

Thirumalayandi thevar Vs. Uthanda thevar

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Court : Chennai

Decided On : Mar-27-1946

Reported in : AIR1947Mad415; (1947)1MLJ212

Appellant : Thirumalayandi thevar

Respondent : Uthanda thevar

Judgement :

Yahya Ali, J.

1. This revision petition raises the question of court-fee payable on the plaint brought by the petitioner herein in O.S. No. 60 of 1945 in the District Munsiff's Court, Tenkasi. The learned District Munsiff held that the relief prayed for by the plaintiff fell in substance under Section 7(iv-A) of the Court-Fees Act and that consequently court-fee should be paid on the actual market-value of the properties affected by the sale deed dated 16th December, 1942, in respect of which a declaration was asked for in the plaint. The petitioner's contention is that in view of the position taken by him that the said sale deed was a sham and nominal transaction and hence inoperative, the provisions of Section 7(iv-A) of the Court-Fees Act were not attracted. The question is which view is correct.

2. One Thirumalayandi Thevar was the owner of the plaint mentioned properties. He had two daughters Sundarathammal and Achi Ammal. The former had two sons, the plaintiff and his younger brother Vellaiyappa Thevar. The latter had one

daughter Ramayee alias Ramathal. After the death of Thirumalayandi Thevar (senior), the property passed to the daughters and for the purpose of convenient enjoyment they seem to have divided it into two shares and enjoyed each her share separately. On the 13th May, 1940, Ramathal the daughter of Achi Ammal who was in possession of her mother's share executed a deed of settlement in favour of three persons. Vellaiyappa. Thevar filed O.S. No. 6 of 1941, Sub-Court, Tinnevely, to set aside the aforesaid deed of settlement executed by Ramathal as being invalid and inoperative. While that suit was under contemplation, a document of transfer was taken from the plaintiff of his half share in the properties which were in the possession of Achi Ammal's daughter. This transfer was found to be inoperative being a transfer of mere spes successionis and eventually a decree was passed in O.S. No. 6 of 1941 in favour of both the plaintiff therein Vellaiyappa Thevar and his elder brother the plaintiff in the present case. In this state of affairs, another transfer was executed by the plaintiff on 16th December, 1942, for Rs. 1,000 in favour of the defendant in the present action conveying to the latter the plaintiff's interest in the said property, i.e., the share that was being enjoyed by Ramathal. It is to avoid that sale and to obtain a declaration that the same was sham and nominal and never intended to be acted upon and not valid in law that the present suit was instituted by the plaintiff. In paragraph 8 of the plaint it is urged that he executed the sale deed and had it registered, that he received no consideration whatever for the sale deed and that it was only a sham and nominal transaction. He explains that because the first sale dated 16th May, 1940, was executed for Rs. 1,000 the latter transfer of 16th December, 1942, was also executed for the same amount. Although the document recites that cash consideration was paid, the recital is not true and was made only for the sake of formality. It is further averred that the plaintiff did not receive from the defendant Rs. 600 for the expenses of O.S. No. 6 of 1941 or any amount for family expenses or for making jewels. He remained ex parte in the prior suit. In paragraph 9, again, it is said that the sale deed was not executed with the idea that it should be operative and take effect and that the defendant has not acquired any interest in the suit property through the said document. The following passage in that paragraph is significant:

At the time of sale deed the properties were not in the possession of the plaintiff. Up to this date he has not got possession. The defendant had also no possession till the filing of the plaint.

3. In paragraph 11 the plaintiff states that the defendant was making terrible attempts for the past one month to establish his interest in the suit properties and then adds:

If the sale deed executed by the plaintiff were allowed to remain with the defendant the plaintiff apprehends much injury.

Paragraph 11-A which seems to have been subsequently added says as follows:

As the defendant had obtained delivery of possession of the properties through the Sub-Court, Tinnevely the plaintiff has to get delivery of the said properties as a consequential relief. Though, in fact, the defendant had not obtained delivery of possession of the properties, yet as the records show that possession (symbolical possession) had been delivered to the defendant, the plaintiff in order to avoid unnecessary litigation in future has included that prayer.

Paragraph 12 says that the cause of action arose on 16th December, 1942, the date of the execution of the sale deed and November, 1944, when the defendant claimed interest in the suit property. The prayer is couched in these words in paragraph 15:

Therefore it is prayed that the Court may be pleased(a) to declare the sale deed as regards the undermentioned properties executed on 16th December, 1942, by the plaintiff in favour of the defendant is a banami one, that it was a sham and nominal transaction, that it was never intended to be acted upon and that it is not valid in law,

(b) to direct delivery of possession of the properties from the defendant to the plaintiff as a consequential relief,

(c) to decree that the costs of the suit may be paid by the defendant, and

(d) for such other reliefs.

