
(2010) 06 MAD CK 0060
In the Madras High Court
Case No : A.S. No. 396 of 1989

Syed Dowlath Hussain (Died) (Rahmathunissa and Others) APPELLANT
Vs
Khatoon Bi (since Deceased) and Others RESPONDENT

Date of Decision : 28-06-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 2(2)
Specific Relief Act, 1963 — Section 31

Citation : (2011) 3 CivCC 477 : (2011) 1 CTC 445 : (2010) 4 LW 35

Hon'ble Judges : S. Palanivelu, J

Bench : Single Bench

Advocate : T.P. Sankaran, for the Appellant; T. Velumani, for R.3 to R.8, for the Respondent

Final Decision : Dismissed

Judgement

S. Palanivelu, J.—This Appeal Suit has been filed by the appellants to set aside the decree and judgment of the learned Trial Judge, Sub

Court, Vellore, North Arcot District, dismissing the suit in O.S. No. 273 of 1985 on 23.02.1989.

2(i). The case of the plaintiff is that the schedule described property originally belonged to Khursheed Kathun Bi, W/o Md. Ismail Sheriff. She had

mortgaged the schedule mentioned property and other property to one Zaibunnissa under the registered mortgage deed dated 11.10.1928. The

said Khursheed Kathun Bi had two daughters viz. Safia Bi and Khatoon Bi. Safia Bi is the mother of the plaintiff and Md. Ismail @ Syed Abdul

Wahab Sahib is the father of the plaintiff. The said Khursheed Khatton Bi had executed a registered settlement deed dated 09.11.1930 in favour

of her two daughters bequeathing the house bearing door No. 353 and 354 with the direction that they should discharge the mortgage debt due on

the mortgage deed 11.10.1928.

2(ii). The said settlement deed was accepted and acted upon and thereupon Safia Bi and minor Khatoon Bi represented by her husband Syed

Azeez Ahmed sold both houses 353 & 354 to Mohmed Ismail @ Syed Abdul Wahab Sahib under the sale deed dated 01.12.1936 for a valid

consideration of Rs. 2,000/-. Abdul Wahab had agreed to discharge the mortgage debt of Rs. 1,700/- and paid the balance Rs. 300/- of which

Safia Bi had taken Rs. 150/- and the remaining sum of Rs. 150/- was paid to Syed Azeez Ahmed. Since then, Md. Ismail @ Syed Abdul Wahab

became the absolute owner of the said houses 353 and 354. The said Md. Ismail @ Syed Abdul Wahab Sahib had paid Rs. 900/- out of Rs.

1,700/- and there was balance of Rs. 800/- for which Md. Ismail @ Abdul Wahab Sahib had executed another mortgage deed dated 04.12.1936

in favour of the said Zaibunissa. The said mortgage debt was discharged by Md. Ismail @ Abdul Wahab Sahib on 22.05.1937. Thus, Md. Ismail

@ Abdul Wahab Sahib after discharging the entire mortgage debt, became the absolute owner of the said property.

2(iii). The said Md. Ismail @ Syed Abdul Wahab Sahib had executed a registered settlement deed dated 07.02.1949 in favour of Khatoon Bi, as

regards a property bearing door No. 151, at Main Bazaar Road, Vellore. The said Khatoon Bi had accepted the said settlement deed and acted

upon the same. The said Khatoon Bi was 16 years old on the date of the sale deed dated 02.12.1936. She had not challenged the sale deed dated

02.12.1936 either within three years after attaining the majority or within 12 years from the date of alienation, thus, the claim of Khatoon Bi is

barred by limitation and she had lost her title to the said property even by adverse possession by not challenging the said sale deed within the

period of limitation.

