Therefore, the suit has to be dismissed for non-joinder of necessary parties.

19. The learned Counsel for the Respondents/Defendants further submitted that the Plaintiff filed the suit only for himself. He did not file the suit on behalf of the creditors. Therefore, the suit is hit by Order II of CPC when he had not impleaded all the creditors. While so, the judgment of the Appellate Court reversing the judgment of the learned Additional District

Munsif, Namakkal, is well reasoned judgment and it does not warrant any interference by this Court.

20. The learned Counsel for the Defendants/Respondents also invited the attention of this Court to Ex.B-1 and Ex.B-2 marked on the side of the D.W-1. Also it is the contention of the learned Counsel for the Respondents that not only these properties, the first Defendant has many other properties and the Plaintiff can very well initiate action against those properties. Therefore, the suit filed for a declaration to declare that the sale deed executed by first Defendant in favour of the second Defendant is fraudulent will not hold good or it will affect the provisions contained under Section 53 of the Transfer of Property Act, 1882.

21. The learned Counsel for the Respondents also invited the attention of this Court to paragraphs 11 to 26 of the Appellate Court judgment and submitted that it is a well reasoned judgment. Also, it is the contention of the learned Counsel for the Respondents that the learned Appellate Judge had discussed the provisions of the Transfer of Property Act, 1882 and Indian Evidence Act and arrived at a well reasoned finding which does not warrant any interference by this Court. The Second Appeal is to be dismissed and the

judgment of the Appellate Court is to be confirmed.

22. When this Second Appeal was listed on 25.01.2018, this Court admitted this Appeal and framed the following substantial questions of law for consideration:-

> (a) Whether the lower Appellate Court is right in law in setting aside the judgment and decree of the trial Court without properly considering the scope of Section 53 of the Transfer of Property Act, 1882 read with Sections 101 and 103 of the Indian Evidence Act?
>
> (b) Whether the lower Appellate Court is right in law in holding that the transfer under Exhibit A-3 is not a fraudulent transfer particularly when the second Defendant has not discharged the burden of proving that she is a transferee in good faith and for consideration?
>
> (c) Whether the lower Appellate Court has properly appreciated the law relating to burden of proof particularly when the Plaintiff has discharged the initial onus of proving that Ex.A-3 transfer is not supported by consideration and hit by the provisions of Section 53 of the Transfer of Property Act, 1882 with an intent to defeat and delay the creditors?

23. Heard the learned Counsel for the Appellant as well as Respondents and perused the materials placed on record.

24. On consideration of the rival submissions, it is found that the Plaintiff is a competent person to challenge the sale deed for the reason that he had paid loan of Rs.3,00,000/- to the first Defendant on 14.08.2009. The Plaintiff, in order to recover the amount from the Plaintiff, had filed the present suit to declare that the sale deed executed by the first Defendant on

22.12.2009 as null and void. It is noticed that within four months of availing the loan on 14.08.2009, the Plaintiff had executed the sale deed in favour of his wife on 22.12.2009. This according to the Plaintiff is an attempt to prevent him from recovering the loan amount.

25. During trial, the second Defendant/wife of the first Defendant, in whose favour the husband/first Defendant had executed the sale deed dated 22.12.2009 and which was challenged by the Plaintiff, did not enter the witness box. Therefore, an adverse inference can be drawn against the Defendants to the effect that the sale deed dated 22.12.2009 has been executed without any consideration and the apprehension of the Plaintiff that he could not recover the amount he paid to the first Defendant is well founded.

26. The first Defendant was examined as D.W-1. In his cross-examination, he had admitted that his wife has no independent source of income and the necessary fees for registration of the sale deed was paid by him. This shows that the sale deed dated 22.12.2009 was sham and nominal and it was executed solely for the purpose of evading the amount borrowed from the Plaintiff.

27. Earlier, the Plaintiff had filed the suit in O.S. No. 109 of 2010 to recover the sum of Rs.3,00,000/- paid to the first Defendant on 14.08.2009. According to the Plaintiff, on receipt of the sum of Rs.3,00,000/-, the first Defendant had executed a promissory note in his favour agreeing to pay the amount with interest at the rate of Rs.0.75 per Rs.100/-. The above said suit in O.S. No. 109 of 2010 was filed for recovery of a sum of Rs.3,21,675/- which represents Rs.3,00,000/- towards the principal sum. This suit was filed on 03.06.2010 for recovery of the amount. Subsequently, on coming to know about the execution of the sale deed dated 22.12.2009 in favour of the second Defendant, the instant suit in O.S. No. 280 of 2011 was filed for the relief of declaration to declare that the sale deed dated 22.12.2009 is sham and nominal and to forbear the second Defendant from alienating or encumbering the property covered in the said sale deed dated 22.12.2009.