4. The main contention of Mr. A. Swaminatha Ayyar for the petitioner is that the prayer for declaration with reference to the sale deed dated, 16th December 1942, is superfluous and unnecessary-and hence it is not essential for the plaintiff to get the sale deed cancelled or set aside for obtaining the relief regarding possession of the properties. The learned Government Pleader urged that in the plaint as framed, the main relief that is required is the declaration touching the sale in question and possession is asked for merely by way of caution and as an incidental or consequential relief. Numerous decisions have been cited on both sides. In view however of the existence in this case of two features in combination which appear to me to decisively negative the petitioner's contention, it may not be necessary to deal exhaustively with the long series of cases cited at the Bar. Those features are (1) that the plaintiff himself was a party to the sale deed which he now impugns as being sham, nominal and inoperative and (2) that he has expressly and specifically asked in the plaint for a declaration that the said deed of sale is for the reasons mentioned by him not valid in law. In none of the cases brought to my notice I find that both these features were together present. On that ground alone it will be sufficient to hold that this case is distinguishable from the various decisions relied upon by the petitioner.

Section 7(iv-A) of the Madras Court-Fees Act is as follows:

In a suit for cancellation of a decree for money or other property having a money value, or other document securing money or other property having such value, according to the value of the subject-matter of the suit and such value shall be deemed to be-

If the whole decree or other document is sought to be cancelled, the amount or value of the property for which the decree was passed or the other document executed.

If a part of the decree or other document is sought to be cancelled, such part of the amount or value of the property.

5. Article 91 of the Limitation Act provides a period of three years for suits for the cancellation or setting aside of an instrument not otherwise provided for, commencing from the date when the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him.

6. Section 39 of the Specific Relief Act also deals with the cancellation of documents and runs thus:

Any person against whom a written instrument is void or voidable, who was reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it adjudged void or voidable; and the Court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.

It is evidently having the language of this provision in view that the plaintiff stated in paragraph 11 of his plaint, as already mentioned, that if the sale deed executed by the plaintiff was allowed to remain with the defendant, the plaintiff apprehended much injury. It may be further noticed that Section 39 of the Specific Relief Act covers both void and voidable documents and as contended by the learned Government Pleader Section 7(iv-A) of the Court-Fees Act is not by its language confined to cancellation of voidable documents only. Even a plaint asking for cancellation of a document which is void ab initio for the reason that it is benami or sham or nominal would fall within the ambit of Section 7(iv-A). It is for this reason that the learned advocate for the petitioner argued that even if he has asked expressly for the setting aside or cancellation of a document of this nature, such relief being really unnecessary and superfluous according to the various decisions on which he relied, the particular relief should be altogether ignored for court-fee purposes and the plaint should be stamped according to the valuation of the main relief sought by him apart from the relief concerning the nature of the document,

7. In *Bijoy Gopal Muherji v. Krishna Mahishi Debi* (1907) 17 M.L.J. 154 : L.R. 34 IndAp 87 : I.L.R. 34 Cal. 320 (P.C) which was a suit by Hindu reversioners impeaching certain alienations made by the widow, the plaintiffs had specifically asked for a declaration that the ijara in dispute had become inoperative after a certain point of time and asked for possession on that basis. The question that arose before the Privy Council was whether upon such averments the period of

limitation that applied was the one provided under Article 91 of Schedule I of the Limitation Act or the usual 12 years period provided by Article 141. It was held that it was unnecessary to ask for a declaration that the ijara was inoperative. This was in the view that a Hindu widow is not a tenant for life but the owner of her husband's property subject to certain restrictions as to alienation and subject to its devolving upon her husband's heirs upon her death. She is competent to alienate it subject to certain conditions although it is voidable at the election of the reversionary heir. A reversionary heir may either affirm it or treat it as a nullity without the intervention of any Court and if he has manifested his election by the overt act of commencing an action to recover possession of the property, there is no call upon the Court to cancel or set aside the alienation as a condition precedent to the right of action of the reversionary heir awarded to him under the personal law and it is open to him to ignore the alienation and sue straightaway for the recovery of the property. Their Lordships however stated this:

It, is true that the appellants prayed by their plaint a declaration that the ijara was inoperative as against them, as leading up to their prayer for delivery to them of the possession. But it was not necessary for them to do so, and they might have merely claimed possession, leaving it to the defendants to plead and (if they could) prove the circumstances, which they relied on, for showing that the ijara or any derivative dealings with the property were not in fact voidable, but were binding on the reversionary heirs.

