



S.A.No.244 of 2003

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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RESERVED ON : 25.06.2024

DELIVERED ON: 28.06.2024

CORAM

THE HONOURABLE MR. JUSTICE S.SOUNTHAR

**S.A.No.244 of 2003
and C.M.P.No.1979 of 2004**

1.Rajammal
2.Maria Alankaran
3.Arulappan
4.Lourdu
5.Aruputham ... Appellants

Vs

1.Varghese (Died)
2.Mariya Sebastian
3.Rathinam
4.Leemarose
5.Alphonse
6.Prakasi
7.Appurose
8.Alakesh (Died)
9.Susilla
10.Erancheesai
11.Christhadas
12.Annamal
13.Thomas
14.Rafeai
15.M.Joy
16.A.Jayanthi
17.Suganthi



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18.Jegan
19.M.Pushpabai (Died)
20.Martin George
21.Louis Mary
22.Stephen Raj ... Respondents

(Respondents 15 to 18 are brought on record as LRs of the deceased 8th respondent vide Court order dated 02.08.2023 made in C.M.P.(MD)Nos. 9704 to 9706/2019 and M.P.(MD)Nos.3 to 5/2015)

(Memo dated 11.07.2023 in USR.No.21742 is recorded as 19th respondent died and the respondents 20 to 22, who are already on record, are recorded as LRs of the deceased 19th respondent vide Court order dated 11.07.2023)

(Respondents 19 to 22 are brought on record as LRs of the deceased 1st respondent vide Court order dated 02.08.2023 made in C.M.P.(MD)Nos. 9704 to 9706/2019 and M.P.(MD)Nos.3 to 5/2015)

PRAYER: Second Appeal filed under Section 100 of C.P.C. against the judgment and decree dated 11.04.1987 made in O.S.No.619 of 1983 on the file of 2nd Additional District Munsif Court, Kullithurai, as confirmed by the judgment and decree dated 18.07.2002 made in A.S.No.96 of 1997 on the file of the 2nd Additional Sub Court, Kullithurai.

For Appellants : Mr.S.Meenakshisundaram,
Senior Counsel for
Mr.R.Manimaran

For Respondents : Mr.P.Thiyagarajan
for R11, R20 to R22
No Appearance for R15 to R18
R2, R3, R5 & R12 – *ex parte*
R1, R8 & R19 – died
R4, R6, R7, R9, R10, R13



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& R14 - dismissed vide Court order dated 10.02.2010

JUDGMENT

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The legal representatives of the deceased sole plaintiff, who were brought on record as plaintiffs 2 to 4, 6 and 7, are the appellants. The suit was filed to set aside the sale deed dated 26.09.1983 allegedly executed by the first defendant in favour of the second defendant. The suit was dismissed by the trial Court and the findings of the trial Court were affirmed by the first appellate Court. Aggrieved by the concurrent findings, the plaintiffs have come by way of this Second Appeal.

The averments found in the plaint:

2. According to the plaintiffs, the deceased first plaintiff Gabriel was the son of the deceased first defendant Rayappan @ Ponnam Perumal. The first defendant got four sons. He received Rs.1,000/- from each of his sons and orally surrendered the suit property to the deceased first plaintiff and his other sons in the year 1970. After surrender by the first defendant, the plaintiff annexed the suit property along with his property and had put up boundaries on all the sides. The deceased first plaintiff improved the suit property into paddy fields by investing Rs. 2,000/-. On 12.06.1962, the deceased first defendant and his 4 sons



