
(1965) 12 MAD CK 0051
In the Madras High Court
Case No : A.A.O. No. 334 of 1964

Muhammad Abdul Razack

APPELLANT

Vs

Syed Meera Ummal

RESPONDENT

Date of Decision : 08-12-1965

Acts Referred:

Limitation Act, 1963 — Article 44, 28

Citation : AIR 1967 Mad 212 : (1966) 79 LW 152

Hon'ble Judges : Venkatadri, J

Bench : Single Bench

Judgement

(1) This appeal arises out of a suit filed by the respondent for declaration of her one-fourth share in the suit property and for partition of the same by metes and bounds.

(2) The suit property is a garden land of an extent of 40 cents with coconut plantations. The respondent based her title to the property on the foot of a document executed by her grand-mother on 27th October 1942, providing life interest for herself. After the demise of the grandmother, mutation was effected in the name of the respondent and she was paying the tax. Even during the lifetime of the respondent's grandmother, her undivided one fourth share was leased to the appellant(defendant) and therefore even after the death of the grandmother the appellant continues to be a lessee. In the meantime the respondent's father divorced her mother. Therefore her mother married a second time and the respondent was living with her mother. Her marriage was performed by her mother. In 1963, the respondent came to know that her father had conveyed the very property, which belonged to her to the appellant, by a document dated 25-4-1948 in the form of a release in favour of the appellant. The respondent herein, therefore, filed the present suit for declaration as aforesaid, as the document of release was void, inoperative and not supported by consideration and necessity.

(3) The suit was resisted by the appellant that the respondent had no subsisting

right over the suit property, that her right in the property was conveyed by her father in the year 1948 and thus the appellant has become the absolute owner of the property, having already possessed the three-fourth share. He had already sold half of the suit property and was therefore in possession of the remaining half. He also alleged that the document of release was executed for the purpose of meeting the expenses in connection with the marriage of the respondent. The respondent was aware of the execution of the release by her father conveying her right in the property, and had acquired in that all these years.

(4) On these pleadings, the parties went to trial. The trial court found that the respondent's one-fourth share over the property could not be disputed, that the release deed Ex. A-6 was valid and binding on the respondent, as she had failed to set aside the same at that distance of time. In the end, the suit was dismissed. The plaintiff preferred an appeal to the District Court, Nagarcoil. During the hearing of the appeal, the plaintiff filed an application I. A. 128 of 1964, for raising an additional ground namely that the release deed in respect of the property situated within the registration district of Colachal was registered in the office of the Sub-Registrar of Attingal and that it was void as being fraud on registration. Hearing the appeal on merits, the lower appellate court found that the release deed by the respondent's father was supported by consideration and necessity but found that the release deed was void on the additional ground raised in the lower appellate court. However, as the trial court had not considered the evidence with regard to mesne profits the lower appellate court remanded the suit for fresh trial on those issues. It is against this judgment and decree, the defendant has preferred this appeal.

(5) In this appeal, the most important question that has to be considered is whether the release deed Ex.A-6 by the respondent's father is void ab initio as it was registered outside the registration district in which the property is situate. This plea was not taken by the respondent in her plaint, nor was it argued during the trial of the suit. It was only at the appellate stage the lower appellate Court allowed the additional ground to be raised by the respondent. No opportunity was given to the appellant by way of defence. The lower appellate court straightway allowed the parties to argue whether the document, Ex. A-6 was a fraud on registration. Even assuming that Ex. A-6 was a fraud on registration still we have to consider whether there is any material on record to come to the conclusion that on account of fraud played by the parties the document was registered.

(6) As far as our High Court is concerned, it has been held in Sri Rajah Dantuluri Devi Prasada Satyanarayana Veerabhadra Venkata Lakshmikantaraju Garu Vs. Sri Rajah Dantuluri Peda Venkata Jagannatharaju Garu and Others, that where there was no collusion between the mortgage and the mortgagors and there was no intention on the part of the mortgagee to include a land not belonging to mortgagors, registration is not vitiated by the fact that property not in existence was included in the deed to effect registration at a particular place. The principle

laid down in the above case has been followed in *M. Veeresalingam and Others Vs. P. Kondayya*, . The learned Judge, while considering the point whether the mortgage was void on the ground that its registration was effected by a fraud on the registering officer, inasmuch as the mortgagor intentionally included therein for purposes of registration property which did not belong to him, observed that in those circumstances, he must accept the ruling of the Bench in *Sri Rajah Dantuluri Devi Prasada Satyanarayana Veerabhadra Venkata Lakshmikantaraju Garu Vs. Sri Rajah Dantuluri Peda Venkata Jagannatharaju Garu and Others*, and held:

"Where no collusion by the mortgagee to assist a fraud by the mortgagor in respect of the registration of the document has been made out, the registration is not valid, at least so far as the interests of the mortgagee are concerned".

(7) Similarly in *Sri Raja Sobhanadri Appa Rao Bahadur Garu Vs. Raja Muganti Venkatarama Rao and Others*, , a Division Bench of this Court observed:

"The general effect of all these decisions is that to establish fraud on the registration law there must be collusion between parties to practise a fraud upon the registering officer, and that as a test of whether the parties had an intention to practise such a fraud, it had primarily to be considered whether there was a property that could be conveyed by the party executant or as to which a genuine belief existed that he could convey it. Another point to be considered is whether there was any intention on the part of the parties that it should be conveyed to the executee, though it is not perfectly clear that it will follow as a matter of course that a fraud on the registration law has to be deduced from the absence of such intention. The facts that the property is small, or that the primary intention was that registration should be in a particular office will not in themselves constitute acts of fraud".