2(iv). The house bearing door No. 354 was bifurcated as 354 and 354/1. The said Md. Ismail @ Syed Abdul Wahab Sahib had rented out the

house bearing door No. 354/1 to Hakeem syed Abdul Hassan Sahib and Jaffar Ali Sahib. Late in 1958, Syed Azeez Ahmed Sahib was permitted

by Md. Ismail @ Syed Abdul Wahab Sahib to be in occupation of the said house. Since they refused to vacate, Md. Ismail @ Syed Abdul

Wahab Sahib had filed H.R.C.O.P. No. 35 of 1957 on the file of the learned

District Munsif Court, Vellore. In the said R.C.O.P. the said Syed

Azeez Ahmed Sahib filed a counter that he and his wife for convenient enjoyment moved into the house after the house fell vacant at the suggestion

of Md. Ismail @ Syed Abdul Wahab Sahib, further the Syed Azeez Ahmed had even admitted in the evidence that he and his wife were put in

possession by Md. Ismail @ Syed Abdul Wahab Sahib himself.

2(v). Thus Syed Azeez Ahmed and his wife had entered into possession of the house only under the permission of Md. Ismail @ Syed Abdul

Wahab Sahid in 1958. The tenants Jaffar Ali and Hakim Syed Abdul Hassan had vacated and sent the key by post. It was not accepted by Md.

Ismail @ Syed Abdul Wahab Sahib. Thereupon, Syed Azeez Ahmed preferred C.M.A. No. 67 of 1957 against the order of eviction. It was held

in the said appeal that Abdul Wahab Sahib can file a suit in a civil Court, for eviction and for possession from Abdul Azeez and his wife.

2(vi). Thereupon the plaintiff issued a registered notice dated 12.05.1980 to Khatoon Bi setting forth the entire matter in detail for which Khatoon

Bi issued a reply notice dated 23.05.1980 setting up claim in herself making false allegations again, the plaintiff issued a rejoinder notice in detail

setting forth the claim of the plaintiff.

2(vii). The plaintiff states that himself and his brothers have effected a registered partition deed on 25.06.1985. In the said partition, the suit

property i.e., house bearing door No. 354/1 morefully described as "A" schedule, was allotted to the plaintiff. In the meanwhile, Khatoon Bi had

created a settlement deed dated 29.04.1983 in favour of the 3rd defendant and another settlement deed dated 19.02.1985 in favour of the second

defendant. The said settlement deeds are not valid and they will not confer any title on the defendants and since first defendant is not the owner of

the property. The defendants are liable to be evicted and the possession has to be delivered to the plaintiff.

2(viii). Hence, the suit has been filed for declaration of title to the suit property and for delivery of possession of the same in favour of the plaintiff.

3. Per contra, denying the allegations in the plaint, the first defendant filed the written statement which runs thus:

3(i). The suit property along with other properties belonged to Khursheed Kathun Bi and that she had mortgaged it to Zaibunnissa under the

mortgage deed dated 11.10.1928 is not correct. The allegations that Khursheed Kathun Bi had only two daughters Safia Bi and Kathoon Bi is not true. But she had three daughters namely Safia Bi, Kathoon Bi and Rafia Bi. Rafia Bi died unmarried. The plaintiff is the son of Safia Bi and that his father's name is Md. Ismail @ Syed Abdul Wahab Sahib. Kathoon Bi's husband is Syed Azeez Ahmed who is the brother of Md. Ismail @ Syed Abdul Wahab Sahib.

3(ii). The allegations regarding the execution of the settlement by Khursheed Kathun Bi in favour of her daughters under the settlement deed dated 09.11.1930 is true. But it is incorrect to state that she had executed the settlement only in favour of two daughters. She executed the same in favour of her three daughters. Subsequently, Rafia Bi died as a child and unmarried.

3(iii). It is true that the settlement deed is accepted and acted upon and Safia Bi and Kathoon Bi are the owners of the houses 353 and 354. They were the co-owners of the said properties. The said properties were not divided between them by way of a partition deed. Each one had a common undivided half share in the entire property.