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entered into a partition and the first defendant had taken properties in the first schedule to the partition deed and the suit property was one among them. At the time of filing of the suit, the first defendant was aged about 90 years and he was mentally and physically infirmed. The first defendant went to the place of his younger son Mariya Sebastian and had been living with him and he was fully under his influence. The younger son of the first defendant had taken him to Parassala Sub Registrar Office and influenced him to execute a sale deed in favour of the second defendant. It was also averred that the first defendant was physically and mentally infirmed at that point of time. The property sold to the second defendant was the suit property over which, the first defendant had no manner of right or possession due to surrender in favour the plaintiff and his sons. The first defendant did not receive any consideration from the second defendant and whole beneficiary of the transaction was Mariya Sebastian, his younger son. The property described as 'B' schedule in the sale deed allegedly available in Parassala Village in Kerala State. The said property is non-existent and fictitious one and the same has been included for the purpose of creating a fraudulent document and getting it registered in Parassala Sub Registrar Office at Kerala State. The suit property which was described as 'A' schedule to the sale deed is located



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within Palliyadi Sub Registrar Office in Tamil Nadu. The inclusion of 'B' schedule property was only for the purpose of getting it registered at Kerala. Therefore, the registration of the sale deed is vitiated by fraud and consequently, plaintiff laid a suit for above said relief.

The averments found in the written statement of the first defendant:

3. The first defendant filed a written statement and denied the plaintiff averments. It was his case that the suit property belonged to him and he sold the suit 'A' schedule property to the second defendant as per sale deed dated 26.09.1983. The first defendant denied the surrender of suit 'A' schedule property to the plaintiff and the first defendant denied the averment in the plaint that suit 'A' schedule property was surrendered to him. It was contended that suit 'A' schedule property had been in his possession and enjoyment till the date of sale in favour of the second defendant and he had planted trees standing thereon. The partition and allotment of the suit 'A' schedule property to the first defendant as pleaded in the plaint was admitted. The allegations regarding physical and mental infirmity of the first defendant found in the plaint was denied. It was also averred by the first defendant that portion of his property was



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WEB CCRI sold to the second defendant, as the first defendant was in urgent need of money for discharging certain debts. The plaintiff has no right to question the alienation made by the first defendant and after the suit sale deed, the first defendant also executed two other documents for the remaining portions of the suit property in the same survey number. Thus, the first defendant supported the sale deed impugned in the suit.

The averments found in the written statement of the second defendant:

4. The second defendant denied the right and possession of the plaintiff over the suit property. He claimed that the suit property absolutely belonged to him. The averments in the plaint regarding exercise of right by the plaintiff over the suit property were denied. The second defendant also averred that the suit property belonged to the first defendant as per the partition deed dated 12.06.1962 admitted in the plaint. The allegations in the plaint that the first defendant was influenced by his younger son was denied. It was also contended by the second defendant that the suit 'B' schedule property was included in the sale deed dated 26.09.1983 only as a collateral security and the said



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property was not conveyed to the second defendant. The first defendant represented that 'B' schedule property also belonged to him and the second defendant believed his representation. The second defendant had no knowledge about the defective title of the first defendant over the 'B' schedule property. Even if the first defendant had no right over the 'B' schedule property, his defective title will not render the sale deed as invalid or ineffective. On these pleadings, the second defendant sought for dismissal of the suit.

Evidence let in by the parties:

5. Before the trial Court, one of the legal representatives of the deceased first plaintiff viz., third plaintiff was examined as P.W.1. Two neighbours were examined as P.W.2 and P.W.3. On behalf of the plaintiff, 9 documents were marked as Ex.A1 to Ex.A9. The second defendant was examined as D.W.1 and the younger son of the first defendant Mariya Sebastian was examined as D.W.2. On behalf of the defendants, six documents were marked as Ex.B1 to Ex.B6. The Advocate Commissioner's report and plan were marked as Ex.C1 and Ex.C2.



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Findings of the Courts below:

6. The trial Court, on appreciation of oral and documentary evidence available on record came to the conclusion that the plaintiff was not entitled to any relief as prayed for and hence, dismissed the suit. Aggrieved by the same, the plaintiffs preferred an appeal in A.S.No.96 of 1997 on the file of II Additional Sub Court, Kullithurai and the first appellate Court affirmed the findings of the trial Court. Aggrieved by the concurrent findings, the plaintiffs have come by way of this Second Appeal.

