(2011) 10 MAD CK 0182

In the Madras High Court

Case No : Second Appeal No. 342 of 2008, M.P.No. 1 of 2008 and M.P.No.1 of 2010

Pappa Naicker and Manian — APPELLANT

Vs

Rangayammal and Others — RESPONDENT

Date of Decision : 31-10-2011

Acts Referred:
Transfer of Property Act, 1882 — Section 52

Citation : (2011) 10 MAD CK 0182

Hon'ble Judges : R.S. Ramanathan, J

Bench : Single Bench

Advocate : T. Murugamanickam, for the Appellant; A.K. Kumarasamy, For R1, for the Respondent

Final Decision : Allowed

Judgement

R.S. Ramanathan

1. Unsuccessful defendants 1 and 2 are the appellants.

2. The first respondent/plaintiff filed the suit against the appellants and others for partition of their share in the A schedule properties. The case of the first respondent was that A schedule properties belonged to her husband Ranga Naicker and her husband deserted her and therefore ,the first respondent filed O.S.No.32 of 1991 form maintenance and also sought for charge over certain items of properties belonging to her husband and the suit was decreed on 19.1.1996 and a charge was created over the properties mentioned in the schedule and during the pendency of the suit, with intention to defeat the rights of the first respondent/plaintiff, her husband executed a document on 15.12.1993 purporting to sell the A schedule properties for a sum of Rs.1,00,000/= to the appellants who are none other than his brothers and no consideration was passed under that document and the sale deed is void abinitio and the appellants will not get any title under the sale deed and the charge created by

the decree in O.S.No.32 of 1991, merged with the title of the plaintiff over A schedule property as she inherited the same and therefore ,she is entitled to partition the suit properties mentioned in schedule A as her husband was only entitled to some share in A schedule property.

3. The appellants contested the suit stating that the sale deed in their favour was not a sham and nominal sale deed and consideration was passed as stated in the sale deed and to discharge the loans incurred by the husband of the first respondent, the sale was effected and therefore, it cannot be stated that the sale deed was a sham and nominal document. Therefore, the appellants became titled to the suit properties as owners. Further, the first respondent failed to enforce the charge created under the decree in O.S.No.32 of 1991 and the execution application filed by her in E.P.No.148 of 1996 was dismissed and she also became the owner of some of the properties belonging to her husband which were not the subject matter of the charge created under the decree inO.S.No.32 of 1991 and in respect of B schedule properties, which were sold to the appellants, the first respondent/plaintiff cannot claim any right.

4. Both the courts held that the sale in favour of the appellants was only a sham and nominal document and no title passed under that document and the appellants also admitted that even after the sale, the husband of the first respondent was in possession and enjoyment of the property and as the appellants have no title, the first respondent/plaintiff being a legal heir, who succeeded to the estate of her husband, is entitled to claim partition along with the appellants as the respondents are holding some undivided share in the A schedule properties. Hence, this second appeal.

5. The following substantial questions of law were framed on 21.2.2011:-

1. When a charge has been created on the suit properties on 19.1.1996 in a maintenance suit filed by the plaintiff, long after the sale dated 15.12.1993 infavour of the appellants herein, whether it can be held, that, this sale is subject to the charge created in the maintenance suit?

2. Whether a finding can be given that the sale of the suit properties made infavour of appellants is not valid in the absence of any pleading or prayer by the plaintiff ?

3. Whether the judgments of the courts below are vitiated in that they have misinterpreted the evidence of DW1 to hold that he has admitted the vendor continued in possession of the suit property even after the sale?

4. When the maintenance decree inO.S.No.32 of 1991 has not been marked asan exhibit, whether the courts below were justified in holding, that, the properties sold under Ex.B6 are covered by the charge said to have been made under this decree?

5. Even assuming, but, not conceding the case of the plaintiff, whether the judgments of the courts below are vitiated ,considering that the courts below

have not given a finding how the shares quantified in the preliminary decree have been arrived at?

But, at the time of hearing the arguments, the substantial questions of law were reframed and the following substantial questions of law were framed and the learned counsel appearing for both sides submitted their arguments on these substantial questions of law:-

1. Whether the courts are right in holding that the sale in favour of the appellants was a sham and nominal and void in the absence of any pleadings or prayer to that effect?

2. Whether the findings of the courts below are perverse inasmuch as the findings that the appellants also admitted that the husband of the first respondent was in possession of the property even after the sale in their favour and no consideration was passed under the sale deed are against the evidence adduced by the appellants?

3. Whether the first respondent can claim partition in respect of B schedule properties which were sold by her husband for a valuable consideration and when she inherited other properties of her husband which are sufficient to satisfy the charge decree obtained by the first respondent?

