

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 16-5-2006

Coram:

The Honourable Mr. Justice T.V. MASILAMANI

S.A. No.1453 of 1997  
and  
C.M.P.No.9591 of 2003

Srinivasam Pillai ... Appellant/Defendant

vs.

1. Subramanian  
2. Kandasami ... Respondents/Plaintiffs

Second Appeal against the judgment and decree dated 16.8.1996 made in A.S.No.41 of 1996 on the file of the Subordinate Judge, Kallakurichi confirming the judgment and decree dated 9.10.1991 in O.S.No.195 of 1987 on the file of the Additional District Munsif, Kallakurichi.

For Appellant : Mrs.Hema Sampath

For Respondents : Mrs.Mythili Suresh,  
For M/s.Sarvabhauman Associates.

JUDGMENT

The defendant in the suit in O.S.No.195 of 1987 on the file of the Additional District Munsif, Kallakurichi is the appellant herein. The respondents filed the suit for declaration and recovery of possession of the suit property with mesne profits and costs. The appellant resisted the suit by filing the written statement and the trial court having considered the evidence and arguments of both sides decreed the suit as prayed for and granted three months time for delivery of possession of the suit property to the respondents herein. Aggrieved by the said judgment and decree of the trial court, the appellant preferred the appeal before the Subordinate Court, Kallakurichi in A.S.No.41 of 1996. The learned Subordinate Judge after analysing the recorded evidence in the light of the judgment and decree passed by the trial court dismissed the appeal

with costs confirming the findings rendered by the trial court. Hence the Second Appeal.

2. The parties to this Second Appeal may be referred to hereunder as they were arrayed before the trial court for the sake of convenience.

3. The brief facts necessary for the disposal of this Second Appeal may be briefly stated as under:-

a) The respondents herein/plaintiffs filed the suit against the appellant herein/defendant for the said reliefs on the ground that the suit property was purchased by the mother of the plaintiffs on 2.6.1969 when the plaintiffs were minors, and that she was in possession and enjoyment of the same in her own right and on behalf of her minor children. While so, despite the fact that the father of the plaintiffs was alive, the defendant obtained the said sale deed from the mother of the plaintiffs fraudulently and trespassed into the suit property. Hence, they have filed the suit for declaration and recovery of the suit property with mesne profits at the rate of Rs.3,000/- per annum.

b) The defendant resisted the suit on the ground that since the father of the plaintiffs neglected the family, the mother alone was managing the affairs by purchasing and selling properties for and on behalf of the minor sons namely, the plaintiffs. In fact, she had sold the property on 3.3.1976 to the defendant for valuable consideration and immediately thereafter on 6.3.1976, she purchased another property out of the said sale proceeds in the name of the then minor plaintiffs for Rs.7,000/- and also dug a well in the said land. Hence the defendant resisted the suit on the ground that the said transactions were entered into by the mother of the then minor plaintiffs for their benefit and that therefore the suit filed beyond time is barred by limitation. In the above circumstances, the courts below rendered the judgments and decrees as referred to above.

4. Heard Mrs.Hema Sampath, learned counsel appearing for the appellant and Mrs.Mythili Suresh, learned counsel appearing for the respondents.

5. Learned counsel for the appellant has submitted the following in support of the appeal:-

The courts below failed to note that while the natural guardian of the minors, their father, neglected the family, their mother was the only guardian available to look after the affairs for and on behalf of the minors. Similarly, both the courts below failed to render a finding that the sale consideration was utilised by the mother for the benefit of the minors to purchase another property

(vide) Ex.B-2, sale deed dated 6.3.1976, within three days from the date of sale in favour of the appellant. The lower appellate court erred in rendering a finding that the suit was not barred by limitation even after holding that the first respondent came to court three years after attaining majority.

6(a) In the above circumstances, the following substantial question of law was formulated by this Court on 7.10.1997 for consideration:-

Whether in law are not the courts below wrong in overlooking that the suit was barred by limitation under Article 58 of the Limitation Act?

(b) The following additional substantial question of law was formulated on 12.4.2006:-

Whether in law the courts below are right in overlooking that as the respondents are eonimine parties to Ex.A-2, sale deed, the suit as framed is not maintainable as they had not sought to set aside the sale deed on paying Court fee (vide) 69 L.W.686 ?

