(2002) 10 MAD CK 0032

In the Madras High Court

Case No : CRP. SR. No. 9808 of 2002 and CMP No. 5791 of 2002

G. Murugan, G. Jayabalan, G. Ezhumalai and G. Babu — APPELLANT

Vs

Manickam — RESPONDENT

Date of Decision : 25-10-2002

Acts Referred:
Court Fees Act, 1870 — Section 25
Limitation Act, 1963 — Article 60

Citation : (2003) 1 MLJ 56

Hon'ble Judges : K. Gnanaprakasam, J

Bench : Single Bench

Advocate : V. Dhanapalan, for the Appellant; M. Sriram, for the Respondent

Judgement

1.The petitioners are the plaintiffs in OS.No.144/1996, on the file of the District Munsif Court, Polur.

2.The plaintiffs have filed the suit for declaration of their title to the ''B''-Schedule property and to direct the defendant to deliver vacant possession

of the same and for permanent injunction.

3.The plaintiffs claim ''A''-Schedule property under a registered Will dated 25.7.1997. At the time of the execution of the Will, the plaintiffs 3 and

4 alone were born and the plaintiffs 1 and 2 were born subsequently. The father of the plaintiffs was the defacto guardian for the minors. As per the

terms of the Will, the plaintiffs are entitled to equal share in the ''A''-Schedule property. The father and defacto guardian of the minors, without any

necessity, nor for the benefit of the minors, had alienated the ''B''-Schedule property to the defendant and the said sale is not valid and binding

upon the plaintiffs.

4.The defendant filed a written statement, denying the Will relied upon by the plaintiffs and also their claims. Yet another contention raised by the

defendant in the written statement is that the suit is barred by limitation, as per the provisions of Hindu Law. If the eldest male member fails to

question the sale before he attains the age of 21 years, the suit would be barred as regards the other members of the family as well. The plaintiffs 3

and 4 were aged 27 and 28 years respectively, on the date of the filing of the suit and they have not chosen to question the sale in favour of the

defendant and therefore, the plaintiffs 1 and 2 also precluded from questioning the sale in favour of the defendant.

5.A check slip was issued in the above case, wherein it is observed as here under:-

This is a suit for declaration of plaintiff''s title to the suit ''B'' Schedule properties, for possession of the same, for permanent injunction against the

defendants restraining them from alternating or encumbering the ''B'' Schedule property for past and further mesne profits and for costs.

According to the plaint averment, the ''A'' Schedule properties have been bequeathed in favour of the plaintiffs by their paternal grand gather under

a registered Will dated 21.5.1970, appointing the plaintiffs'' father Gopal as Guardian. The plaintiffs'' father died about a years ago. The plaintiffs''

defacto guardian/father Gopal without any necessity seems to have alienated the ''B'' Schedule property to the defendant under a registered sale

deed dated 23.10.1972, during the minority of the plaintiffs. But, the registration copy of the said sale deed has not been filed by the plaintiff along

with the plaint. The plaintiffs may be co-nominee parties to the said sale deed. Further it is alleged in the plaint that the plaintiffs came to know

about the said alienation only ten months back. The age of plaintiffs 3 and 4 are 27 and 24 respectively, as per cause title in the plaint. As such the

claim by the plaintiffs 3 and 4 is barred by limitation. The plaintiffs valued the suit under statutory minimum of Rs.300/- u/s 25(a) of the Court Fee

Act and paid Rs.23.00/-. The plaintiffs ought to have prayed for cancellation of the sale deed dated 23.10.1972 and to pay Court Fee u/s 40(1) of

the Court Fee Act.

Hence, the market value of ''B'' Schedule properties as on the date of the suit to be ascertained and Deficit Court Fee to be ascertained and Deficit

Court Fee to be paid, besides maintainability of claim by the plaintiffs 3 and 4.

6.The plaintiffs filed objections to the Check Slip, wherein they have stated that if any alienation is made by a Defacto guardian, the same can be

questioned within the period, as stated under Article 65 of the Limitation Act and not as stated under Art.60 of the Limitation Act. It is further

stated that the alienation made by the father/defacto guardian need not be set aside as the plaintiffs were not parties to the said sale deed. The trial

court accepted the check slip and rejected the contention of the plaintiffs and also passed an order, rejecting the plaint itself, holding that the same

is barred by limitation. As against the same, the plaintiffs have preferred this civil revision petition.