3(iv). The allegations that Safia Bi and the then minor Kathoon Bi alleged to have been represented by her husband Syed Azeez Ahemed, sold the properties to Md. Ismail @ Syed Abdul Wahab Sahib, under the alleged sale deed dated 02.12.1936 for a sum of Rs. 200/- and that Md. Ismail @ Syed Abdul Wahab Sahib discharged the alleged mortgage debt of Rs. 1,700/- and paid the alleged balance Rs. 300 and out of which Safia Bi had taken Rs. 150/- and Syed Azeez Ahemed had taken Rs. 150/- and since then Md. Ismail @ Syed Abdul Wahab Sahib became the absolute owner of the properties and that for the discharge of the alleged mortgage, he paid Rs. 900/- and there was balance of Rs. 800/- for which he executed another alleged mortgage claimed to be dated 04.12.1936 in favour of Zaibunnissa and it was discharged by him later on 22.05.1937 and that therefore he became the owner of the property are all absolutely incorrect. This defendant denied the reality, validity, due execution, passing of the consideration, binding nature and legality of the alleged sale deed dated 02.12.1936. The alleged sale deed is not legal, valid and it is not binding on the defendant.

3(v). In any event, this defendant's husband Syed Azeez Ahemed, in law, had no right to sell the property belonging to this defendant who was

admittedly a minor. The alleged sale deed even if true, is void ab initio, and it is not binding on anybody. The alleged sale deed dated 02.12.1936

was not given effect to, in the sense that it was not acted upon and that Md. Ismail @ Syed Abdul Wahab Sahib never exercised any act of

ownership over the property. In fact, from the time of her mother, this defendant continues to be in possession of the entire properties including the

suit properties in her own right as its co-owner having half share in the same. She never parted with the possession of suit and other properties at

any time, either to Md. Ismail @ Syed Abdul Wahab Sahib or to anybody else. Even if the sale by Safia Bi to Md. Ismail @ Syed Abdul Wahab

is held to be valid regarding the share of Safia Bi, it will not bind the half share of this defendant in the entire suit property and Md. Ismail @ Syed

Abdul Wahab Sahib can never claim or become the owner of the half share in the entire property belonging to this defendant.

3(vi). The execution of settlement deed dated 07.02.1949 in favour of this defendant by Md. Ismail @ Syed Abdul Wahab Sahib is completely

different and has got no connection whatsoever with regard to the suit property. The allegations that Kathoon Bi was 16 years old on the date of

the alleged sale deed dated 02.12.1936 and that she has not challenged the same within 3 years, after attaining majority or within 12 years from the

date of alienation; therefore, her claim is barred by limitation and that she has lost her title to the property even by adverse possession etc. are all

absolutely unsustainable in law and on facts. This defendant continues to be in possession of the entire property regarding her undivided half share

and she never parted with the possession of the property including the suit property in which, she is physically residing, to Md. Ismail @ Syed

Abdul Wahab Sahib. Therefore, the question of limitation does not arise.

3(vii). The allegations that door No. 354 was bifurcated as 354 and 354/1 and that Md. Ismail @ Syed Abdul Wahab Sahib had rented out the

house bearing door No. 354/1 to Hakeen Syed Abdul Hassan Sahib and Jaffar Ali Sahib and that in 1958, Syed Azeez Ahemed Sahib was

permitted by Md. Ismail @ Syed Abdul Wahab Sahib to be in occupation of the said house; and that since they refused to vacate, Md. Ismail @

Syed Abdul Wahab Sahib filed RCOP. No. 35 of 1957 and in which Syed Azeez Ahmed Sahib filled a counter and himself and his wife for

convenient enjoyment moved into the house, after the house fell vacant, at the suggestion of Md. Ismail @ Syed Abdul Wahab Sahib.

3(viii). He even admitted in the alleged evidence that himself and his wife were put in possession by Md. Ismail Syed Abdul Wahab Sashib and

that he entered into possession of the properties only under the alleged permission of Md. Ismail @ Syed Abdul Wahab Sahib in 1958, that the

alleged tenants Jaffar ali and Bakin Abdul Hasan had vacated and sent the key by post and that was not accepted by Md. Ismail @ Syed Abdul

Wahab Sahib and that it was held in the said appeal that Md. Ismail @ Syed Abdul Wahab Sahib can file a suit in civil court for eviction and for

possession from Abdul Azeez and his wife are all false.

