(1996) 02 SC CK 0148

Supreme Court of India

Case No: Civil Appeal No''s. 2915-2916 of 1996

Sadasivam		APPELLANT
	Vs	
K. Doraisamy		RESPONDENT

Date of Decision: Feb. 9, 1996

Citation: (1996) 2 AD 355 : AIR 1996 SC 1724 : (1996) 2 JT 400 : (1996) 2 SCALE 89 : (1996) 8 SCC 624 : (1996) 2 SCR 336

Hon'ble Judges: G. N. Ray, J; B. L. Hansaria, J

Bench: Division Bench

Advocate: Kapil Sibal and V. Krishnamurthy, for the Appellant; U.R. Lalit, C. Balasubramanium and K. Ram Kumar, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

G.N. Ray, J.
Leave granted.

2. Heard learned Counsel for the parties. These appeals are directed against judgment dated December 1. 1994 passed by the Division Bench of Madras High Court in A.S. No. 96 of 1988 and Transferred A.S. No. 1507 of 1988 and Transferred A.S. No. 1508 of 1988. Transferred Appeal No. 1507 of 1988 arose out of O.S. No. 187 of 1985 in the Court of learned Subordinate Judge, Namakkal. Transferred A.S. No. 1508 of 1988 arose out of O.S. No. 168 of 1987 in the said Court. A.S. No. 96 of 1988 arose out of O.S. No. 274 of 1985 in the Court of learned Subordinate Judge, Namakkal. The father of the appellant Sadasivam was one Marappa Gounder. The said Marappa Gounder filed a suit in the Court of the learned Subordinate Judge, Namakkal being O.S. No. 187 of 1985 for a declaration that the sale deed executed by the said Marappa in favour of the respondent-Doraisamy was a sham document and had not been acted upon. The said Marappa also filed another suit in the Court of the District Munsif, Namakkal being O.S. No. 781 of 1985 for a permanent

injunction restraining the respondent Doraisamy from interfering with the peaceful enjoyment of the suit proper-tics being Survey No. 149/1 on an allegation that the respondent had been attempting to encroach on the said property unlawfully. The said suit before the learned Subordinate Munsif was subsequently transferred to the Court of the learned Subordinate Judge, Namakkal and was numbered as O.S. No. 168/87. While the two suits were pending, the respondent Doraisamy also filed a suit being O.S. No. 274/85 in the Court of the learned Subordinate Judge, Namakkal inter alia for a declaration of half share in the joint properties by Karuppanna Gounder the father of Marappa since bequeathed to the said Doraisamy by a will dated January 17, 1979 executed by the said Karuppanna Gounder.

3. The learned Subordinate Judge, Namakkal, dismissed the suits filed by Marappa but decreed the suit filed by the respondent Doraisamy inter alia on the finding that the sale deed executed by Marappa in favour of Doraisamy conveying his share in the joint family properties was not a sham document but a valid document and the will executed by Karuppanna bequeathing his half share in the joint family properties in favour of the respondent Doraisamy was also a genuine will thereby conveying the interest of Karuppanna in favour of the said Doraisamy.

4. Being aggrieved by the judgments passed in the said suits, Marappa preferred appeals but during the pendency of such appeals, Marappa died and his son Sadasivam the appellant before this Court was brought on record as his legal representative. In A.S. No. 96/88 Sadasivam was also an appellant. The High Court disposed of all the said appeals by a common judgment dated December 1, 1994. The High Court inter alia held that the will was executed by Karuppanna Gounder voluntarily in respect of his half share in the joint properties and such will was genuine and by virtue of the said will, the respondent acquired the half share in the joint a family properties belonging to Karuppanna. The High Court also upheld the finding of the trial court that the sale deed executed by Marappa in respect of other half share in the properties in favour of the respondent was not a sham document and in view of such sale deed, the respondent also acquired the title to the joint family properties belonging to the said Marappa Gounder.

5. Mr. Kapil Sibal, learned senior counsel appearing for the appellant, has submitted that the will should not have been held valid and genuine by the courts below since the validity of a will operates as a judgment in rem. The Court has a duty to ensure that such will had in fact been executed by the testator out of his free violation by fully understanding the implication of the will executed by him and the execution of such will has been properly attested by at least two witnesses. He has submitted that if there are circumstances which raise suspicion about the genuineness of the will, it is the duty of the legatee or the executor of the will to satisfy the Court that the will had been genuinely executed by repelling the suspicious circumstances. Mr. Sibal has indicated some of the circumstances which according to the appellant reasonably raise suspicion about the genuineness of the will and he has contended

that evidence adduced in the case was not sufficient to repel suspicion arising out of such circumstances. We are, however, not inclined to accept such contentions of Mr. Sibal because in the impugned judgment, the High Court has indicated cogent reasons as to why the will executed by Karuppanna Gounder should be accepted to be genuine.