7. Admittedly the respondents/plaintiffs' mother purchased the property as mother and guardian of the respondents under a registered sale deed dated 2.6.1969 for Rs.5,000/- from one Chinnapillai Ammal for herself and as guardian of her minor children and subsequently, the respondents' mother sold the same to the appellant herein/defendant under Ex.B-1, registered sale deed dated 3.3.1976 for valuable consideration for herself and as guardian of the then minor sons who are the plaintiffs in the suit before the trial court. The case of the plaintiffs is that the said sale deed Ex.B-1 is not binding for the reason that the same was obtained from their mother by the defendant under threat, coercion and fraud and that therefore they are entitled to recover the property from the defendant. Since the courts below agreed with the contention put forth by the plaintiffs, it has to be considered in this appeal whether the plaintiffs have discharged the burden of proof cast on them in proving the alleged fraud, misrepresentation and coercion alleged to be perpetrated by the defendant in obtaining the sale deed Ex.B-1 from their mother.

8. Learned counsel for the appellant has argued at the outset that since the father of the plaintiffs as natural guardian neglected the family, their mother Pavayee Ammal acting as their guardian entered into the transactions under Ex.A-1 and B-1 referred supra. In this context, she has relied on the decision GITHA HARIHARAN v. RESERVE BANK OF INDIA (1999 (I) C.T.C. 481) in support of her contention that the mother could validly act as guardian on behalf of

minor if the father is indifferent to minors and even if the father and mother live together or by virtue of mutual understanding, mother has to be exclusively in charge of the minor or if the father is physically unable to take care of minor either because staying away from mother and the minors or on account of physical or mental incapacity of the father.

9. It is no doubt true that Section 6 of the Hindu Minority and Guardianship Act, 1956 provides as follows:-

"6. Natural guardians of a Hindu minor.-- The guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are-

(a) in the case of a boy or an unmarried girl-the father, and after him the mother; provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;

(b) in the case of an illegitimate boy or an illegitimate unmarried girl-the mother, and after her, the father;

(c) in the case of a married girl-the husband;

Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section

(a) if he has ceased to be a Hindu, or

(b) if he has completely and finally renounced the world by becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi).

Explanation.-- In this section, the expressions 'father' and 'mother' do not include a step-father and step-mother."

10. Learned counsel for the appellant has pointed out the evidence in this case that the father of the plaintiffs, who were then minors, was working in Salem and that the mother and the minor children were living separately. It is seen from the evidence of the first plaintiff as P.W.1 that his father was working as a weaver in Salem and living separately and also having separate mess by cooking himself and that the mother and children who were originally residing in the suit property shifted to Alagapuram, Kallakurichi Taluk after selling the property. Therefore the learned counsel for the



appellant has relied on the ratio laid down in the decision cited to above, to support her further contention that in view of the evidence in this case, it can be safely concluded that even though the father was alive, since he was indifferent, the mother was looking after the affairs of the minor children as their guardian.

11. In this context, the ratio laid down in the said decision in paragraph 16 by the Hon'ble Supreme Court may be extracted hereunder to appreciate the facts and the evidence in this case:-

"While both the parents are duty bound to take care of the person and property of their minor child and act in the best interest of his welfare, we hold that in all situations where the father is not in actual charge of the affairs of the minor either because of an agreement between him and the mother of the minor (oral or written) and the minor is in the exclusive care and custody of the mother or the father for any other reason is unable to take care of the minor because of his physical and/or mental incapacity, the mother, can act as natural guardian of the minor and all her actions would be valid even during the life time of the father, who would be deemed to be 'absent' for the purposes of Sections 6(a) of Hindu Minority and Guardianship Act and Section 19(b) of Guardian and Ward Act."

12. Though the learned counsel appearing for the respondents has contended that since it is admitted by D.W.2, vendor under Ex.B-2 that at the time of the execution of the sale deed, father of the plaintiffs was also present in the office of the Sub Registrar, he acted as the natural guardian, such contention is not fortified by any clinching evidence that the father had attested in Ex.B-2 nor had he taken any part in the transaction so as to enable this Court to accept such an argument put forth on behalf of the respondents. Therefore, I am unable to endorse the submission made by the learned counsel for the respondents. Hence in view of the admission of the first plaintiff as P.W.1 in his evidence as referred to above and having regard to the ratio of the said decision, this Court has no hesitation to come to the conclusion that the transaction under Ex.B-1 cannot be challenged on the mere ground that the same was executed by the mother as guardian of the minor sons while the father, who was the natural guardian alive. It follows that the sale deed Ex.B-1 executed by the mother of the then minor sons cannot be questioned on the basis of the aforesaid contention.

