

(2017) 01 MAD CK 0070

In the Madras High Court

Case No : 742 of 2011 and M P (MD)No 1 of 2011

Mohideen Fathima

APPELLANT

Vs

Mounasami, & Ors.

RESPONDENT

Date of Decision : 30-01-2017

Acts Referred:

Citation : (2017) 01 MAD CK 0070

Hon'ble Judges : M.Duraiswamy

Bench : SINGLE BENCH

Advocate : M.Duraiswamy

Judgement

1. Challenging the judgment and decree passed in A.S.No.6 of 2010, on the file of the Additional Subordinate Court, Tenkasi, confirming the

judgment and decree passed in O.S.No.47 of 2005, on the file of the District Munsif cum Judicial Magistrate Court, Shenkottai, the plaintiff has

filed the above Second Appeal.

2. The plaintiff filed the suit in O.S.No.47 of 2005 for declaration and permanent injunction. The brief case of the plaintiff is as follows:

According to the plaintiff, the suit property originally belonged to one Sadagopal Naidu. Subsequently on 29.08.1960, one Mounasamy Nadar

purchased the property from Sadagopal Naidu. After the death of Mounasamy Nadar, his legal heirs viz., the defendants 1 to 3 sold the property

to the plaintiff on 12.09.1988. The defendants 1 to 3 are the sons of Mounasamy Nadar and the defendants 4 to 7 are his daughters. The first

defendant executed a sale deed dated 12.09.1988 as guardian of the defendants 2 and 3. During the pendency of the suit, the second defendant

had died as a bachelor. Therefore, according to the plaintiff, the defendants 1 to

3 are his legal representatives. The sisters of the defendants 1 to 3 were impleaded as defendants 4 to 7. Since the defendants claimed share in the suit property, the plaintiff has filed the suit.

3. The brief case of the defendants 2 and 3 is as follows:

According to the defendants, the second defendant is not mentally sound. He was under the care of his mother. He was a major on the date of execution of the sale deed dated 12.09.1988. It has been fraudulently mentioned as minor in the sale deed. Mounasamy Nadar died on

04.02.1971 leaving behind his wife and the defendants 1 to 7 as his legal heirs. The third defendant was born on 04.05.1971. The suit property

was purchased by Mounasamy Nadar. Hence, his legal heirs are entitled to equal share. The sale deed was executed by the first defendant in

favour of the plaintiff, who defrauded the other defendants. The sale deed executed by the first defendant will only bind his share in the suit

property. In these circumstances, the defendants prayed for dismissal of the suit.

4. The brief case of the fourth defendant is as follows:

According to the fourth defendant, the first defendant and her mother orally sold the property to her and since the date of her oral purchase, he has

been in possession and enjoyment of the suit property. Hence, according to the fourth defendant, the first defendant has no right over the suit

property. The fourth defendant did not know about the sale made by the first defendant in favour of the plaintiff. The sale deed executed by the

first defendant in favour of the plaintiff is not valid. In these circumstances, the fourth defendant prayed for dismissal of the suit.

5. Before the trial Court, on the side of the plaintiff, two witnesses were examined and 8 documents viz., Exs.A.1 to A.8 were marked and on the

side of the defendants, two witnesses were examined and 3 documents viz., Exs.B.1 to B.3 were marked. The trial Court, taking into

consideration the oral and documentary evidences let in by both sides, partly decreed the suit by declaring that the plaintiff is entitled to 1/8 share in

the suit property. The trial Court rejected the relief of permanent injunction.

6. Aggrieved over the judgment and decree of the trial Court, the plaintiff preferred an appeal in A.S.No.6 of 2010 and the lower Appellate Court

also confirmed the judgment and decree of the trial Court and dismissed the appeal. Aggrieved over the concurrent findings of the Courts below,

the plaintiff has filed the above Second Appeal.

7. Heard Mr.V.Meenakshi Sundaram, learned Counsel appearing for the appellant, Mr.S.S.Thesigan, learned Counsel appearing for the first

respondent and Mr.M.S.Suresh Kumar, learned Counsel appearing for the respondents 2 and 4.

