

**(1998) 04 MAD CK 0159**  
**In the Madras High Court**

|                                                          |            |
|----------------------------------------------------------|------------|
| Chellappa Gounder (died) and Others                      | APPELLANT  |
| Vs                                                       |            |
| Ramasami Gounder alias Karuppa Gounder (died) and Others | RESPONDENT |

---

**Date of Decision :** 15-04-1998

**Acts Referred:**

Transfer of Property Act, 1882 — Section 54

**Citation :** (1998) 3 MLJ 372

**Hon'ble Judges :** S.S. Subramani, J

**Bench :** Division Bench

---

**Judgement**

S.S. Subramani, J.—The appellant in S.A.No. 1351 of 1981 is the 1st defendant in O.S.No. 647 of 1978, on the file of Principal District Munsif, Namakal. Subsequent to the filing of the second appeal, he died and his legal heirs have been impleaded as additional appellants. In the others second appeal, which arises out of O.S.No. 308 of 1977, on the file of the same court, the plaintiff is the appellant. The plaintiff in O.S.No. 308 of 1977 is the 1st defendant in O.S.No. 647 of 1978. Both these suits were jointly tried and common evidence was taken in O.S.No. 647 of 1978. The parties in these two appeals are also referred to in accordance with their rank in O.S.No. 647 of 1978.

2. One Devi Gounder had four sons apart from his widow Sellayee. The sons are Karuppanna Gounder, Kuppusawami Gounder, Chellappa Gounder and Veerappa Gounder. The plaintiff in O.S.No. 647 of 1978 is Karuppanna Gounder, and the 1st defendant in that suit is his brother Chellappa Gounder. The 2nd defendant therein is his another brother Veerappa Gounder. Kuppusamy Gounder, who is one of the brothers died and he is not a party to these proceedings.

3. O.S.No. 647 of 1978 was the suit filed by Karuppanna Gounder for declaration of his right to "B" schedule properties and for consequential injunction restraining the defendants therein from interfering with his peaceful possession and enjoyment, and an alternative relief was also claimed for recovery of possession. In that suit he has also impleaded defendants 3 to 12 who are alienees of the property.

4. The material averments of the plaint could be summarised thus:

After the death of Devi Gounder, the father, brothers entered into a partition under Ex.A-1, dated 19.3.1952. The family had 18.50 acres of land in four survey numbers, viz., S.No. 124/2B (5 acres and 22 cents) S.No. 124/1 (7 acres and 55 cents), S.No. 124/2C (4 acres and 73 cents) and S.No. 123/2 (1 acre). In the partition deed -Ex.A-1, each brother took 3 acres and 43 1/2 cents, with 1/4th right in common pathways. The total area of partition was only 14 acres and 50 cents. The remaining 4 acres were left in common for the purpose of discharging certain debts and each brother undertook to discharge the debt in proportion to their right. On that date the family was in debt due to one Kolanda Gounder, on the basis of promissory note and mortgage deeds. As per Ex.A-2, dated 19.3.1952, the plaintiff i.e., Karuppanna Gounder took a sale deed from his mother and three brothers of their right in the common property, which was kept for discharge of debts. The recital therein directed Karuppanna Gounder to discharge the debt due to Kolanda Gounder under the promissory notes and also the mortgage debts. It is the case of the plaintiff that after he purchased the B" schedule property he left for Ceylon, entrusting the properties with his brothers, and it is also his case that he has discharged the debts due to Kolanda Gounder. It is also his case that his brothers were directed to take the income and send the amount to him. After he returned from Ceylon, he took possession of the properties from his brothers, except that portion of the property which he conveyed to one Kumara Goundar under Ex.A-3 on 12.5.1957. It is his case that after he came into possession, the other defendants, at the instance of defendants 1 and 2 are interfering with his possession, which necessitated the filing of the suit.