(8) Again in *Ramanathan Chetti and Others Vs. Delhi Badaha Tevar and Others*, a D.B. of this court consisting of Beasley, C.J and Curgenvin, J have observed that there should be that strongest possible evidence on the fact that there was collusion between the mortgagors and the mortgagees before the mortgagees can be deprived of the mortgage amount owing under the mortgage by reason of its registration being invalid because of the inclusion of a small item of property not belonging to the mortgagors, and that it is not a question of negligence but of fraud and the burden of proving this lies upon the party alleging it.

(9) On a review of the case law on this subject, I am of opinion that in the instant case there is absolutely no material on record to prove that there was any collusion between the respondent's father and the appellant. It is the duty of the respondent to prove that there was collusion by adducing strong, cogent and clear evidence. As I said there is absolutely nothing on record to give a finding that there was collusion. At the most it would be a case where by mistake of the parties concerned the release deed which have been registered in a wrong office and that would not amount to fraud being played by any one. Really if it is a

mistake of the parties concerned, what it is to happen. Are the unfortunate parties to be without any remedy ? These questions were posed by the learned Judges of the Nagpur High Court in *Seth Suganmal v. Umraobi* AIR 1938 Nag 550. The learned Judges extracted the observations of Sir Barnes Peacock in *Sah Mukhnlall v. Sah Koondunlal*, (1875) 24 SWR 75

"If the registering officer refuses to register the mistake may be rectified upon appeal under S. 38 (now S. 72) or upon petition under S. 84 (now Ss.73-75) as the case may be but if he registers where he ought not to register innocent persons may be misled and may not discover until it is too late to rectify it the error by which if the registration is on consequence of it to be treated as a nullity, they may be deprived of their just rights"

The learned Judges answered the question to the effect that the registration was invalid because the concerned Sub-Registrar had no jurisdiction to accept the document for registration, the property comprised in it being outside the territorial limits of his jurisdiction and that was enough to enable the parties to present the document for registration and was enough to enable the proper registering officer to proceed as if the document was being presented before him for the first time, and that no question of limitation could arise because there was no limitation for the re-registration of a document. In this case also, anything might have happened, namely, the parties, without knowing the correct registration office, might have registered the document in a wrong office. Or the property might have been situated on the border between two registration districts and that the parties might have presented the document at the correct registration office and the Sub-Registrar might have thought that the document presented to him could not be registered in his office and directed them to the other registration office. Or the Sub-Registrar of the office might have been under the genuine impression that he could register the document in his office and he might have registered it in good faith. The plaintiff respondent has not at all pleaded this fact of fraud on registration in her plea and her plea is completely silent on this point. This point was neither raised nor argued at the stage of trial and there is no evidence also on the point. The lower appellate Court, therefore, ought not to have allowed the plaintiff to raise a new plea. As observed by the Privy Council in AIR 1930 57 (Privy Council) no amount of evidence can be looked into upon a plea which was never put forward. The general rule is that the appellant cannot be allowed to raise in his memorandum of appeal a new ground; nor can he raise in his memorandum of appeal any objection, which if it had been taken in the trial Court, might have been cured by appropriate amendment or otherwise. It is true that there are certain exceptions to this rule such as question of law, question of limitation, *res judicata*, etc., which can be substantiated on the facts already on record. But a matter which though of law, depends upon the question of fact for its determination cannot be raised for the first time in appeal. As I said, in this case, there is no plea taken either in the plea or is there anything in evidence as to the document being registered at a wrong registrar's office where the property is not situate. Unless

there is evidence on the record that the property is situate in a wrong place or the parties had deliberately chosen a wrong registration office, this fact cannot be urged in the court of appeal as an act of fraud on registration. In *Sreematy Bajroga Khatun and Others Vs. Province of Bengal and Others*, the learned Judges observed that where the facts are not clear and undisputed the question of limitation should not be allowed to be raised in appeal as the necessary facts had not been pleaded and so attention had not been drawn to them at the time of the trial.

(10) Once I come to the conclusion that the document is not void, because it has been registered in wrong office, I must hold that it is only voidable in character. If it is voidable in character, then it is clear and settled law that a suit to recover possession by a ward should be filed within 3 years of attaining majority, to set aside the alienation made by her guardian. If the ward fails to file a suit within 3 years then her title becomes extinguished under S. 28, Limitation Act. The law on the subject is so clear that it is unnecessary to discuss the principle in extenso, and it is enough to cite the decision in *Raja Ramaswami (dead) and Others Vs. Govindammal and Others*, which has been followed in *Alamelu Ammal Vs. Krishna Chetty and Others*, . It is clear that in the instant case, the plaintiff respondent did not file the suit within 3 years after attaining majority, and her suit has therefore to fail. Further both the courts have gone into the question of consideration and the trial Court has found that Ex. A-6 is supported by consideration and the lower appellate Court has characterised the question as not very relevant. However, I do not see any equity in this case, because the property has been alienated by the father to meet the marriage expenses of his daughter. The respondent has filed the suit long after her marriage only for reasons best known to herself for recovering the property against her brother. Because the trial court found that Ex. A-6 was valid and binding on the plaintiff the plea of fraud on registration was presumably taken in the appellate court to escape the inconvenient Art. 44 of the Limitation Act, and the parties cannot be encouraged to take such a new plea in the appellate stage to circumvent this article of the Limitation Act.

(11) In the result, the appeal is allowed and the suit is dismissed. Each party will bear his or her costs throughout. No leave.

(12) Appeal allowed.