

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date: 31.1.2011

Coram

THE HON'BLE MR.JUSTICE R.S.RAMANATHAN

Second Appeal No.1008 of 2001
and
C.M.P.Nos.10516 of 2001 and 3194 of 2007

U.Palanisamy

Appellant/1st Defendant

-Versus-

1. K.Thangavelu
2. U.Krishnasamy

Respondents/Plaintiff &
Defendants

For appellant : Mr.N.Jothi for
Mr.N.Manokaran

For R1 : Mr.S.V.Srinivasan

Prayer:- Second Appeal against the judgment and decree dated 24.4.2001 made in A.S.No.103 of 1999 on the file of the Principal District Court Coimbatore confirming the judgment and decree dated 28.8.1998 made in O.S.No.1501 of 1992 on the file of the III Additional Sub Court Coimbatore.

JUDGMENT

The unsuccessful first defendant is the appellant.

2. The suit was filed by the first respondent herein for partition and separate possession. The case of the first respondent was that the suit property is the ancestral property and the appellant is the paternal uncle and the second respondent is his father and all of them constitute joint Hindu Family and the first respondent has got $\frac{1}{4}$ share in the suit property by birth and without any legal necessity, his father executed a release deed dated 25.2.1976 releasing his share as well as the first respondent's share in the property in favour of the appellant and the said release deed is not binding on the first respondent and he is entitled to $\frac{1}{4}$ share in the property and therefore, filed the suit for partition. It is also stated in the plaint that the second respondent, his father, was addicted to alcohol and was having all vices and taking advantage of the weakness of the second respondent, the appellant colluded with the second respondent with the intention of misappropriating the joint family properties, and obtained the release deed in his favour.

3. The second respondent herein, father of the first respondent, remained absent and was set ex parte and the appellant filed statement denying the allegations made in the plaint and stated that the release deed was validly executed by the kartha of the family and it is binding on the first respondent and the release deed is a valid one and the first respondent was a party to the said document and without a prayer to set aside the release deed, the suit for partition is not maintainable and the suit is also barred by limitation as the suit was not filed within three years from the date of attaining majority by the first respondent.

4. The Trial Court held that the suit is not barred by limitation and Article 60 of the Limitation Act will not apply to the facts of the case and the release deed executed by the second respondent in favour of the appellant is not valid in law and therefore, the plaintiff is entitled to the relief of partition.

5. The first appellate court also confirmed the judgment and decree of the Trial Court. Aggrieved by the same, the second appeal is filed.

6. At the time of admission of the second appeal, the following substantial question of law was framed:-

"Whether, in the absence of any specific relief for declaration of the release deed, Ex.A8 as null and void, can the suit be maintainable in view of the Full Bench decisions of this court in AIR 1941 Madras 481, 1956 II MLJ 411 (FB) and 2000 (2) CTC 154?"

7. Mr.N.Jothi, learned counsel for Mr.N.Manoharan, learned counsel for the appellant submitted that both the courts below erred in decreeing the suit without recognising the principles of law laid down by the Honourable Supreme Court and in contravention of the provisions of the Hindu Minority and Guardianship Act (HMG Act). Mr.N.Jothi, learned counsel for the appellant submitted that under section 8(3) of the HMG Act, any transaction of minor's interest by the natural guardian without permission of the court is voidable and being a voidable transaction, has to be set aside within a period of three years from the date of attaining majority by the minor and in this case, admittedly, the suit was filed after the expiry of three years from the date of attaining majority by the first respondent and the first respondent has not prayed for the relief of declaration that the release deed is not binding on him and therefore, in the absence of any prayer for setting aside the transaction, the suit is not maintainable and as the suit was filed after the period of three years from the date of attaining majority, the suit is barred by limitation as per Article 60 of the Limitation Act.

8. The learned counsel Mr.N.Jothi also relied upon the following judgments of the Supreme Court in support of his contention.

- 1) MADHUKAR VISHWANATH v. MADHAO ((1999) 9 SCC 446)
- 2) NANGALI AMMA BHAVANI AMMA v. GOPALAKRISHNAN NAIR ((2004) 8 SCC 785)
- 3) NAGAPPAN v. AMMASAI GOUNDER ((2004) 13 SCC 480)

9. On the other hand, Mr.S.V.Srinivasan, learned counsel for the first respondent submitted that the second respondent has no authority to execute the release deed in favour of the appellant and the release deed is not binding on the first respondent and therefore, there is no need to set aside the transaction and the suit for partition is sufficient to indicate that the minor has not accepted the release deed and had chosen to ignore the same by filing the suit. In support of his contention, the learned counsel relied upon the following judgments

- 1) THIRUVENKADA GOUNDER AND OTHERS v. AMMAIAPPAN @ KOTHANDARAMAN & OTHERS (2006 (1) CTC 390)
- 2) BRAMMAGIRI v. MINOR SIVASUBRAMANIAM & ANOTHER (2007 (3) CTC 718)
- 3) ATHIAPPA GOUNDER v. MOHAN (1995 1 MLJ 357).