5. The appellant in his written statement contended that Ex.A-2 sale deed is one without consideration and therefore, title did not pass. According to him, the intention was that the plaintiff should discharge the debt due to Kolanda Goundar and he having failed to discharge the debt, the sale deed did not come into effect. He also contended that the subsequent conduct will prove that the intention of the parties was that if consideration did not pass. Ex.A-2 need not come into effect. He further said that the plaintiff was never in possession and the common property was dealt with by the brothers as their own and the alieness came into possession. They were also dealing with the properties by executing mort-gages and sale from the 1st defendant, admitting his title for the common property. It is his further case that the reliefs of declaration and consequential injunction cannot be granted to the plaintiff and he prayed for the dismissal of the suit.

6. The alienees have also filed a written statement supporting the contentions of the appellant, contending that they are bona fide purchaser for proper value. They have also pleaded the case of adverse possession and limitation.

7. Even before the filing of the suit of I.A.No. 647 of 1978, Chellappa Goundar, the appellant had filed O.S.No. 308 of 1977, for an injunction restraining his

brother Karuppanna Gounder and six others defendants therein from interfering with his possession in respect of that portion of "B" schedule property, which he claims as his own.

8. Both the suits were jointly tried and the evidence was taken in O.S.No. 647 of 1978. The trial Court held that the intention of the parties was that Ex.A-2 document should not come into effect, and in fact has not come into effect, since no consideration was paid by the plaintiff. It dismissed the suit in O.S.No. 647 of 1978 and decreed O.S.No. 308 of 1977. Two appeals were preferred by the plaintiff as A.S.Nos. 107 and 108 of 1980, on the file of Subordinate Judge at Namakkal. By a common judgment, the lower appellate court reversed the finding of the trial court and held that Ex.A-2 has come into effect and title passed on the plaintiff. The lower appellate court also held that it was not a condition that the title should pass only on payment of consideration. It also held that as against the alienees i.e., defendants 3 to 12, the plaintiff is not entitled to recover the property. He also took note of the fact that all the alienees together have purchased 48 1/2 acres of land and in view of the concession made by the plaintiff that he is not pursuing the remedy as against them the suit was dismissed and for remaining portion, the suit was decreed and the appeals were allowed. Consequently, the suit in O.S.No. 647 of 1978 was decreed and the suit in O.S.No. 308 of 1977 was dismissed.

9. It is as against the said judgment, Chellappa Gounder preferred these two second appeals, on the following substantial questions of law:

1. Whether the suit is not barred by res judicata in view of the finding given in the earlier suits O.S.No. 344 of 1975 and O.S.No. 504 of 1975 on the file of the District Munsif's Court, Namakkal.

2. Whether the finding of the learned Judge that the sale deed dated 19.3.1952 conveyed absolute title to the suit property is correct?

3. Whether the finding of the Subordinate Judge that the suit was not barred by limitation and adverse possession as against defendants 1 and 2 legally sustainable?

4. Whether the judgment of the Subordinate Judge is sustainable for not giving a finding as to the maintainability of suit pleaded by the defendants?

10. learned Counsel for the appellant reiterated his contention as was raised before the courts below. According to the counsel, Ex.A-2 has not come into effect, and there is no evidence in this case to show that the plaintiff paid consideration for the same. It was further contended that a perusal of Ex.A-2 itself would show that the document was executed in favour of the plaintiff directing him to discharge certain debts and since he has failed to discharge those debts, the title did not pass. It was further contended that the plaintiff has taken an agreement Ex.A-4 from the 1st defendant, which would show that he continues to be the owner of the property, and the plaintiff also recognised his

title. Exs.A-6 and A-7 were also brought to my notice to contend that in spite of Ex.A-2, Kuppusamy Goundar and defendants 1 and 2 have executed documents as if they are owners of the common property i.e., "B" schedule property. It is also contended that after Ex.A-2, there is no evidence to show that the plaintiff was exercising ownership and the title if any of the plaintiff is also lost by adverse possession and limitation.

11. learned Counsel for the appellant mainly stressed the substantial question of law Nos. 2 and 3. There is no argument on question Nos. 1 and 4. It may also be noted that the question of res judicata was found against the appellant, even by the trial court and the lower appellate court also in paragraph 24 of the judgment, has confirmed that finding. Before this Court also, no argument was put forward on those questions.