4. Whether the sale in favour of the appellants is hit by section 52 of the Transfer of Property Act?

6. Mr. T. Murugamanickam, learned counsel for the appellants submitted that both the courts below committed error in holding that the sale deed in favour of the appellants was a sham and nominal document and it was avoid one without properly appreciating the recitals stated therein and the evidence of D.Ws.2 and 3, who proved the passing of consideration. According to the learned counsel for the appellants, as per the sale deed in favour of the appellants ,Ex.B6/A1, the appellants were directed to discharge three promissory notes one dated 20.9.1989 infavour of Ranga Naicker for a sum of Rs.25,000/=, another promissory note dated 25.12.1990 in favour of Chenniappan for a sum of Rs.35,000/= and another promissory note dated7.9.1990 in favour of the second appellant for a sum ofRs.30,000/= and including the interest payable on the above three promissory notes the total liability on those three promissory notes were calculated at Rs.99,000/= and cash ofRs.1000/= was paid and the property was sold forRs.1,00,000/= and to prove discharge of promissory notes, the appellants examined the promisees and the son of one of the promisees and also exhibited the promissory notes executed by Ranga Naicker, husband of the first respondent and without properly appreciating these aspects, the courts below erroneously held that one promisee is a relative of the appellant and the appellants admitted that even after the sale deed, Ranga Naicker continued to be in possession of the property and held that the sale deed was a sham and nominal document. According to the learned counsel for the appellants, no admission was made by the appellants about the possession of the property by

Ranga Naicker after the sale deed and without properly appreciating the evidence, the courts below have given sucha finding and the findings of the courts below are perverse and are liable to be set aside. He further submitted that the first respondent filed execution proceedings to execute the decree in O.S.No.32 of 1991 and that was allowed to be dismissed holding that she has become owner of the properties after her husband and she claimed partition in respect of 13 items of properties in various Survey Numbers and in the suit for maintenance, O.S.No.32 of 1991,charge was created only in respect of ten items of properties and in addition to the properties sold to the appellants ,the respondent inherited some items of properties and therefore, her maintenance right could be adjusted towards that properties and therefore, the sale infavour of the appellants cannot be challenged and she cannot claim any right over the properties sold in favour of the appellants.

7. Mr. A.K. Kumarasamy, learned counsel for the first respondent submitted that both the courts concurrently held on the basis of oral evidence that the sale deed was a shamand nominal one and it was void ab initio and therefore, the concurrent finding of facts cannot be interfered within the second appeal and admittedly, the sale in favour of the appellants was effected during the pendency of the maintenance suit filed by the first respondent claiming charge over the properties belonging to her husband and therefore, the sale is pendente lite and subject to the result of O.S.No.32 of 1991 and in the maintenance suit, charge was created in respect of certain properties belonging to her husband and therefore, the purchase of property is subject to maintenance charges. Considering all these aspects, both the courts below decreed the suit. He further submitted that the sale in favour of the appellants was declared as sham and nominal and the appellants cannot claim any right in the property belonging to her husband and therefore, the concurrent findings need not be interfered with in the second appeal and the second appeal is liable to be dismissed.

8. Heard both sides. The first respondent mentioned 13items of properties in schedule A and contended that the properties in schedule A belonged to her husband and he was holding some share in those properties and in respect of the properties mentioned in schedule B which also formed part of schedule A, the sale deed was purported to have been executed by her husband in favour of the appellants and no consideration was passed and the sale deed was void ab initio and therefore, the appellants will not get any title through the sale deed in respect of B schedule. Therefore ,we will have to see whether the sale deed infavour of the appellants was a sham and nominal document and a void one as contended by the first respondent.

9. As stated supra, the A schedule properties were the properties belonging to the husband of the first respondent and in the sale deed, Ex.A1/B6, he sold B schedule properties viz., eight items of properties to the appellants. A reading of the recital in Ex.A1/B6 would make it clear that towards the discharge of three promissory notes for a sum of Rs.99,000/=, the sale was executed for a

consideration of Rs.1,00,000/=. Though it was stated by the first respondent that the promissory notes are fabricated and there was no debt incurred by the late Ranga Naicker as stated in the sale deed, the appellants produced the promissory notes and they were marked as Exs.B3 to B5 and also examined D.Ws.2 and 3 to prove the execution and discharge of the promissory notes as stated in the sale deed.

