
(1969) 03 MAD CK 0011
In the Madras High Court

Kaka Hajee Md. Ishaque Sahib	Vs	APPELLANT
Kaka Md. Saddiq Sahib and Others		RESPONDENT

Date of Decision : 18-03-1969

Acts Referred:

Tamil Nadu Court Fees and Suits Valuation Act, 1955 — Section 40

Citation : (1969) 82 LW 622 : (1970) 1 MLJ 207

Hon'ble Judges : S. Ganesan, J

Bench : Division Bench

Judgement

S. Ganesan, J.—The plaintiff in an un-numbered suit of 1966 pending In the Court of the Subordinate Judge of Tirupattur had filed this

revision petition against the order passed by the learned Subordinate Judge, which is to the effect that, as in substance, the suit is one for

cancellation of the documents, Court-fee u/s 40 of the Madras Court-Fees and Suits Valuation Act, 1955, has to be paid.

2. The allegations in the plaint are that the plaintiff is the absolute owner of the suit properties; that, in order to save the properties from the reach of

creditors and Income Tax Department, he executed a sham and nominal instrument of deed of gift (hiba) dated 24th April, 1956 in favour of his

son, the first defendant and others who were then minors without any intention to transfer the title; that, in any event, the gift deed is void in law as it

had not been accepted by any competent person and as no possession was delivered; that the second defendant, by playing fraud on the first

defendant who had no title to the A Schedule properties comprised under the gift deed, obtained a sale of those properties from the latter; that the

sale deed is Void and that defendants 3 and 4 and similarly obtained a sale deed dated 6th March, 1961 comprising some of the suit properties.

On these allegations the plaintiff has prayed (1) for a declaration of his title to the suit properties and (2) for possession of the same and has paid a

sum of Rs. 377 as Court-fee u/s 25 (a) of the Madras Court-Fees Act. The learned Subordinate Judge has held that, in substance, the suit is one

for cancellation of the instruments of sale and that the petitioner should have paid Court fee on that basis u/s 40 of the Madras Court-Fees Act.

The question is whether this order can be upheld.

3. In Sahul Hameed Rowther Vs. K.C.P. Mohideen Pichai, , a Division Bench of this High Court has ruled that, where a plaintiff alleged that a sale

deed executed by him in favour of the defendant was sham and nominal, it was not necessary for him to pray for cancellation of the deed. The

learned Judges have observed that, in such cases, where the sham and nominal character of the transaction is proved, title will not pass by that

document and that those transactions are not insuperable obstacle to the granting of the plaintiff's prayer and they have also observed incidentally

that, in such cases, there was no necessity even to ask for a declaration that the transactions were sham and nominal and that the plaintiff could

have ignored the deed in the plaint and could have asked merely for injunction or possession as the case might be; and that it was open to the

plaintiff to point out to the Court in the course of the trial that the transaction was only sham and nominal.

4. In Unni v. Kunchi Amma ILR(1891) Mad. 26, the following observations occur:

If a person not having authority to execute a deed, or having such authority under certain circumstances which did not exist, executes a deed, it is

not necessary for persons who are not bound by it to sue to set it aside, for it cannot be used against them. They may treat it as non-existent and

sue for their right as if it did not exist.

5. The same principle have been distinctly laid down by the Privy Council in Bijoy Gopal Mukjerje v. Krishna Mahishi Debi ILR(1907) Cal. 329,.

In that case a reversioner sued for a declaration that a lease granted by the widow of the last male owner was not binding on him and for khas

possession. The plea that there must have been a prayer for setting aside the lease was negatived in emphatic terms; and it was further held that,

even if the plaint, in such cases contained a prayer for declaration or cancellation, it must be held to be purely incidental and not a necessary relief

and that in such a case it was open to the plaintiff to treat the lease as a nullity without intervention of any Court.

6. In Vellayya Konar (died) and Another Vs. Ramaswami Konar and Another, , Wadsworth, J. laid down the law broadly as follows:

When the plaintiff seeks to establish a title in himself and cannot establish that title without removing an insuperable obstruction such as a decree to which he has been a party or a deed to which he has been a party, then quite clearly he must get the decree or deed cancelled or declared void in toto.

7. In C.R. Ramaswami Aiyangar, represented by his mother and next friend Lakshmi Ammal Vs. C.S. Rangachariar and Others, , the majority of

Judges of a Full Bench of this Court have held that:

Where the plaintiff was not bound under the substantive law by which he was governed to sue for declaration or cancellation in respect of any of the transactions a prayer for declaration or cancellation in such cases even if the plaint contained will be one for a purely incidental, but unnecessary relief.

8. In Appanna v. Venkatappadu (1953) 1 M.L.J. 476 : (1953) 66 L.W. 304, a Division Bench of this Court, while dealing with Article 91 of the

Limitation Act, which is concerned with suits for cancellation, had observed that where under the law there is no duty cast on the person to get an instrument set aside, for example, in the case of an instrument, which is void ab initio, that Article did not impose any obligation on him to get it set aside.

9. The law on the subject of cancellation of instruments is thus fairly clear. Normally a transaction will bind a person if he or persons under whom

he derives title are eo nomine parties to the same, and must be set aside before any relief is claimed thereunder. This, however, is subject to two

important, exceptions : (1) Where the transaction is only a sham and nominal one, not intended to be given effect to; and (2) Where the transaction

is void in law. It necessarily follows that (1) transactions to which a person or persons under whom the said persons derive title are not eo nomine

parties; (2) transactions which are challenged as sham and nominal and (3) transactions which are void ab initio are not legally binding in character

need not be cancelled and set aside, before any claim is made thereunder. The

reason is fairly obvious. In the first group of cases, there can be no difficulty, as it is an elementary principle of law that transactions to which a person or persons under whom the said person derives title are not parties cannot bind them. In the case of sham and nominal or void transactions comprised in the second and third group of cases, title has not passed to the transferees. Prayer for setting aside such transactions will be superfluous and the plaintiff will be entitled to ignore them altogether. The case is otherwise in respect of voidable transactions and benami transactions. In such cases the law will uphold the ostensible title conferred by those instruments; and the said title will prevail until the transactions are challenged with success by seeking appropriate reliefs declaratory or otherwise in Court of law.

10. The question for consideration in the first place, is whether the petitioner is bound to ask for cancellation of the instruments of sale dated 10th

July, 1961 and 6th March, 1961. It is true that there is an allegation that both these instruments are tainted by fraud; but that allegation in my view

is only ancillary and the main emphasis is laid on the fact that those instruments had been executed by the first defendant, a minor who had really

acquired no title under the instrument of Hiba (gift). The sum and substance of the attack is that these instruments of sale are void ab initio, in that

they have been executed by the first defendant who had no title in himself. As the allegation is that the two transactions of sale are void ab initio, it

necessarily follows that the petitioner is not bound in law to sue for cancellation of those instruments in the suit.

11. The second point relates to the instrument of Hiba, dated 24th April, 1956. Admittedly the petitioner is eo nomine a party to the instrument of

Hiba now attacked by him ; but then the transaction of gift is attacked as sham and nominal and also void. It is clear that, if the allegation is proved,

the petitioner would succeed in the suit without asking for cancellation of this instrument also.

12. The suit as laid for declaration of the petitioner's title and for khas possession is properly valued u/s 25 (a) of the Madras Court-fees Act and

no additional Court-fee need be paid u/s 40.

13. The revision petition is therefore allowed.