7.As there is delay in filing the petition, an application to condone the delay has been filed in CMP.No.5791 of 2002. The respondent, on notice,

represented by their advocate. The application to condone the delay and the unnumbered Civil Revision Petition have been taken and heard

together and passed the following order:-

8.The plaintiffs have filed the suit for declaration of their title to the ''B'' Schedule property and for recovery of possession and for permanent

injunction, against the defendant, not to alienate or encumber the ''B'' Schedule property, till the disposal of the suit. The plaintiffs'' case is that the

''A'' Schedule property was bequeathed to them, by their paternal grand father Vasiyan, under the registered Will dated 21.5.1970 and at that

time, the plaintiffs 3 and 4 alone were born and subsequent to the Will, the plaintiffs 1 and 2 were born to the defacto guardian, Gopal, i.e. the

father of the plaintiffs. The Will was executed by Vasiyan, while he was in a sound and disposing state of mind. As per the terms of the Will, all the

plaintiffs are entitled to the properties in equal moiety. The plaintiffs and their father were the members of the Hindu joint family and the plaintiffs

were represented by their father, including the plaintiffs 1 and 2, who were born subsequent to the Will. The plaintiffs'' defacto guardian and father

Gopal without any necessity nor for the benefit of the minors, had alienated the ''B'' Schedule property to the defendant, without getting proper

sanction from the court also. The sale in favour of the defendant is not valid and binding upon the plaintiffs. The plaintiffs, therefore, sought for

declaration of their title to the ''B'' Schedule property and also for recovery of possession.

9.The defendant has filed written statement, denying the claim of the plaintiffs, especially the alleged Will. In order to discharge the family debt, the

plaintiffs'' father Gopal sold the property and therefore, the sale is valid. Gopal, as a natural guardian for the minors/plaintiffs, sold the property to

discharge the antecedents debt and therefore, the sale if at all could only be said as voidable and not a void transaction. It is stated that the suit is

also barred by time. If the eldest male member fails to question the sale deed before he attains the age of 21 years, the suit is barred as regards the

other members of the family as well. The plaintiffs 3 and 4, were aged 27 and 28 years respectively, on the date of the filing of the suit and they

have not chosen to question the alienation made by Gopal and therefore, the plaintiffs 1 and 2 also cannot question the sale deed.

10.The defendant further stated that if the plaintiffs desire to set aside the sale deed dated 1.10.1972, they have to value the suit u/s 40(1) of the

Court Fees Act. In the check slip issued also, it is stated that the plaintiffs'' defacto guardian/father Gopal sold the ''B'' Schedule property and the

same is challenged by the plaintiffs in the suit. The plaintiffs should have prayed for cancellation of the sale deed dated 23.10.1972 and should have

paid Court Fee u/s 40(1) of the Court Fees Act. That apart, the plaintiffs 3 and 4 are aged 27 and 24 years respectively, on the date of the filing of

the suit and as such, the claim of the plaintiffs 3 and 4 is barred by limitation.

11.The learned advocate for the defendant has submitted that as against the order of rejection of plaint, an Appeal alone would lie and not a

Revision and that therefore, the CRP is not maintainable.

12.The points arise for consideration in this civil revision petition are:-

i.Whether the order, rejecting the plaint, is a decree or order and if so, whether the civil revision petition is maintainable?

ii.Whether the suit, filed by the minors, questioning the validity of the sale deed beyond three years, after attaining majority, is in time?

13.The learned advocate for the petitioners would contend that the sale deed executed by their father is a void document and the same is not valid

and binding upon them. In such circumstances, they need not pray for setting aside of the sale deed. The plaintiffs'' suit is one for declaration of

their title to the suit properties and it is the contention of the plaintiffs that the cancellation of the sale deed is only an incidental and it does not require a separate prayer and also the payment of court fee u/s 40(1) of the Court Fees Act. The plaintiffs claim to the ''B'' Schedule property is

not in dispute and the same was alienated by their father and defacto guardian of the minors, which is not valid and binding upon them.

14.Section 11 of the Hindu Minority and Guardianship Act, 1956 prohibits the sale of minors'' property by the defacto guardian and it says, ""After

the commencement of this Act, no person shall be entitled to dispose off, or deal with, the property of a Hindu minor merely on the ground of his

or her being the defacto guardian of the minor."" As such, any alienation made by the defacto guardian, after the commencement of this Act, would

be void abinitio and the alienee would not acquire any title to the property. The minors can very well ignore the sale made by the defacto guardian

and it may not be necessary for them to pray for a declaration that the sale made by their defacto guardian is not valid.