13. Moreover, as has been rightly pointed out by the learned counsel for the appellant, in view of the above said ratio laid down by the Apex Court in 1999 (I) C.T.C. 481, the principle of law on

this aspect of the matter as laid down in GOVINDARAJU PADAYACHI, P. AND ANOTHER v. V.V.O.MALAVARAYA NAYANAR & OTHERS (1997-3-L.W. 586) and SRI AUROBINDO SOCIETY, PONDICHERRY v. RAMADOSS NAIDU (1980 (I) ML.J. 118) relied on by the learned counsel for the respondents cannot be made applicable to the facts of this case. In the judgment in 1997-3 Law Weekly, 586 the question whether maternal uncle could act as a de facto guardian or not was decided with reference to the suit for partition of joint family properties. Similarly, in the case reported in 1980(1) M.L.J. 118, sale by the life estate holder for her minor son and on her own behalf was challenged and therefore, on facts also the ratio laid therein can not be applied to the facts of this case.

14. Similarly, the learned counsel for the appellant has also pointed out the evidence in this case to show that the property acquired by the mother under Ex.A-1 was subsequently sold by her under Ex.B-1 to the appellant for purchasing another property (vide) Ex.B-2, registered sale deed dated 6.3.1976 from D.W.2, Saradhammbal for herself and as guardian for her minor children and therefore he has contended that the plaintiffs had not only been benefited out of the sale consideration passed under Ex.B-1 in favour of them through their guardian and mother Pavayee Ammal, but also utilised the balance amount for their welfare. In this context, she has pointed out the specific recitals in Ex.B-1 itself that the property was sold by the mother in order to purchase the property covered by the sale deed Ex.B-2 from D.W.2 and her husband. Further as per the recitals in Ex.B-1 immediately three days after the execution of the sale deed, the said Pavayee Ammal purchased the property under the original of Ex.B-2, measuring 2.83 acres for a sum of Rs.7,000/-. It is in the evidence of D.W.2, the vendor under Ex.B-2 that the said Pavayee Ammal as well as the plaintiffs were in possession and enjoyment of the property purchased under Ex.B-2 by digging a well in the said land for cultivation.

15. In this context, learned counsel for the appellant has referred me to the certified copy of the sale deed produced along with the petition in C.M.P.No.9591 of 2003 in this appeal in support of her further contention that the plaintiffs after attaining majority joined with their mother Pavayee Ammal and their sister in executing the said sale deed on 23.10.2002, after filing of this appeal in respect of 1.07 acres out of 2.83 acres purchased by them under the said sale deed Ex.B-2 from D.W.2 for a consideration of Rs.49,200/-. Further he has also pointed out the recitals in the said sale deed produced in the said C.M.P. that on the same date, they had also sold 1.30 acres to one Ayyakannu out of the remaining extent in the property purchased under Ex.B-2 and contended that even after executing the sale deeds totally comprising an extent of 2.37 acres, they are still in possession and enjoyment of 0.46 acres in the property purchased by them under Ex.B-2.

16. It is in these circumstances that the learned counsel for the appellant has strenuously contended that in view of the subsequent events, as narrated above, it is no longer open to the plaintiffs to contend that the sale deed under Ex.B-1 was obtained by the defendant by fraud, misrepresentation and coercion from the said Pavayee Ammal as well as her minor sons who are the plaintiffs in this suit. As has been rightly pointed out by the learned counsel for the appellant, curiously enough the mother of the plaintiffs, though alive has not gone into the box in support of the claim made by the plaintiffs. On the contrary, the self serving testimony of P.W.1, the first plaintiff who was a minor at the time of the said transaction under Exs.A-1 and B-1 cannot help to advance the case put forth in the plaint. Hence, there is no clinching evidence adduced in this case to support any of the contentions put forth in the plaint.

17. As has been referred to above, the evidence of the appellant/defendant as D.W.1 is corroborated by D.W.2, the vendor under Ex.B-2 and therefore this Court is of the considered view that the defendant who had purchased the suit property under Ex.B-1 for valuable consideration was entitled to protect the same in a manner known to law. But, on the contrary, though the plaintiffs have alleged fraud, coercion and undue influence in obtaining the sale deed Ex.B-1 by the defendant, they have not discharged the burden of proof cast on them.

18. It is seen from the plaint averments that the plaintiffs filed the suit as soon as they attained the age of 21 and 19 years respectively and therefore this Court is inclined to accept the contention of the learned counsel for the respondents/plaintiffs that the suit is not barred by limitation (vide) Article 58 of the Limitation Act, 1963.

19. Further, as has been rightly argued by the learned counsel for the appellant, in view of the provision under Section 35 of the Transfer of Property Act, 1882, the plaintiffs ought to have elected to return the benefits availed by them under the said transactions, as it has been proved categorically that they had not only purchased the property from D.W.2 under Ex.B-2 by utilising the sale proceeds received by them under Ex.B-1, but also they had largely benefited by subsequent sale of 2.37 acres out of 2.83 acres purchased under Ex.B-2.