Substantial question of law formulated at the time of admission of the Second Appeal:

7. At the time of admission, this Court formulated the following substantial question of law, by an order dated 21.02.2023:

“Is the judgment of the Court below sustaining the title of the defendant under Ex.B1, the registration of which is opposed to Section 28 of the Registration Act as laid down in the judgment reported in 1988 (1) MLJ 447, is opposed to law?”



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Submissions of the learned Senior Counsel appearing for the appellant:

8. The learned Senior Counsel appearing for the appellants submitted that the sale deed impugned in the suit was hit by Section 28 of the Registration Act, 1908 and hence, the same shall be treated as a void document. It is the submission of the learned Senior Counsel that the first defendant had no right over the suit 'B' schedule property located in Kerala State and the said property was included in the impugned sale deed only for the purpose of registering the document in Kerala State. It is his submission that when the suit 'A' schedule property located at Tamil Nadu, in order to defraud the provisions of Registration Act, just to present the document for registration before the Kerala State, a fictitious and non-existent 'B' schedule property was included in the sale deed and the document was registered before the Sub-Registrar Office at Kerala and therefore, it is hit by Section 28 of the Registration Act, 1908. In support of his contention, the learned counsel relied on the following Judgements:



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1. *M.Mohamed Kassim & Others Vs. C.Rajaram & Others*

reported in **1988 (1) MLJ 447 equivalent to CDJ 1987 MHC 236**; and

2. *D.Vijayalakshmi Vs. V.Hariselvan and others* reported in **2020 (3) CTC 438.**

Submissions of the learned counsel for the respondents:

9. The learned counsel for the respondents submitted that suit 'B' schedule property was shown as security in Ex.A1 sale deed dated 26.09.1983 and as per the recital found in the impugned sale deed, the suit 'B' schedule property was the property of first defendant's family and the first defendant had been in possession and enjoyment by inheritance with patta. The learned counsel for the respondents by taking this Court to the averment found in the plaint would submit that plaintiff himself claimed right over the suit property including the 'B' schedule property, as if the same was surrendered to him by the first defendant. He pleaded surrender and oral conveyance and the same has not been proved. In such circumstances, the title of the first defendant cannot be



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challenged. The learned counsel for the respondents further submitted that if the property is not really available, the Sub Registrar would not have registered the same and hence, when registered document is produced before the Court, the same is a *prima facie* proof of existence of the property and it is for the plaintiffs to prove the non-existence of the same by leading evidence. The learned counsel for the respondents further submitted that Ex.B5, sale deed executed by the first defendant in respect of remaining portion in the suit survey property in favour of Mariya Sebastian, wherein also the suit 'B' schedule property was shown as security, has not been questioned by the plaintiff and therefore, the suit claim is not a *bona fide* one. The learned counsel for the respondents further by relying on first proviso to Section 92 of the Indian Evidence Act, 1872 submitted that the plaintiff, who wants to invalidate a document on the ground of fraud, shall establish the same. In support of his contention, the learned counsel relied on the judgment of this Court in ***Gopi and another Vs. H.David and others*** reported in ***2011 (1) CTC 694.***

Discussion on the question of law framed:



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10. A reading of the averments found in the plaint would establish that the suit first schedule property was allotted to the share of first defendant in 1962 partition deed. The plaintiff claimed that the suit first schedule property was surrendered to him and his brothers in the year 1970. Admittedly, no registered conveyance deed was executed in favour of the plaintiff and the surrender of the suit first schedule property in favour of the plaintiff was not at all proved by leading any acceptable evidence. Therefore, with regard to the title of the first defendant over the suit first schedule property is concerned, there is no dispute. It is the claim of the plaintiffs that suit second schedule property is a fictitious property and the same has been purposely included in the impugned sale deed just to enable the Sub Registrar Office at Kerala to entertain the registration. It is the specific submission of the learned Senior Counsel for the appellants that such inclusion of fictitious property in the suit sale deed would amount to fraud on the Registration Act and hence, hit by Section 28 of the Registration Act, 1908. The plaintiff has not produced any material to prove surrender of property in his favour by the first defendant in the year 1970 as pleaded in his plaint. Therefore, he cannot impugn the suit sale deed on the basis of his own title. Therefore, the only question to be decided is whether the suit sale deed is hit by Section