3(ix). This defendant and her husband continued to remain in the house belonging to this defendant. They did not come into possession of the same

under the alleged permission of Md. Ismail @ Syed Abdul Wahab Sahib. In the RCOP proceedings, this defendant claimed title over the

properties. It was so held in CMA.67 of 1957, that if the plaintiff's father can claim title, he should file a suit for declaration of title and for

possession and even after the judgment in CMA. 67 of 1957 the said Md. Ismail @ Syed Abdul Wahab Sahib had not at all taken any steps so

far. It would show that he had no title to the property as claimed by him and that he is barred and estopped from claiming title to the suit property.

Notice dated 12.5.1980 referred to in para 7 of the plaint, is properly replied.

3(x). The alleged partition deed dated 25.6.1985 regarding the suit properties and other properties between the sons of Md. Ismail @ Syed Abdul

Wahab Sahib including the plaintiff is a self-serving document. This defendant was not a party to the same. It has no legal effect at all.

Consequently, the claim of the plaintiff that the suit property had been allotted to him in the alleged partition is not valid and it does not confer any

title on him. The allegations that Kathoon Bi created a settlement deed dated 29.04.1983 in favour of the 3rd defendant and another settlement

deed dated 19.02.1935 in favour of the 2nd defendant, that the settlement deeds are not valid and that they will not confer any title on the

defendants 2 and 3, that the defendants are liable to be evicted and possession

has to be delivered are all false.

3(xi). The plaintiff has no title to the suit property and he is not entitled for possession of the same also. Without filing a suit against the 1st

defendant who is a co-owner along with Safia Bi, for partition, the plaintiff is not entitled to claim title to the suit property and file the suit for

declaration and possession and prayed for the dismissal of the suit.

4. The learned Principal Sub Judge, Vellore, after scrutinizing all the evidence on record, dismissed the suit, refusing to grant relief as prayed for by

the plaintiff. He died pending appeal and his legal heirs are on record. They are before this Court with this appeal.

4.(a) Notice was not served upon the fourteenth respondent as per records. The learned Counsel for the respondent has filed a memo stating that

the fourteenth respondent is none other than the third respondent who is already on record for whom an advocate is on record and hence no fresh

notice need to be given to the fourteenth respondent and both of them are one and same.

5. The following points have arisen for consideration in this appeal:

(1) Whether Ex.A.3, sale deed dated 02.12.1936 is valid and binding on the first respondent?

(2) Whether the first respondent has been in possession and enjoyment of the suit property as co-sharer?

(3) Whether the plaintiff had prescribed title by adverse possession?

6. Points No. 1 and 2: In order to appreciate the facts and circumstances of the case, the relationships of the parties have to be seen. Khursheed

Kathun Bi W/o Md. Ismail Sheriff, as per plaint, had two daughters by name Safia Bi and Khatoon Bi, the first respondent. It is in the written

statement that Khursheed Kathun Bi had three daughters and one more daughter was Rafia Bi, who died as a child and unmarried. Syed Abdul

Wahab Sahib and Syed Azeez Ahmed were siblings who married Safia Bi and Kathoon Bi respectively. Khursheed Kathun Bi on 09.11.1930

settled her properties bearing door Nos. 353 and 354 in favour of her three daughters by a registered settlement deed. as per the recitals in the

document both the daughters had to discharge the mortgage dated 11.10.1928 (Ex.A.1) to Zaibunnissa, with whom Khursheed Khaton Bi

mortgaged the property.