8. At the time of admission of the above Second Appeal, the following Substantial Questions of Law arose for consideration:

(a) When the first defendant had executed the sale deed marked as Ex.A.2 being the eldest male member and kartha of the family and on behalf

of the minor brothers, whether the finding of the first appellate Court that Ex.A.2 is a void document and that no declaration can be granted on the

basis of Ex.A.2 is correct and warrants interference? and

(b) When the plaintiff has been in open and continuous occupation asserting positive title in herself and against everyone and she can claim adverse

possession, whether the findings of both the Courts below that the plaintiff cannot claim title by adverse possession also is correct and warrants

interference?

9. On a careful consideration of the materials available on record and the submissions made by the learned Counsel appearing on either side, it

could be seen that the plaintiff had filed the suit for declaration and injunction. The plaintiff claimed title over the suit property under a registered

sale deed dated 12.09.1988 executed by the first defendant, who had executed the sale deed on his behalf and also as guardian to the defendants

2 and 3. According to the first defendant, the defendants 2 and 3 were minors on the date of execution of the sale deed. The defendants 4 to 7 are

the sisters of the defendants 1 to 3. The defendants 1 to 7 are the children of one Mounsamy Nadar, who died intestate on 04.02.1971. The said

Mounasamy Nadar died on 04.02.1971 leaving behind his wife Thangammal and the defendants 1 to 7 his children, as his legal representatives.

10. The mother of the defendants viz., Thangammal had died on 11. 02.2002 i.e., after the execution of Ex.A.2 sale deed dated 12. 09.1988. The

third defendant was born on 04.05.1971. Admittedly, the second defendant was aged 21 years at the time of execution of Ex.A.2 sale deed by the

first defendant. In spite of the second defendant being a major on the date of execution of the sale deed, the first defendant had executed the sale

deed in favour of the plaintiff as though the second defendant was a minor. That apart, when Mounasamy Nadar had died intestate leaving behind

his wife and the defendants 1 to 7 his children as his surviving legal representatives, the first defendant, without making the other cosharers as

parties in the sale deed had sold the property to the plaintiff.

11. It is not in dispute that the suit property is the self acquired property of Mounasamy Nadar. That being the case, when he died intestate, the

defendants 1 to 7 and their mother are entitled to 1/8 share each in the suit property. The defendants 2 and 3 and the fourth defendant had

disputed the sale made by the first defendant in favour of the plaintiff. When the mother of the defendants 2 and 3 was very much available on the

date of execution of the sale deed, the first defendant had sold the property showing him as the guardian of the defendants 2 and 3.

12. It is settled position that the mother is the natural guardian of minors. But the mother of the defendants was not made as a party in the sale

deed. As already stated, the second defendant was not at all a minor on the date of execution of the sale deed. Only to defraud the other co-

sharers viz., his brothers and sisters, the first defendant had executed the sale deed in favour of the plaintiff. If at all, the first defendant could have

sold his undivided 1/8 share in the suit property to the plaintiff. He has no right to sell the shares of the other defendants to the plaintiff without the

knowledge of the other cosharers.

13. The Courts below have rightly held that the first defendant is entitled to 1/8 share in the suit property and therefore, decreed the suit in favour

of the plaintiff in respect of 1/8 share. In these circumstances, I do not find any ground, much less any substantial question of law, to interfere with

the concurrent findings of the Courts below. The Second Appeal is liable to be dismissed. Accordingly, the same is dismissed. There shall be no

order as to costs. Consequently, the connected Miscellaneous Petition is also dismissed.

14. Mr.V.Meenakshi Sundaram, learned Counsel appearing for the appellant/plaintiff submitted that since the Courts below have declared that the

plaintiff is entitled to 1/8 undivided share in the suit property, the decree passed by the Courts below can be treated as a preliminary decree and

the plaintiff may be permitted to file an application for passing of final decree.

15. The learned respective Counsel appearing on behalf of the respondents submitted that they have no objection for giving liberty to the

appellant/plaintiff to file a final decree application based on the decree passed by the Courts below in respect of his 1/8 share.

16. In view of the submissions made by the learned Counsel appearing on either side, I give liberty to the appellant/plaintiff to file a final decree

application in respect of his undivided 1/8 share, which has been decreed by the Courts below. Since the suit is pending from the year 2005, I am

of the view that the plaintiff should be directed to file the final decree application within a stipulated time. Accordingly, the appellant/plaintiff shall file

a final decree application within a period of two months from the date of receipt of a copy of the judgment and decree in the Second Appeal.