10. It is seen from the evidence of D.Ws.2 and 3 thatDW3 was the promisee under Ex.B5 and he gave evidence that Ranga Naicker borrowed a sum of Rs.35,000/= and the same was discharged by the appellants and after discharge, the promissory note was handed over to the appellants. Admittedly ,he is not related to the appellants. DW2 also gave evidence stating that Ranga Naicker borrowed a sum of Rs.25,000/= from his father and executed Ex.B3 promissory note and the same was discharged by the appellants and after discharge, promote was handed over to the appellants. The second defendant was examined as DW1 and he also gave evidence that his brother borrowed money from him and the promissory note amount was adjusted in the sale consideration .DW2 has admitted that his son in law one Ganesan is the son of the first defendant. Further DW1 did not admit in evidence that after the execution of the sale deed in favour of the appellants, Ranga Naicker continued to enjoy the property. Further, a perusal of Exs.B3 to B5would make it clear that those promissory notes would not have been created for the case and the promissory notes must have been executed on the respective date it bears. Without appreciating all these aspects, both the courts below erroneously held that there was no consideration passed for the sale under Ex.A1/B6 and the appellants also admitted that Ranga Naicker was in possession of the property even after sale. Therefore, I hold that the courts below committed error in holding that the sale deed in favour of the appellants in Exs.A1/B6 was void and shamand nominal and such finding is perverse and is liable to be set aside. Hence, substantial questions of law 1 and 2are answered in favour of the appellant.

11. As per the amended plaint in O.S.No.32 of 1991,charge was created in respect of ten items of property. Out of the ten items of properties, eight items of properties were the subject matter of sale in favour of the appellants .Further, as per the schedule A, 13 items of properties were mentioned as belonging to Ranga Naicker and out of 13 items of properties, charge was created in respect of ten items of properties and in respect of three items of properties, there was no charge and they are 18cents in S.No.32/1, 38 cents in S.No.33/3 and 30 cents inS.No.33/4. Admittedly, the first respondent claimed charge over the properties of her husband in respect of her maintenance right. The husband owned 13 items of property and she claimed charge in respect of ten items of property and therefore, even after the sale of 8 items of property, she inherited 5 items of property, and having become the owner of remaining 5 items of properties which are not the subject matter of Ex.A1/B6, it cannot be contended that she is entitled to claim maintenance against her husband''s entire property

as she became the owner of 5 items of properties which were not the subject matter of the sale.

12. Therefore, even though charge was created in respect of 10 items of properties towards maintenance right in favour of the first respondent, as the first respondent became the owner of 5 items of properties which are not the subject matter of sale, her maintenance right would be satisfied from and out of the 5 items of properties which devolved on her on the death of her husband, she cannot claim any right over the properties purchased by the appellants under Ex.A1/B6. Further, as a charge holder, the first respondent was having a lesser right over the properties belonging to her husband and on the death of her husband ,5 items of properties which are not the subject matter of the sale devolved on her and she became the owner of those properties and therefore, the lesser estate namely the charge holder right merged with the larger estate namely absolute right in respect of 5 items of properties and considering that, the court below dismissed the execution petition filed by her in O.S.No.32 of 1991 as evidenced by Ex.A2. Further, it is seen from Ex.A2, the order passed on the Execution Petition, the petition was dismissed and no appeal or revision was filed against that order and it has become final. As the first respondent became the owner of 5 items of properties which are not the subject matter of sale under Ex.A1/B6, her maintenance right merged with her ownership in respect of 5 items of properties which are not the subject matter of sale underEx.A1/B6. I, therefore, hold that the first respondent cannot claim any right over the properties sold underEx.A1/B6 in favour of the appellants. The third substantial question of law is answered in favour of the appellants .

13. Mr. A.K. Kumarasamy, learned counsel for the first respondent submitted that the sale in favour of the appellants was hit by section 52 of the Transfer of Property Act and therefore, the purchase of the property by the appellants is subject to the charge decree in favour of the first respondent and section 52 applies to the maintenance suit also and relied upon the judgment reported in Kandasamy Vs. Selvambal and Jayaraman, No doubt, the learned Judge has held that u/s 52, any property transferred or dealt with during the pendency of the suit by any party thereto, is subject to the result of the suit and as per the judgment reported in Sathuluru Seetharamanujacharyulu Vs. Narra Venkatasubbamma and Another, once the charge is created by a court it takes effect from the date of the plaint and any other sale subsequent to the date of the plaint will naturally be subject to lispendens and therefore, section 52 of the Transfer of Property Act will apply to any sale made by the person against whom charge decree was passed.

14. However, having regard to the finding rendered in respect of the third substantial question of law that the first respondent became the absolute owner of 5 items of properties which are not subject matter of sale in favour of the appellants under Ex.A1/B6, and she had only right of maintenance against her husband and that right merged with the absolute right of ownership she got after

death of her husband in respect of 5 items of properties, the sale in their favour cannot be impeached by her and she cannot claim any right over the properties purchased by the appellants .Hence, the fourth substantial question of law is also answered in favour of the appellants.

In the result, the judgments of the courts below are set aside. The first respondent is not entitled to claim any share in respect of B schedule properties which were sold by the husband of the first respondent late Ranga Naicker in favour of the appellants for a valuable consideration and the sale under Ex.A1/B6 was not a sham and nominal document and it was not a void one and is a valid one. The second appeal is partly allowed. The first respondent is entitled to claim share only in respect of the properties which are not subject matter of B schedule properties .No costs. The connected miscellaneous petitions are closed.