6(i). On 02.12.1936, Safia Bi and Syed Ahmed as guardian to his wife (minor aged 16 years) by means of Ex.A.3 sale deed, sold the suit

property in favour of Mohamed Ismail, husband of Safia Bi for Rs. 2,000/-. Mohamed Ismail agreed therein that he would discharge the mortgage

debt of Rs. 1,700/- under Ex.A.1 mortgage deed. He paid Rs. 300/- to the vendors and Rs. 900/- to the said mortgagee and for the balance of

Rs. 800/- he further mortgaged the property on 04.12.1936 to the above said Zaibunnissa. It is stated that on 22.05.1937 by virtue of Ex.A.6, the

endorsement on Ex.A.5, the said mortgage was discharged.

7. It is keenly contended by the appellant's side that at the time of Ex.A.3 sale deed, the first respondent was 16 years and within three years from

the date of her majority or within three years from the date of her knowledge, she could have got the sale deed set aside by any manner known to

law and since she has not done so, the sale deed Ex.A.3 has become valid, in respect of which she could not project any objection.

8. Conversely, it is argued on behalf of the respondents that in Muslim law, the husband of the minor wife cannot act as guardian for her property

and the sale deed itself is void ab-initio and the said document has been void from the inception. As per law, it need not be set aside. It is

profitable to see the position in Mahomedan law as far as the guardianship is concerned. Section 359 provided in the Mulla's Principles of

Mahomedan Law 19th edition, in page 292 with excerpts are extracted hereunder:

359. Legal guardians of property- The following persons are entitled in the order mentioned below to be guardians of the property of a minor (z):

(1) the father;

(2) the executor appointed by the father's will;

(3) the father's father;

(4) the executor appointed by the will of the father's father.

Baillie, 689: Macnaghten, 62, 304.

Mother, brother, uncle, etc., not legal guardians: The four guardians mentioned to this Section are hereinafter called legal guardians. The only

relations who are legal guardians of the property of a minor are (1) the father, and (2) the father's father. No other relation is entitled to the

guardianship of the property of a minor as of right, not even the mother, brother or uncle. But the father of the paternal grandfather of the minor

may appoint the mother, brother, uncle, or any other person as his executor or executrix, in which case they become legal guardians and have all the

powers of a legal guardian as defined in Sections 362 and 366. The Court also may appoint any one of them as guardian of the property of the

minor, in which case they will have all the powers of a guardian appointed by the Court, as stated in Sections 363 and 367.

9. As per Muslim law, the minor's father or the father's father alone can appoint the guardian or otherwise, the Court has to appoint anyone of the

persons mentioned in the said provision as guardian for the minor. Others, whatever may be the relationship with the minor, could not act as

guardian for the minor and to deal with his property. If there is violation or deviation from this provision, then the transaction is inevitably to be

declared as void. Husband of a minor wife can never be a guardian to her, unless he is appointed by the Court.

10. As far as the facts and circumstances of the present case are concerned, Syed Azeez Ahmed, the husband of the first respondent acted as

guardian for his minor wife, who was then aged 16 years, for which he was not competent. The first respondent as R.W.1 would admit in her

cross-examination that at the time of Ex.A.3, the sale deed, she was aged 16 years and she did not know anything about the said sale and only in

1957, she got the knowledge of the sale. She further says that there was no necessity for her nor her husband to sell the property, that her husband

had no right or authority to sell the property and the same is not binding on her. She also pleads ignorance of mutation of her name in the

municipality for payment of property tax. In Maimunnissa Bibi and Others Vs. M.S.N.N. Abudul Jabbar and Others, it is observed that a

conveyance of immovable property by a defacto guardian of a muslim minor is void and is not binding on the minor. Under the Mahomedan law, a

mother of a minor is not his legal guardian and she will have no power to act on behalf of the minor and make a valid conveyance of his property.