12. Question No. 2: Ex.A-2 is the sale deed admittedly executed by mother, defendants 1 and 2 and their late brother Kuppusamy Goundar. The purchaser is none other than the plaintiff. In the written statement filed by the appellant, he has no case that Ex.A-2 sale deed was sham and nominal or the same was executed to shield the properties from others. In fact, in paragraph 7 of the Judgment of the lower appellate court, it is seen that the appellant's counsel himself has admitted that his client has no case that Ex.A-2 is sham and nominal. The concession by the counsel for the appellant is recorded by the lower appellate court. The lower appellate court has held that:

it may also be noted in this context that it is not also the case of the defendants that the original of Ex.A-2, is. a sham and nominal document, because the trial court while referring to a decision cited on the defendant's side took a view on its own accord to the effect that it is a sham and nominal document and hence it is vitiated in law. When this view of the trial court as reflected from its judgment was pointed out to the learned Counsel appearing for the respondents/defendants in this appeal the learned respondent's counsel would say that, it was wrong on the part of the trial court to hold that this document was a sham and nominal document nor was there any plea raised by the defendants to that effect. Therefore, the view taken by the trial court that this document is a sham and nominal document cannot be correct and sustained.

13. If it is not sham and nominal, as agreed, then the only question is whether under Ex.A-2 title has passed. In Ex.A-2, there is no contract or statement to show that the document will come into effect only on payment of consideration. u/s 54 of the Transfer of Property Act, "Sale" is defined as a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised. The plaintiff has a case that he has discharged the debt and the same is fully supported by consideration. That apart, even if we take into consideration the argument of learned Counsel for the appellant that the price was not paid, I do not think that the contention that the title cannot pass due to non-payment of price is correct.

14. In a very early decision of our High Court reported in Yella Krishnamma v. Kotipalle Mali AIR 1920 Mad. 164. it was held that "a vendee of immovable property under a registered deed of conveyance, who has not paid the purchase-money of the property, can maintain a suit for possession of the property without paying for it, or submitting to a decree for payment or a condition attached to the decree as to the purchase money which he had agreed to pay." At page 165 of the reports, it was further held thus:

The learned Judge in this case, besides the decisions in Madras which we feel constrained to hold are no longer good law in view of the Full Bench ruling, and of the ruling in Velayuthan Chetty v. Govindasami Naicken ILR (1911) Mad. 543, refers to the case of Nil Madhab v. Harem Prasad (1913) 20 Ind.Cas. 325. The case is also reported in 19 Cri.L.J. 146. We think that the learned Judge clearly misconstrued the effect of the decision because the ground upon which that judgment really proceeds is this: that in that case there was evidence of an intention that a registered document was not to take effect ipso facto at once on execution and was not intended to be performed till something else had been done. Now if there had been evidence in this case that it was the intention of the parties that this sale-deed which is absolutely unqualified on the face of its should only come into effect when in fact the consideration had been paid, no doubt any court would have the right to give effect to such a contract and to hold that there was such an intention. The section of the T.P.Act which enumerates the respective duties of vendor and vendee is expressly qualified by the words "in the absence of a contract to the contrary." The Calcutta case held on its particular facts that there was a contract to the contrary and that therefore clearly the consequence of the statute did not necessarily ensue.

15. In The Melur Co-operative Marketing Society Vs. Salia Mariam and Others, , a learned Judge of this Court considered all the earlier decisions of this Court and has held thus:

Payment of the price is not necessarily, a sine qua non to the completion of the sale. If the intention is that the property should pass on registration, the sale is complete as soon as the deed is registered, whether the price has been paid or not. Then the purchaser is entitled to sue for possession although he has not paid the price. This would follow from the words of Section 54 of the Transfer of Property Act, "price paid or promised or part paid or part-promised". If the price is not paid, the seller on that account cannot repudiate the sale and his only remedy is to sue for the price or the balance of the price unpaid.