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28 of Registration Act, 1908 and inclusion of suit 'B' schedule property is a fraudulent act.

11. In ***M.Mohamed Kassim & Others Vs. C.Rajaram & Others*** reported in ***1988 (1) MLJ 447***, while considering the similar question, the Hon'ble Division Bench of this Court observed as follows:

“.....The preponderance of legal opinion in respect of such a document where fictitious properties were included in a sale deed or where an insignificant property over which the vendor has no title or where over such property the vendor has no intention of conveying any title, is that it is a fraudulent document and as such it is void. It is needless to say that when there is a specific provision in the Registration Act that a document should be registered in a particular manner and in a particular place, it-should be dealt with according to law. The authority to register arises from the existence of some property within the jurisdiction of the registering officer and if the property is property as the term is understood in law and is capable of ownership and enjoyment and if title is intended to pass, then whatever may be the object with which it is included in the document, the registration would be valid. But where no property exists or on the property the vendor has no semblance of right and the parties never intend that the title should pass under the property, then it must be held that such an inclusion is a



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document amounts to fraud on the Registration Law and no registration obtained by means thereof is valid..... ”

12. In ***D.Vijayalakshmi Vs. V.Hariselvan and others*** reported in **2020 (3) CTC 438**, while explaining the scope of Section 28 of Registration Act, 1908, this Court observed as follows:

“57.....

(1)....

(2)....

(3) Unless, it is shown that the property itself was not in existence or the vendor or the mortgagor, as the case may be, did not have title to the properties so included in the Sale Deed, it cannot be said that such registration would amount to a fraudulent registration, thereby, making the entire document invalid.”

13. In ***Gopi and another Vs. H.David and others*** reported in **2011 (1) CTC 694**, this Court, while considering the similar question, observed as follows:

“27. Further, in the judgment reported in ***S.Joseph Nadar and Another v. T.Dasammal Nadathi and 2 others, 1989 T.L.N.J. 242***, the learned Single Judge followed the judgment of the Division Bench in ***A.S.No.406 of 1977*** and distinguished the decision reported in ***M.Mohamed Kassim***



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Vs. C.Rajaram, 1988 (1) MLJ 447 and held that to declare a document void for having contravened the provisions of Section 28 of the Registration Act, 1908, there must be cogent evidence of fraud and collusion between the parties and in the absence of such cogent evidence, the document cannot be held as invalid. It has been held as follows:-

"On the other hand, the Bench affirmed the view in the decision, Appeal No.406 of 1977 wherein such a question has been elaborately considered and it was observed that there must be collusion between the parties and it should be established by cogent, clear and strong evidence to hold that a particular document is void and a fraud on the law of registration."

14. In the light of the law laid down in the above mentioned judgments, let us consider the facts of the present case and find out whether the suit sale deed can be treated as a void document by virtue of Section 28 of the Registration Act, 1908. In support of plaint averments, the third plaintiff was examined as P.W.1. In his chief examination, he deposed that suit 'B' schedule property was included in the sale deed surreptitiously. He has not mentioned that suit 'B' schedule property is a non-existent and fictitious property. P.W.1 also admitted that he has not questioned the sale deed executed by the first defendant in favour of Mariya Sebastian, brother of his father. The sale deed in favour of Mariya Sebastian was marked as Ex.B5 and the suit 'B' schedule property



