

(2011) 08 MAD CK 0336

Madras High Court

Case No: Second Appeal No. 453 of 2007, M.P. No's. 1 and 2 of 2007 and 1 of 2011

Dhandapani, Thulukanam and
Kumar

APPELLANT

Vs

Loganathan, Hemamalini,
Porgunam and Ekambaram

RESPONDENT

Date of Decision: Aug. 19, 2011

Acts Referred:

- Hindu Minority and Guardianship Act, 1956 - Section 8

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

Bench: Single Bench

Advocate: M. Rajasekhar, for the Appellant; M.S. Subramanian, for RR 1 to 3, for the Respondent

Final Decision: Dismissed

Judgement

R.S. Ramanathan, J.

The Plaintiffs are the Appellants.

2. The Plaintiffs filed the suit for partition of their 3/4 share in the suit property and for permanent injunction restraining the Respondents from interfering with their peaceful possession and enjoyment of the suit property. The case of the Appellants/plaintiffs was that the suit property is the ancestral property of the plaintiffs and the first Defendant, who is their father and the suit property was allotted to the share of their father under an oral partition between him and his brother. Therefore, the Plaintiffs/appellants are entitled to 3/4share in the property and without any legal necessity, the first Defendant/fourth Respondent viz., their father sold the property to the second Defendant and the same is nonbinding on the Plaintiffs/appellants and they are entitled to claim their share viz., 3/4 share in the property. Hence, they filed the suit for partition.

3. The Trial Court decreed the suit holding that the sale deed executed by the father of the Appellants viz., the first Defendant/fourth Respondent will not bind the appellants and therefore, there is no need to set aside the said sale and as the Plaintiffs/appellants are entitled to 3/4 share, they are entitled to the relief of partition. The lower appellate court reversed the said finding and allowed the appeal filed by Defendants 2 to 4 holding that the plaintiffs were parties to the sale deed executed by the father in favour of the second Defendant and therefore, they are bound by the sale deed and they ought to have prayed for setting aside the sale as the sale is voidable and therefore, in the absence of any prayer for setting aside the sale, the suit for partition is not maintainable. Hence, the second appeal.

4. The following substantial questions of law were framed at the time of admission:

1. Whether the first appellate court is correct in dismissing the suit when the Plaintiffs have not been made as parties to the sale deed Ex.B2 for want of declaratory relief.

2. Whether the first appellate court is correct in holding that the sale deed Ex.B2 is valid unless and until it is set aside by the competent civil court.

5. Learned Counsel for the Appellants submitted that the sale in favour of the second Defendant was not for family necessity and the sale was without getting permission of the court and therefore, they are not bound by the sale and hence, there is no necessity for them to pray for setting aside the sale. He further contended that the Appellants also filed application in M.P. No. 1 of 2011 seeking permission of this Court to amend the plaint to include the relief of declaration that the sale deed Ex.B2 is not binding on the Appellants and therefore, that application may be allowed and the Appellants may be permitted to include the relief of declaration.

6. Mr. M.S. Subramanian, Learned Counsel for Respondents 1 to 3 submitted that the lower appellate court rightly distinguished the judgment reported in AIR 2002 215 (SC) and held that when any alienation is made by the natural guardian, Section 8 of the Hindu Minority and Guardianship Act, 1956 will apply and the sale is only voidable and not void and unless the sale is set aside, the Appellants cannot claim any relief in respect of the property and without a prayer for setting aside the sale, the suit is not maintainable and therefore, the lower appellate court has rightly allowed the appeal and dismissed the suit. He further submitted that the application filed by the Appellants in M.P. No. 1 of 2011 isn't maintainable at this stage and admittedly, the suit was filed in the year 2004 and they were aware of the proceedings pending in court and the first Appellant can represent Appellants 2 and 3 and therefore, the present application cannot be entertained at this stage after the disposal of the first appeal.

7. As rightly pointed out by the Learned Counsel for the Respondents and held by the lower appellate court, in this case, the sale was effected by the first

Defendant, the father on behalf of the minor children and sold the property to the second Defendant. Therefore, as per Section 8 of the Hindu Minority and Guardianship Act, the sale by the father is not a void one and it is only avoidable one at the option of the minor and therefore, in the absence of any prayer for declaration that the sale isn't binding or to set aside the sale made by the father, the suit for partition in respect of that property can not be maintained. Admittedly, the Appellants are parties to the sale deed Ex.B2 and therefore, they are bound by the said document and in the absence of any prayer for setting aside the sale and for declaration, the suit for partition is not maintainable and therefore, substantial questions of law 1 and 2 are answered against the Appellant.

8. The application in M.P. No. 1 of 2011 cannot be entertained at this stage as admittedly, the third appellant attained majority in the year 2007 and he would have represented the interest of the second Appellant and filed the application within three years from the date of attaining majority. Further, the first Appellant was a major when the suit was filed. Considering all the aspects, the permission now sought for, for amending the prayer cannot be entertained and hence, M.P. No. 1 of 2011 is dismissed.

9. In the result, the second appeal is dismissed and the judgment and decree of the lower appellate court is confirmed. No costs. The connected pending miscellaneous petitions are also dismissed.