16. In Kutcherlakota Vijaylakshmi Vs. Radimeti Rajaratnamba and others, , it was held thus:

Even if consideration under registered sale deed is not paid, still the purchaser gets title, The only remedy of the vendor is to claim the consideration and of course he will have a right or lien over the properties sold, for sale consideration or balance of sale consideration as the case may be.

17. In Premnarayan and Another Vs. Kunwarji and Another, , it was held thus:

Where the document on its face is a deed of sale, duly executed and registered and it is not the plea of the vendor that tile in the suit property was not intended to be passed on to the vendee and was postponed to be passed until the consideration was paid, even if the possession was not delivered and the price was not paid, on the contents of the document the title passed to the vendee. If the vendee was deprived of possession he was well justified in asking for the same. The remedy of the vendor lay in asking for payment of price.

18. All the above cases are interpreting Section 54 of the Transfer of Property Act. Section 58 of the said Act deals with mortgages. Mortgage is also defined as a transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt or the performance of an engagement which may give rise to a pecuniary liability. If the mortgagee has not paid the full amount covered by the mortgage, what is the remedy of the mortgagor. Can be contend that the mortgagee has no title. The said question came up for consideration in the decision reported in State of Kerala Vs. Cochin Chemical Refineries Ltd., . In paragraph 5 of the judgment, at page 1363 of the reports, the following contention was raised:

Counsel for the State contended that so long as the loan was not advanced by the State, the mortgage was not in law effective, and the company could not enforce the contract relating to groundnut cake agreed to be purchased by the State, for the obligation undertaken was in consideration of the loan of Rs. 2,50,000 and arose only when the loan was advanced. But the assumption, that if the State did not advance the loan which it had undertaken to advance, the indenture was ineffective, cannot be accepted. There is no such express term in the deed, and none can be implied from the covenants and the surrounding circumstances. A transaction of mortgage formally executed does not become void or ineffective merely because the mortgagee fails to advance the amount of money undertaken to be advanced by him. If without advancing the amount agreed to be advanced, he sues on the title created under the deed of mortgage, the court will not award him a decree for anything more than what he has advanced. But that is not to say that the mortgage is invalid.

Their Lordship in that case further went on and said thus:

In Tatia v. Babaji ILR (1898) Bom. 176, Farran, C.J., observed:

I am not, however, prepared to assent to the train of thought which puts conveyances of lands in the mofussil perfected by possession or registration where the consideration expressed in the conveyance to have been paid has not in fact been paid in the same category as contracts void for want of consideration.

Similar observation were made in Bashik Lal v. Ram Narain ILR (1912) All. 272, where Karamat Hussain, J. observed at p.276:

...mortgage under the Transfer of Property Act is a transfer of an interest in the land mortgage, and not a mere contract. It therefore follows that no sooner a valid mortgage deed is registered, an interest in the property mortgaged, in the absence of any contract to the contrary, vests in the mortgagee notwithstanding the fact that the mortgage money has not been paid by the mortgagee to the mortgagor. The mere non-payment of the mortgage money cannot have the effect of rendering the mortgage invalid. Sulaiman, J., in *Dip Narain Singh Vs. Nageshar Prasad and Others*, observed that once a document transferring immovable property has been registered, the transaction passes out of the domain of a mere contract and into one of a conveyance. Such a completed transaction is governed by the provisions of the Transfer of Property Act and so much of the Contract Act as is applicable thereto.

6. The argument that because the amount was not advanced by the State to the company, the mortgage was void or ineffective therefore cannot be accepted.

19. Now let us take Ex.A-2. The document does not say that in case consideration is not passed or in case the plaintiff fails to discharge the debt title will not pass. The document says that in consideration of Rs. 3,000 the executants hereby absolutely convey their title to the property to the plaintiff and that he may deal with the same in any manner he likes, with the further declaration that on and from the date of conveyance, they ceased to have any right over the same. It further says that it is the look out of the plaintiff to discharge the debt, due to Kolanda Goundar and it is not their concern. Whether he discharges or not, from the date of Ex.A-2, they will have no responsibility to discharge the same. No contract intention is seen in Ex.A-2. The intention seems to be clear that the parties wanted to convey title to the plaintiff on and from the date of Ex.A-2.