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was offered as a security in the suit sale deed also. When P.W.1 was cross examined, whether first defendant had any property in Parassala (Kerala State), initially he answered that he did not know. Thereafter, he changed his answer and said 'No'. Therefore, the core averment of the plaintiff that the suit property is a fictitious and non-existent property and the same was included fraudulently to give jurisdiction to Sub Registrar at Kerala State to register the sale deed, does not find support from the evidence of P.W.1. His evidence in this regard is very shaky. P.W.2 is a neighbour. He pleaded ignorance about the sale deed in favour of second defendant. Therefore, his evidence is not useful to support the plea of the plaintiff that suit 'B' schedule property is a fictitious property. P.W.3 is an another neighbour. He has also not spoken about the non-existent or fictitious nature of 'B' schedule property. Therefore, though the plaintiff, in order to challenge the EX.A1 sale deed, in his plaint pleaded that suit 'B' schedule property is a fictitious and non-existent property and the same has been included fraudulently in Ex.A1 to give jurisdiction to Sub-Registrar at Kerala to entertain the sale deed for registration, failed to lead any evidence in support of the said plea.

15. The learned Senior Counsel for the appellants submitted that



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the existence or otherwise of the suit 'B' schedule property can be proved only by the defendants by leading positive evidence and the plaintiff cannot prove the negative. However, the plaintiff challenged the sale deed only on the ground that it is hit by Section 28 of the Registration Act, 1908. It is the case of the plaintiff that suit 'B' schedule property is a non-existent and fictitious property and the first defendant had no right over the same. At least there must be some evidence on the side of the plaintiff to support the said plea. P.W.2 and P.W.3 do not talk about the said plea raised by the plaintiff. Even P.W.1 does not say anything regarding fictitious nature of the suit 'B' schedule property or first defendant's competency to convey the same. Only if the plaintiff's side witnesses enter the box and assert suit 'B' schedule property are fictitious property and the first defendant had no title to convey the same, the burden of proving existence of the property would shift to the defendants. When the plaintiff failed to lead any evidence in support of the said plea, the burden of proof will never shift. Ex.A1 is a registered document and some kind of sanctity is attached to it. As rightly pointed out by the learned counsel for the respondents, unless 'B' schedule property was situated within the territorial limits of the concerned Sub Registrar, he would not have entertained the registration of the said



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document. When the statutory authority has entertained Ex.A1 and registered the same, we can safely presume that 'B' schedule property is physically available within his jurisdiction. Recitals in Ex.A1 would suggest that 'B' schedule property was an ancestral property of first defendant's family. When the plaintiff's side witnesses failed to discharge their burden by deposing in favour of the plea raised in the plaint regarding the non-existence or fictitious nature of the suit 'B' schedule property, both the Courts below, on appreciation of evidence available on record, came to the conclusion that the impugned sale deed is a valid document and the same is not vitiated by any fraud. The said conclusion reached by the Courts below is not vitiated by any perversity and therefore, the question of law framed at the time of admission is answered against the appellants and in favour of the respondents.

16. Both the Courts below, on proper appreciation of evidence available on record, came to the conclusion that the plea of the plaintiffs that Mariya Sebastian used his influence and got the sale deed executed in favour of the second defendant was not proved by the plaintiffs. The learned Senior Counsel for the appellants has not assailed the said finding of fact in the Second Appeal and the argument was advanced



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only based on Section 28 of the Registration Act, 1908. In view of the answer to the question of law, the Second Appeal fails and the judgments and decrees passed by the Courts below are confirmed. In the facts and circumstances of the case, there will be no order as to costs. Consequently, connected miscellaneous petition is closed.

28.06.2024

Neutral Citation : Yes

Index : Yes

vsm

To

- 1.II Additional District Munsif, Kullithurai.
- 2.II Additional Subordinage Judge, Kullithurai
- 3.The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



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S.SOUNTHAR, J.

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**Judgement in
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