6. As regards the circumstances which have been characterised by Mr. Sibal as suspicious, the one, namely the will seeing light of the day only in 1985 though it was executed in 1979, is really suspicious; others, like it being unregistered, there being no witness of the locality and divesting of close relations, are not so, as, very often a will is not registered and such persons are called to attest it in whom the testator has confidence, even if they be residing at some distance. Divesting of close relations being the purpose of execution of will, this is normally not a suspicious circumstance. This apart, as submitted by Mr. Lalit, good reason existed for bequeathing the property to the respondent - the same being his having been brought up by Karuppanna. As to making the will public in 1985, the explanation is that relationship with Marappa become strained when he filed suit No. O.S. 187 of 1985, where after suit for probate of the will was filed by the respondent - the same suit No. O.S. No. 274 of 1985. The aforesaid delay cannot, in these facts, raise any suspicion. So, the will cannot be said to be surrounded with suspicious circumstances.

7. Mr. Sibal has also submitted that unfortunately the trial court and the High Court have also found that the sale deed executed by Marappa Gounder in favour of the respondent Doraisarny was a genuine document even though the High Court failed to consider and appropriate the deposition of PW 2 Chinnappa Gounder and the deposition of PW 3 Nallusamy in A.S. No. 96/87. Mr. Sibal has submitted that according to the respondent the sale deed was executed by Marappa in favour of the respondent to liquidate his debts on account of two promissory notes executed by Marappa in favour of Chinnappa Gounder and Nallusamy for a total sum of Rs. 15,000 but both the said Chinnappa Gounder and Nallusamy stated in their depositions that Marappa Gounder did not receive Rs. 10,000 from Chinnappa Gounder and Rs. 5000 from Nallusamy and the said Marappa had not executed any pronote in favour of the said Chinnappa Gounder or Nallusamy. Such evidence clearly indicates that there was no necessity for executing the said sale deed for liquidating the loans under the pronotes and the case of the defendant Doraisamy that he had paid off the loans under the said pronotes as a consideration for the said sale deed, cannot therefore be accepted.

8. Mr. Sibal has also submitted that as a matter of fact, the sale deed was produced by Marappa in the suit and if the possession of the said document with Marappa is considered in the context of the depositions of Chinnappa Gounder and Nallusamy, it will be quite apparent that no genuine sale deed had been executed by Marappa by receiving consideration for the valuable properties alleged to have been

conveyed by him to Doraisamy. Mr. Sibal has submitted that unfortunately the High Court failed to consider the implication of the depositions of the said two alleged creditors of Marappa. Hence, the finding made by the High Court that the sale deed executed by Marappa in favour of Doraisamy was a genuine document should not be accepted as a proper finding of fact on consideration of relevant materials.

9. Mr. Sibal has submitted that in the aforesaid facts, even if the will is held to be genuine, this Court should allow this appeal to the extent of half share belonging to Marappa in favour of the appellant. Mr. Sibal has also submitted that even if the sale deed executed by Marappa is held to be a genuine sale deed and not a sham document, by such sale deed the interest of the appellant Sadasivam cannot be affected. No evidence has been led that Marappa as a Karta of the joint family transferred the interest of both Marappa and Sadasivam for any legal necessity of the joint family. In the absence of a case of transfer of the joint family property by the karta for legal necessity, the interest of Sadasivam who is a coparcener in the said property cannot be affected. Hence, even if this Court is not inclined to hold that the said deed executed by Marappa was a sham document, the appellant is entitled for a declaration that his interest in the half share of the joint property had not been affected by the transfer by way of sale deed executed by Marappa in favour of the respondent.

10. The learned Counsel appearing for the respondent Doraisamy has however submitted that the will executed by Karuppanna and the deed of sale executed by Marappa in favour of the respondent have been held to be genuine and valid documents by the learned Subordinate Judge and also by the High Court after considering the evidences adduced in the case. Such findings based on cogent reasons and on correct appreciation of the facts and circumstances of the case and the evidences on record should not be interfered with by this Court.

11. It has also been contended by the learned Counsel for the respondent that Doraisamy, the respondent was a very close relation of Marappa and he being daughter''s son of Karuppanna was brought up in the ancestral house of Karuppanna and Marappa. Taking advantage of such close relationship between the parties and also taking advantage that at the relevant time, Doraisamy used to stay in family dwelling house of Marappa, the sale deed executed by Marappa and the two pronotes executed by Marappa in favour of the creditors had been removed by Marappa from the custody of Doraisamy. Such case of the respondent has been accepted by the High Court by indicating reasons. Hence no adverse inference against the respondent for the custody of such documents with Marappa should be drawn. The learned Counsel has submitted that Marappa in his pleadings in the suit for declaration that the sale deed executed by him in favour of Doraisamy was a sham document, had clearly admitted that when he was ill, his son the appellant before this Court did not render any assistance to him and he became annoyed with his son and hence executed the sale deed to liquidate his debts. The plaintiff did not

lead any convincing evidence to show that the deed was executed under any undue influence exerted by Doraisamy although onus was with the plaintiff to establish the factum of undue influence alleged to have been exerted on him. Marappa also failed to lead reliable and convincing evidence to show that despite execution of the said sale deed in favour of Doraisamy, it was Marappa who had owned and possessed the land sold by him. It was necessary for the success in the suit filed by Marappa to establish the fact of owning and possessing the land sold by Marappa. The learned Counsel for the respondent has submitted that in the aforesaid facts, both the courts had no difficulty in rejecting the contention of Marappa that although he had executed the sale deed in favour of Doraisamy such deed was not intended to be acted upon and the same was a sham document. The learned Counsel has, therefore, submitted that no interference is called for by this Court and the appeals should be dismissed with cost.