15.The learned advocate for the petitioners further contended that the order passed by the trial court on the check slip is only an order and not a

decree and therefore, revision would lie. On the contrary, the learned advocate for the respondent would submit that the order, rejecting the plaint,

is only a decree and only an appeal would lie, u/s 96 of CPC.

16.Both the learned advocates for the petitioners and the respondent relied upon few decisions to support their contentions, which would be

referred infra.

17.The learned advocate for the petitioners relied upon the case of Ratansingh Vs. Vijaysingh AIR 2001 SC 279, wherein, the Supreme Court

considered the definition of ''decree''. That is the case where an application to condone the delay was dismissed and consequently, the appeal was

also dismissed as time barred. In the said context, it was held that the dismissal of the application to condone the delay and consequent appeal are

not a decree and it is only an incidental order.

18.But, on the contrary, the learned advocate for the respondent relied upon the case of Nesammal and another Vs. Edward and another, ,

wherein, the learned Judge of this court (S.S. Subramani, J.), has held that since the order, rejecting the plaint, is a decree under the Code of Civil

Procedure, revision is not maintainable,. Even if the plaint is rejected on some other grounds not covered by Order & Rule 11 of CPC, the remedy is only an appeal u/s 96 of Code of Civil Procedure. That is the law declared by this court in the case of R. Shanmughavelu Pillai Vs. R.

Karuppannan Ambalam AIR 1976 Mad 289 also.

19.A similar question arose for the consideration of this court in the case of K.S. Geetha Vs. Stanleybuck and Dr. P. Sedhu Ammal, , wherein the

learned Judge (A.S. Venkatachalamoorthy, J.), after referring to various decisions, including the one reported in Nesammal and another Vs.

Edward and another, , has held that as against the rejection of plaint, appeal alone will lie and not a revision. In view of the established and

unassailed principles laid down by this court, the 1st question is answered against the plaintiffs.

20.The next question is with regard to the validity of the sale deed, executed beyond 3 years after attaining majority. In the case of

T.M.Kishnamoorthy Pillai Vs. Mangalam 1998 MLJ 173, a question arose for the consideration of the court, whether the alienation by the defacto

guardian of the minors'' property without prior permission of the court is a void transaction and the period of limitation, within which the minor, in

such circumstances, would seek for relief. After referring to various decisions rendered by this court and also the apex court and placing reliance

upon the decisions in the case of Mayilswami Chettiar Vs. Kaliammal and Others, , and Kallathil Sreedharan Vs. Komath Pandyala Prasanna

1997 1 MLJ 61 SC, held that the alienation was a void transaction, and the prayer would fall within the period of limitation under Article 65 and

not under Article 60 of the Limitation Act. Art.60 of the Limitation Act is meant to set aside a transfer of property made by the guardian of a ward,

which prescribes 3 years time for the ward, who has attained majority, from the date on which the ward attained majority. Art.65 of the Limitation

Act deals with, `for filing a suit for possession of an immovable property or any interest therein based on title, which prescribes 12 years time,

when the possession of the defendant become adverse to the plaintiff. Our case is by the ward to set aside the sale made by the guardian and

therefore, it falls only under Art.60 of the Limitation Act and not under Art.65.

21.In our case, out of four plaintiffs, the plaintiffs 3 and 4 were aged 27 and 24 years, on the date of the institution of the suit and they have not

challenged the alienation made by the father within three years after they have attained majority. But, however, the plaintiffs 1 and 2 were aged only

20 and 16 years and in fact, the 2nd plaintiff was a minor, represented by one of his brothers, Ezhumalai. Though the suit filed on behalf of the

plaintiffs 1 and 2 was within a period of 3 years from their attaining majority, the failure on the part of the 3rd plaintiff, who was the Manager of the

family and neither himself nor the 4th plaintiff having failed to take action within the period of limitation provided for, the property itself was lost to

the family and the suit was barred as against the younger brother also, whose suit independently was within the period of limitation. The above said

view of mine was fortified by the judgement in the case of Natarajan and Another Vs. Karumana Gounder and Others, and the said view was

accepted by the Division Bench of this court, in the case of Venkatesan Vs. Neelayathakshiammal and Others, .