11. Mr. T.P. Sankaran, learned Counsel for the appellant would contend that a void or voidable decree or order has to be set aside through Court

of law, likewise the document Ex.A.3, also has to be set aside at the behest of the first respondent within a period of limitation and since she has

not initiated any proceedings, presently she could not make claim over the property. In support of his contention, he relies upon a judgment of the

Honourable Apex Court in *Sneh Gupta Vs. Devi Sarup and Others*, wherein Their Lordships, while discussing about the provisions under

Sections 33, 2(2) and Order 23 Rule 3 and Section 9 and Order 9, Rule 13 of Civil Procedure Code, held that it is well settled principle of law

that even a void order is required to be set aside by a competent Court of law inasmuch as an order may be void in respect of one person but may

be valid in respect of another, that even if a compromise decree may be void or voidable but it is required to be set aside by filing a suit to set aside

the decree or order, within the period of limitation.

12. But in this case, a registered sale deed is the subject matter. Prima facie, in the light of Muslim personal law, herein before stated, Ex.A.3 sale

deed is void ab initio. It had no legal sanctity. No lawful right belonging to the minor was conveyed to Md. Ismail in the suit property since the

husband of the first respondent was neither recognized as a guardian by law nor had he been appointed as a guardian for the property of his minor

wife. Hence Section 31 of the Specific Relief Act of 1963 comes to play. When dealing with the import of Section 31 of the Specific Relief Act,

the Honourable Supreme Court in Appeal (Civil) 2412 of 2006 in *Prem Singh and Ors. v. Birbal and Ors.* decided on 02.05.2006 has held as

follows:

Section 31 of the Specific Relief Act, 1963 thus, refers to both void and voidable documents. It provides for a discretionary relief.

When a document is valid, no question arises of its cancellation. When a document is void ab initio, a decree for setting aside the same would not

be necessary as the same is non-est in the eye of law, as it would be a nullity.

13. Following the principle laid down in the aforesaid decision, it has to be held that since Ex.A.3 is a void document which is non-est in the eye of

law, it need not be set aside. Hence the first respondent has to be treated to be in joint possession of the suit property.

14. The mortgage deed executed by Md. Ismail has no relevance, since Ex.A.3 has been declared to be a void document. The appellant's father

viz., Md. Ismail had paid property tax payable to the Municipality under Exs.A.8 to A.16. It is well settled that mere payment of revenue or the

property tax to a property in dispute, will not confer any title upon the person who claims the same. Point No. 1 is answered in negative and two in affirmative.

Point No. 3:

15. It is pleaded in the plaint that the plaintiff has got right by adverse possession also in the suit property, since the right of the first defendant was barred by time. As discussed in point Nos. 1 and 2, as Ex.A.3 is non-est, there is no necessity for the first respondent to get it set aside. Hence no

question of limitation would arise in this case. The heirs of Md. Ismail and Kathoon Bi have to be treated as joint owners in the suit property who

have got joint interest in the same. Hence no question of adverse possession would arise. There is no material nor evidence to show that Md.

Ismail alone had enjoyed the property as his own with the knowledge of the first respondent, ousting her. There is no specific pleading in this

regard available in plaint.

16. It is well settled principle of law that the plea based upon title and adverse possession cannot come together and the party who pleads on both

grounds will have to stick on to either one of them, as held in 2009(5) CTC 558 in S. Ganesan v. Bharathirajan.

17. The learned trial Judge has observed in his judgment that it is strange for the plaintiff to plead adverse possession while he claims right through

Ex.A.3. The said observation is proper. The appellant has not prescribed any title by adverse possession to the suit property. I answer this point in negative.

18. On a careful scrutiny of the pleadings, exhibits and oral documents, this Court of the considered view that Ex.A.3 is not a valid transaction to

the extent of the interest of the first respondent in the suit property. Hence, there could be no declaration nor direction of delivery of possession

with respect to the suit property in favour of the appellants. There is no valid ground to upset the findings of the trial Court. It has thoroughly

analysed the evidence and rendered the judgment by dismissing the suit. The judgment and decree of the trial Court deserve to be confirmed and

they are accordingly, confirmed. The appeal fails.

19. In the result, the appeal is dismissed. No costs.