12. After giving our careful consideration to the facts and circumstances of the case and the decisions of the courts below, it appears to us the validity of the sale deed executed by Marappa has not been considered in the proper perspective. The sale deed was purported to have been executed by Marappa for liquidating his antecedent debts to the tune of Rs. 15,000 on account of two pronotes executed by him in favour Chinnappa and Nallusamy respective for Rs. 10,000 and Rs. 5,000. Marappa was not a man without means and he owned and possessed valuable properties. No evidence was led to establish that he had to incur debts for maintenance of family. It is on record that Karuppanna the father of Marappa was alive till 6.2.1979. The joint family owned and possessed various properties out of which shortly before his death in January 1979, Karuppanna bequeathed his half share in the joint family properties by executing a will in favour of Doraisamy. The evidence on record indicates that Karuppanna and Marappa had good terms. As a matter of fact, it is the positive case of the respondent Doraisamy that with the knowledge and consent of Marappa the said will was executed by Karuppanna where Marappa was a signatory. The disputed sale deed was executed in 1984. There is no evidence to suggest that during the period before 1979 to 1984 Marappa had to incur loans for the legal necessity for maintaining the family. The sale deed was executed for a consideration of Rs. 19,000 and out of the said sum of Rs. 19,000 Rs. 15,000 was paid to two creditors on account of alleged pronotes. Both the said creditors have deposed in the case instituted by Marappa as witnesses for the plaintiff and they have categorically deposed that they did not advance any loan for which pronotes had to be executed in their favour. The sale deed and both the pronotes were produced by Marappa. Unfortunately High Court failed to consider the implication of the depositions of Chinnappa and Nallusamy, In our view, such depositions coupled with the fact that the sale deed and pronotes were in the custody of Marappa support the case of Marappa that out of dissatisfaction of Marappa for his son Sadasivam and to teach him a lesson the sale deed was executed in favour of his very close relation Doraisamy who was not only his sister''s

son but also his wife''s brother, without any consideration for such sale deed and on an understanding that the said document was not to be acted upon. The High Court accepted the case of Doraisamy that such documents were illegally removed by Marappa taking advantage that Doraisamy used to stay in the house of Marappa without adverting to the depositions of the alleged creditors. The said depositions clearly support the case of Marappa that there was no necessity to liquidate any antecedent debt for which a valid sale deed on receiving consideration had to be executed. It may be noted here that Doraisamy also failed to produce any receipt or convincing evidence to show that after liquidating Rs. 15,000 towards the debts he had in fact, paid the balance sum of Rs. 4,000 to Marappa. It may also be stated here that Marappa challenged the validity of the sale deed shortly after its execution. Normally if a deed was voluntarily executed, it is not expected to be challenged shortly after such execution.

13. It has been contended by the learned Counsel for the respondent that if the sale deed was a sham document, not intended to be acted upon. Marappa should have established his possession of the lands under the sale deed to the exclusion of Doraisamy. We may indicate here that there is no finding by the High Court as to the exclusive possession of either of the party. Even if it is accepted that Doraisamy had exercised possession over the land covered by the sale deed, such possession may be explained by indicating that Doraisamy obtained interest to the extent of half share by virtue of the will executed by Karuppanna. Hence, as a co-sharer, he was expected to possess the lands not partitioned between the parties. Exclusive possession of a co-sharer does not amount to adverse possession against other co-sharers unless such possession is exercised by ousting the other co-sharers. There is no such case of ouster of a co-sharer and thereafter exercise of exclusive possession openly and as of right by Doraisamy. That apart, the sale deed was executed by Marappa in September 1984 and the suit was instituted by Marappa for declaration of the sale deed as sham and invalid document in 1985. Hence, question of title by adverse possession did not arise.

14. We have already indicated that no interference is called for against the decree in favour of Doraisamy about his title to half share of Karuppanna in joint family properties on account of will executed by the said Karuppanna in favour of Doraisamy. But in the facts of the case, the sale deed executed by Marappa must be held to be an invalid document being executed without any consideration presumably executed on an understanding between the parties that the sale deed would not be acted upon. We, therefore allow the appeals in part by setting aside the judgments and decrees passed in A.S. Nos. 1507 and 1508 of 1988 arising out of O.S. No. 187 of 1985 and O.S. No. 168 of 1987 of the court of the learned Subordinate Judge, Namakkal. The appellant''s half share in the joint family properties is hereby decreed after setting aside the sale deed dated 10.9.84 executed by Marappa in favour of respondent Doraisamy. There will be no order as to costs.