22.In the case of Subramanyam Vs. Venkataraman and Others, , it was held that ""It is very well settled that a suit to set aside an alienation filed

more than three years after the attainment of majority by the elder brother, who was the manager of the family would be barred by limitation u/s 7

of the Limitation Act, 1908, even though the suit was filed within three years of the attainment of majority of the younger brother. The above said

ruling is squarely applicable to the case on hand, as in our case also, the plaintiffs 3 and 4 have attained majority long back and they have not

chosen to question the sale within a period of 3 years, but, the plaintiffs 1 and 2, who are well within 3 years have filed the suit and the said suit is

barred, in view of the principles laid down by this court. These views flow from the decisions in the case of Subramania Aiyar alias Pichu Aiyar Vs.

M. Subba Naidu (dead) and Anantha Krishna Naidu L.R., .

23.In the case of Vishwambhar and others Vs. Laxminarayana (Dead) through LRs and another 2001 3 CTC 316, the apex court held that

Article 60 of the Limitation Act prescribes a period of 3 years for setting aside a transfer of property made by the guardian of a ward, by the

ward who has attained majority and the period is to be computed from the date when the ward attains majority. Since the limitation started running

from the dates when the plaintiffs attained majority, it has, therefore, to be concluded that the suit is not filed by the plaintiffs 3 and 4 within a

period of 3 years from the date of their attaining majority and that the suit filed by the plaintiffs 1 and 2 also can be barred, though they have not

barred independent of their claim.

24.It is also to be noticed that under the Limitation Act, three types of declarations are provided under Articles 56, 57 and 58. Article 56 states,

To declare the forgery of an instrument issued or registered, the period of limitation is three years and the time from which period begins to run is,

when the issue or registration becomes known to the plaintiff."" Article 57 states, ""To obtain a declaration that an alleged adoption is invalid, or

never, in fact, took place, the period of limitation is three years and the time from which period begins to run is, when the alleged adoption

becomes known to the plaintiff."" Article 58 states, ""To obtain any other declaration, the period of limitation is three years and the time from which

period begins to run is, when the right to sue first accrues."" Article 56 and 57 are inapplicable to our case. But, the residuary clause provided under

Article 58 deals with any type of declaration, which also prescribes only three years from the date when the right to sue first accrues. The right to

sue first accrues when the plaintiffs attain majority and three years from the date of majority. This article is similar to Article 60 of the Limitation

Act. The proper article would be Article 60, which states, ""To set aside a transfer of property made by the guardian of a ward (a) by the ward,

who has attained majority, three years from the date on which the ward attains majority."" The plaintiffs have not filed the suit within three years

from the date of their attaining majority. This article has got to be read conjointly with Section 7 of the Limitation Act, which reads as under:-

Disability of one of several persons:- Where one of several persons jointly entitled to institute a suit or make an application for the execution of a

decree is under any such disability, and a discharge can be given without the concurrence of such person, time will run against them all; but, where

no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the

concurrence of the others or until the disability was ceased.

Explanation I:- This section applies to a discharge from every kind of liability, including a liability in respect of any immovable property.

Explanation II:- For the purposes of this section, the manager of a Hindu undivided family governed by the Mitakshara law shall be deemed to be capable of giving a discharge without the concurrence of the other members of the family only if he is in management of the joint family property.

As the 3rd plaintiff is the eldest male member and Manager of the Hindu undivided family, he shall be deemed to be capable of giving a discharge

without the concurrence of the other members of the family and when he has not chosen to file his suit within a period of three years from the date

of attaining majority, the said disability would extend to the plaintiffs 1 and 2 also and therefore they are barred from bringing the suit. In the said

view of the matter, even if the plaintiffs have paid the court fee u/s 40(1) of the Court Fee Act to declare the sale as invalid, their very right to file

the suit itself is barred under Article 60 of the Limitation Act read with Section 7 of the Limitation Act, 1963 and therefore, the very suit instituted

by the plaintiffs is not maintainable and hence, the plaintiffs'' prayer cannot be complied with.

25.For the reasons stated above, the application in CMP.No.5791/2002 to condone the delay is dismissed and the unnumbered civil revision

petition is also dismissed on both the grounds (i) that as against the rejection of the plaint, revision will not lie and only an appeal will lie (ii) that the

suit brought out by the plaintiffs 1 and 2 is barred as the plaintiffs 3 and 4 have not brought the suit within a period of 3 years from their attaining

majority, as provided under Article 60 of the Limitation Act read with Section 7 of the Limitation Act, 1963.