20. learned Counsel for the appellant relied on certain circumstances to come to the conclusion that Ex.A-2 did not come into effect. Reliance was mainly placed on Ex.A-4. That is an agreement executed by the appellant in favour of the plaintiff. An argument was taken on the basis of Ex.A-4. That if the plaintiff himself takes a document from the 1st defendant, which includes his right over 1/4th share, the plaintiff cannot thereafter deny his right over the property, which implies that Ex.A-2 did not come into effect. The argument seems to be attractive, but when we read Ex.A-4, the fallacy of the argument also could be exposed.

21. After Ex.A-2 partition, plaintiff executed Ex.A-3 in favour of one Komara Gounder on 12.5.1957, whereby he sold his 1/4th right in all the properties including his 1/4th share in the property left open for common enjoyment. Consideration for the same was the payment to Kolanda Goundar, who has already instituted the suit for recovery of the amount due under the promissory note and also under the mortgage deed. It is seen that this right under Ex.A-3 was purchased by the appellant under Ex.A-13 on 10.1.1969. The right purchased by the appellant under Ex.A-13 was agreed to be sold by him to the

plaintiff under Ex.A-4. It is, therefore, clear that it is not the right under Ex.A-2, that is agreed to be conveyed under Ex.A-4, but the right purchased by Chellappa Goundar under Ex.A-13, that is agreed to be conveyed under Ex.A-4. If that be so, the argument that Ex.A-2 did not come into effect falls to the ground.

22. It may also be seen that after Ex.A-2, there is a no evidence in this case to show that Kolanda Goundar had at any time sought to recover the property from the other brothers. Neither the appellant nor his brother, the 2nd defendant made an attempt to discharge the debt due to Kolana Goundar. Consequent to Ex.A-4, Ex.A-5 sale deed was also executed by the appellant in favour of the plaintiff. The argument by the counsel on the basis of Exs.A-4 and A-5 that the appellant's title has been recognised by the plaintiff, is therefore, not correct. Exs.A-4 and A-5 pertains only that portion of the property, which the plaintiff himself has alienated under Ex.A-3 and the same was repurchased by him under Ex.A-5. There is no other evidence to show that Ex.A-2 has not come into effect, except the oral evidence. The lower appellate court has rightly come to the conclusion that under Ex.A-2, title passed on the plaintiff. Substantial question of law No. 2 is, therefore, found against the appellant.

23. Question No. 3: In regard to adverse possession and limitation, the lower appellate court has in paragraph 21 of the judgment, believed the evidence of plaintiff and has come to the conclusion that the appellant and the 2nd defendant continued in possession on the basis of entrustment by the plaintiff. The lower appellate court found that in view of the close relationship between the parties and also for the reason that the plaintiff has to immediately go to Ceylon, he was compelled to entrust the property with the appellant. The lower appellate court was of the view that the possession of the appellant was thereafter only as an agent of the plaintiff and misusing his position, he sold the portion of the properties to defendants 3 to 12. No series argument was put forward on the said fact found by the lower appellate court. The lower appellate court has further found that Exs.A-6 and A-7 are invalid and the executants have no right to execute the deeds, after having parted their right to the plaintiff. Once it is held that Ex.A-2 has come into effect and title passed on to the plaintiff, naturally the only conclusion could be that Exs.A-6 and A-7 are invalid. If the possession of the appellant and 2nd defendant was only that of the agents of the plaintiff, there cannot be any question of adverse possession and limitation. The possession of the appellant must be deemed to be the possession of the plaintiff himself. Substantial question of law No. 3 is also, therefore, found against the appellant.

24. In the result, the judgment of the lower appellate court is confirmed and both the second appeals are dismissed, and taking into consideration the close relationship between the parties, they are directed to suffer their costs. The pending C.M.Ps., are closed.