28. The first and foremost contention of the first Defendant is that he has very many properties and the Plaintiff can take steps for recovery of money against those properties. Such a contention cannot be countenanced especially when the first Defendant had not provided the details of those properties either in the written statement or in his evidence. Also the

properties that fetches more value had been protected by the first Defendant by executing a sale deed in favour of the second Defendant. Therefore, the first Defendant cannot be heard to contend that the Plaintiff is not entitled to seek for attachment of the property which is the subject matter of the suit.

29. The next contention of the first and second Defendant in the separate written statement filed by them is that the suit had not been instituted for common ground or for common cause by all the creditors of the first Defendant. This contention also cannot be accepted by this Court. If it is an Insolvency Petition, all the creditors can be impleaded. This is not an Insolvency Petition and it is a suit for declaration to declare the sale deed dated 22.12.2009 as sham and nominal. The Plaintiff is competent to challenge the sale deed executed by the first Defendant in favour of the second Defendant as he had paid Rs.3,00,000/- to the first Defendant. The first Defendant in his cross examination admits that his wife has no independent source of income. Even in the recitals in the sale deed dated 22.12.2009, the words that he is selling the properties to repay the loan to various creditors are absent. He does not mention the name of creditors of the first Defendant in the sale deed dated 22.12.2009 to whom he allegedly to repay loan amount. Therefore, by all means, the sale deed under Ex.A-3 is fictitious and frivolous

sale deed. The claim of the Defendants that it is for the Plaintiff to prove the fraudulent transaction is not accepted. The Plaintiff had by marking the certified copy of the sale deed clearly stated that the sale deed was created with ulterior motive to prevent the creditors from taking action against the Defendants. Civil cases are decided based on preponderance of probabilities and not proof beyond doubt. Therefore, the Plaintiff had proved the case on preponderance of probabilities by marking the documents and letting in evidence. In such circumstance, the submission of the learned Counsel for the Appellant that the second Defendant is the most competent witness to speak about the transaction but she had avoided stepping into the witness box is not acceptable. Section 120 of the Indian Evidence Act provides that the husband or wife of the parties to the dispute in a civil case can be a competent witness. Here in this case, even though second Defendant did not enter the witness box, the first Defendant had let in evidence on behalf of the Defendants 1 and 2. The contention of the Plaintiff regarding sale of property by first Defendant in favour of second Defendant was put as suggestion to the first Defendant as D.W-1. The answers elicited by the Plaintiff from cross examination of first Defendant as D.W-1 probabilised the claim of the Plaintiff that second Defendant has no independent income to purchase a property and to clear the debts of first Defendant. The first Defendant admitted in his cross-examination that his wife, second Defendant has no independent income. Under such circumstances, the claim of the Plaintiff is probablised and it proved the claim of Plaintiff that first Defendant had executed sale deed in favour of second Defendant without any consideration passed from second Defendant to first Defendant. Therefore, the granting of decree by the learned Additional District Munsif, Namakkal, in favour of the Plaintiff in O.S.No.280 of 2011 is found to be proper and well reasoned judgment. The reasoning of the learned Sub Judge, Namakkal, in reversing the judgment of the learned Additional District Munsif, Namakkal, thereby dismissed the suit of the Plaintiff is found perverse.

30. Accordingly, the substantial questions of law raised in this Second Appeal are answered in favour of the Appellant/Plaintiff and against the Respondents/Defendants. The judgement dated 20.07.2017 made in A.S. No. 76 of 2014 by the learned Sub Judge, Namakkal reversing the judgment dated 30.10.2014 in O.S.No.280 of 2011 passed by the Additional District Munsif, Namakkal is found perverse and the same is to be set aside.

In the result, **this Second Appeal is allowed with costs throughout.** The judgment and decree dated 20.07.20117 passed by the Sub Judge, Namakkal in A.S. No. 76 of 2014 is set aside and the judgment and decree dated 30.10.2014 passed in O.S. No. 280 of 2011 by the learned Additional District Munsif, Namakkal is restored. Consequently, connected miscellaneous petitions is closed.

03-06-2025

Index:Yes/No
Internet: Yes/No
Speaking Order/Non-speaking Order
shl/srm

To

1. The Sub Judge,
   Namakkal.

2. The Additional District Munsif,
   Namakkal.

3. The Section Officer,
   V.R.Section,
   High Court, Madras.

SATHI KUMAR SUKUMARA KURUP, J

srm

Judgment made in
Second Appeal No.66 of 2018

03-06-2025