20. Section 35(1) of the Transfer of Property Act reads as under:-

"35. Election.-- (1) Where a person professes to transfer property which he has no right to transfer, and as part of



the same transaction confers any benefit on the owner of the property, such owner must elect either to confirm such transfer or to dissent from it; and in the latter case he shall relinquish the benefit so conferred, and the benefit so relinquished shall revert to the transferor or his representative as if it had not been disposed of, subject nevertheless,

where the transfer is gratuitous, and the transferor has, before the election, died or otherwise become incapable of making a fresh transfer,

and in all cases where the transfer is for consideration,

to the charge of making good to the disappointed transferee the amount or value of the property attempted to be transferred to him."

21. It is in this context that this Court finds the principles of Law in paragraph 41 of the judgment rendered by S.S.SUBRAMANI,J., in Govindaraju Padayachi,P. and another - vs. - V.V.O. Malavaraya Nayanar and others reported in 1997-3 Law Weekly 586, may be quoted as under:-

"Section 35 of the Transfer of Property Act deals with the principles of election. The argument of learned Senior Counsel is that when a transaction is set aside, the benefit derived on the transaction must be returned. If the plaintiffs are not prepared to return the benefit, they cannot have the transaction set aside. I do not think the said argument merits acceptance. There is no evidence in this case to show that the minors were benefited by any of the transactions. When the transaction is declared void, in the eye of law, there is no transaction at all. If that be so, the question of return of any benefit also will not arise. The principle of election has no application in such cases."

Per contra, as has been rightly argued by the learned counsel for the appellant, in this case, the defendant has proved that the plaintiffs have derived the benefits out of the impugned transaction and that since the transaction under Ex.B-1 is not liable to be set aside as a void one, the plaintiffs ought to have elected under the said provision of law to return the benefits derived by them.

22. In view of the ratio laid down in the decision referred supra and in the light of the said provision of law, I am of the considered view that the plaintiffs ought to have averred in the plaint that they elected to return the benefits derived by them under



the sale deed Ex.B-1 as well as by the subsequent purchase and sale of the said property under Ex.B-2. In the absence of any such averment regarding election of their claim in the suit, vide Section 35 of the Transfer of Property Act, 1882, as has been rightly argued by the learned counsel for the appellant, the plaintiffs have to be non-suited.

23. Nextly, learned counsel for the appellant has relied on the decisions SANKARANARAYANA PILLAI v. KANDASAMIA PILLAI (69 L.W. 686 (F.B.)), SRIDHARAN v. ARUMUGAM (1993 (2) M.L.J. 428 (D.B.)) and BALU @ BALAKRISHNAN v. MINOR B.SASIKUMAR AND OTHERS (2001 (3) M.L.J. 15) in support of her contention that since the suit was laid by the plaintiffs without a prayer to set aside the alienation made by their mother, while they were minors and in the absence of the suit being valued as per Section 37(1) of the Tamil Nadu Court Fees and Suit Valuation Act 1955, the suit is not maintainable. The dictum of law on this aspect of the matter was reiterated by the Division Bench of this Court in 1993(2) M.L.J. 428, in paragraph 6 as under:-

"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 - vs. - C.S.Rangachariar, I.L.R. 1940 Mad. 259:32 M.L.J. 477."

In view of the facts and circumstances of this case, this Court is of the considered view that the said principles of law is squarely applicable herein. Hence, this Court has no other option except to hold that the suit as framed is not maintainable, as the plaintiffs had not sought to set aside the sale deed by paying necessary court fees.

24. In any view of the factual aspects of the case and having regard to the principles of law cited above, this Court finds that the courts below failed to appreciate the evidence on record and therefore in view of the ratio of the decision of the Hon'ble Supreme Court in ESTRALLA RUBBER v. DASS ESTATE (P) LTD (2001 (8) S.C.C. 97), the judgments and decrees rendered by both the courts below are set aside as their findings are not at all justified on the basis of the evidence on record and in view of the settled legal position, as no reasonable person can accept the same.

25. For the foregoing reasons, the appeal is allowed setting aside the judgments and decrees passed by the courts below and the

suit is dismissed. However, there is no order as to costs. Consequently, C.M.P.No.9591 of 2003 is ordered.

Sd/  
Asst.Registrar

/true copy/

Sub Asst.Registrar

dpp/ts

To

1. The Subordinate Judge, Kallakurichi.
2. The Additional District Munsif, Kallakurichi.
3. The Section Officer, V.R.Section, High Court, Madras-104.

+1cc to M/s. Sarvabhauman Associates Sr 23433

SGL (CO)  
km/13.6.

S.A.No.1453 of 1997  
and  
C.M.P.No.9591 of 2003



WEB COPY