10. The question that has to be considered in this second appeal is whether the alienation of the minor's share by the father in respect of ancestral property is void or voidable. Admittedly, the property is ancestral property in the hands of the second respondent and therefore, the first respondent, being the son of the second respondent, is entitled to $\frac{1}{4}$ share in the suit property. But, during the minority of the first respondent, his father, the second respondent released his share as well as the first respondent's share in favour of the appellant for valuable consideration and therefore, we will have to see whether the release deed executed by the second respondent is valid in law. The Honourable Supreme Court in the judgment reported in SRI NARAYAN BAL v. SRIDHAR SUTAR (1996 SC 2371 = 1996 (8) SCC 54) has held as follows:-

"5. With regard to the undivided interest of the Hindu minor in joint family property, the provisions aforesaid are beads of the same string and need be viewed in a single glimpse, simultaneously in conjunction with each other. Each provision, and in particular Section 8, cannot be viewed in isolation. If read together the intent of the legislature in this beneficial legislation becomes manifest. Ordinarily the law does not envisage a natural guardian of the undivided interest of a Hindu minor in joint family property. The natural guardian of the property of a Hindu minor, other than the undivided interest in joint family property, is alone contemplated under Section 8, where under his powers and duties are defined. Section 12 carves out an exception to the rule that should there be no adult member of the joint family in management of

the joint family property, in which the minor has an undivided interest, a guardian may be appointed; but ordinarily no guardian shall be appointed for such undivided interest of the minor. The adult member of the family in the management of the Joint Hindu Family property may be a male or a female, not necessarily the Karta. The power of the High Court otherwise to appoint a guardian, in situations justifying, has been preserved. This is the legislative scheme on the subject. Under Section 8 a natural guardian of the property of the Hindu minor, before he disposes of any immovable property of the minor, must seek permission of the court. But since there need be no natural guardian for the minor's undivided interest in the joint family property, as provided under sections 6 and 12 of the Act, the previous permission of the Court under Section 8 for disposing of the undivided interest of the minor in the joint family property is not required. The 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. Thus section 8 in view of the express terms of Sections 6 and 12, would not be applicable where a joint Hindu family property is sold/disposed of by the Karta involving an undivided interest of the minor in the said joint Hindu family property. The question posed at the outset therefore is so answered."

11. Therefore, as per the above judgment, the provisions of section of the HMG Act will have no application and the kartha is competent enter into any transaction and it is binding on the minor.

12. Further, as per section 8(3) of the HMG Act, any alienation the natural guardian without permission of the court is voidable. In t judgment reported in 1999 (9) SCC 446 (cited supra), the Honourab Supreme Court held that the transaction is only voidable and it has to set aside within three years from the date of attaining majority as p Article 60 of the Limitation act. In the judgment reported in 2004 (1 SCC 480, the Honourable Supreme Court relied upon the judgment VISHWAMBHAR v. LAXMINARAYAN ((2001) 6 SCC 163) and held that a alienation by a natural guardian in contravention of sub-sections 1 and of section 8 is voidable at the instance of the minor and it has to be s aside by the minor before claiming any right in the property. In t judgment reported in 2004 (8) SCC 785 (cited supra), the Honourab Supreme Court has held that the transaction by the natural guardi without permission of the court is only voidable and the suit must filed by the minor within the time prescribed by Article 60 of t Limitation Act. Therefore, from the above judgments of the Honourab

Supreme Court, it is made clear that even assuming that the transaction entered into by the natural guardian without the permission of the court is for legal necessity, it is open to the minor to set aside the same transaction as it is only voidable.

13. In the judgment reported in BALJINDER SINGH v. RATTAN SINGH ((2008) 16 SCC 785), the Honourable Supreme Court discussed the meaning of void and voidable and quoted with approval, the decision reported in GOVERNMENT OF ORISSA v. ASHOK TRANSPORT AGENCY ((2002) 9 SCC 28) and held as follows:-

" 'Voidable act' is that which is a good act unless avoided, e.g., if a suit is filed for declaration that a document is fraudulent and/or forged and fabricated, it is voidable as the apparent state of affairs is the real state of affairs and a party who alleges otherwise is obliged to prove it. If it is proved that the document is forged and fabricated and a declaration to that effect is given, a transaction becomes void from the very beginning. There may be voidable transaction which is required to be set aside and the same is avoided from the day it is so set aside and not any day prior to it. In cases, where legal effect of a document cannot be taken away without setting aside the same, it cannot be treated to be void but would be obviously voidable."

14. Therefore, when the transaction is voidable, it is required to be set aside and therefore, without a prayer for setting aside the same transaction, the suit for partition is not maintainable.

15. Though in the judgments reported in 2007 (3) CTC 718 and 2006 (3) CTC 390, this court has held that a suit for partition by the minor attaining majority is maintainable, the law laid down in those judgments may not be correct having regard to the law laid down by the Supreme Court referred to above. Further, in those two judgments, the learned Judges have not discussed about Article 60 or the right of the minor to file a suit for partition without a prayer for setting aside the same. As the Supreme Court has laid down that in respect of the transaction entered into by a natural guardian and father without permission from court, the minor must pray for setting aside the transaction and in view of the decisions reported in AIR 1941 Madras 481, 1956 II MLJ 411 (FB) and 2007 (2) CTC 154 and as per Article 60 of the Limitation Act, the suit ought to have been filed within three years from the date of attaining majority by the minor.

16. In this case, it is not in dispute that the suit was filed after three years from the date of attaining majority. Hence, the suit is also barred by limitation as per section 60 of the Limitation Act. Hence, the substantial question of law is answered in favour of the appellant. The

suit filed by the first respondent for partition without prayer for setting aside the transaction is not maintainable and the judgment and decree of both the courts below are set aside.

In the result, the second appeal is allowed. No cost. The connected miscellaneous petitions are closed.

C.M.P.No.1953 of 2009 is filed to receive additional documents. According to me, those documents will not help the court to give judgment on the merits of the case and no proper explanation was also given for the non-production of those documents before the courts below. Hence, the application is dismissed.
SSK.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1. The Principal District Judge,
Coimbatore.
2. III Additional Sub Judge,
Coimbatore.

Copy to: The Section Officer, V.R. Section, High Court, Madras.
+1 CC to Mr.Su.Srinivasan, Advocate (SR.6910)
+1 CC to Mr.N.Manokaran, Advocate (SR.7076)

S.A.No.1008 of 20

(C.O)
VVI/18.5.2011

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