8. Eventually their Lordships held that the Article that was applicable was 141 and not 91.

9. In *Pethaperumal Chetty v. Muniyandi Servai* (1908) 18 M.L.J. 277 : L.R. 35 IndAp 98 : I.L.R. 35 Cal. 551 (P.C) again the question arose before the Judicial Committee whether Article 91 was the appropriate provision to apply or Article 141. The instrument in that case was alleged to have been brought into existence to defeat and defraud a creditor, and being benami was said to be inoperative in effect. The suit was to recover possession and there was no prayer for a declaration that the document was inoperative. The only objection raised was that as a preliminary to the relief for possession, the plaintiff had to set aside or cancel

the document and that the suit would be barred under Article 91. It was held that it was unnecessary for the plaintiff to have it set aside as a preliminary to the obtaining of the relief that he claimed, since the deed had been held by the Courts in India as being inoperative and ineffective which finding their Lordships accepted as binding upon them. With reference to both these decisions, the point of distinction that is noticeable is that in both, the plaintiff was not a party to the impugned document and in *Pethaperumal Chetty v. Muniyandi Servai* (1908) 18 M.L.J. 277 : L.R. 35 IndAp 98 : I.L.R. 35 Cal. 551 (P.C) there was no declaration asked for that the document was inoperative. The document was merely ignored and possession was claimed. It must however be mentioned that although in *Pethaperumal Chetty v. Muniyandi Servai* (1908) 18 M.L.J. 277 : L.R. 35 IndAp 98 : I.L.R. 35 Cal. 551 (P.C) the plaintiff was not a party to the document that was questioned, he claimed that his brother was a party to the same.

10. In *Sangawa v. Huchan gowda* I.L.R. (1923) Bom. 166, which was a suit to recover possession of lands, a sale by the plaintiff's husband was impugned as a paper transaction not intended to be operative having been vitiated by misrepresentation and fraud. It was found that the sale that was attacked was an inoperative transaction and it did not require to be set aside before granting to the plaintiff the relief of possession. It was also held that Article 144 applied to the case. In this case also it has to be noticed that the plaintiff was not a party to the document sought to be set aside and there was no declaration asked for concerning the inoperative nature of the sale deed.

11. In *Krishnaswami Aiyangar v. Kuppu Ammal* : AIR1929 Mad478 decided by Curgenven, J., the relief claimed was a declaration of the plaintiff's title to certain property and an injunction to restrain the defendants from interfering with his possession. A settlement deed that had been executed by the plaintiff's maternal grandfather in favour of the grand-daughters was impugned as a mere fictitious or sham transaction contrived as a defence against a maintenance claim and no property was intended to pass thereunder. The learned Judge held that the plaintiff was not in those circumstances obliged to have the settlement set aside before becoming entitled to the other reliefs and that the appropriate provision of the Court-Fees Act to be applied was Section 7(iv)(c). Reference was made in this

judgment *inter alia* to *Unni v. Kunchi Amma* I.L.R. (1890) Mad. 26 relating to recovery of property alienated by the karnavan of a Malabar tarwad and to the Privy Council decision in *Pethaperumal Chetty v. Muniyandi Servai* (1908) 18 M.L.J. 277 : L.R. 35 IndAp 98 : I.L.R. 35 Cal. 551 (P.C.). already referred to and the latter was held to conclude the question. The decisions in *Sangawa v. Huchan gowda* I.L.R. (1923) Bom. 166 and *Swaminatha Ayyar v. Rukmini Ammal* (1919) 55 I.C. 766 were also adverted to. The decision largely turned upon the question whether there was a real or actual transfer however voidable. If there was no real transfer but it was only a fictitious arrangement, it was not necessary to set it aside. If however the transfer was merely voidable, the learned Judge would have thought it necessary to get it set aside before giving any further relief. With regard to this case also it must be observed that the plaintiff was not a party to the transfer and there was no declaration asked for to set aside the deed that was questioned. All that was prayed for was a declaration of title to the property in suit.

12. In *Kattiya Pillai v. Ramaswamia Pillai* (1929) 56 M.L.J. 304 there was a will executed by the plaintiff's father in favour of the plaintiff's brothers, defendants 1 and 2. The plaintiff sued expressly for a declaration that the will was a forgery and for its cancellation and also for the cancellation of the registration of the will by the Sub-Registrar. He alleged that he and another brother the third defendant were in actual possession of the property. Venkatasubba Rao, J., referred to Section 39 of the Specific Relief Act and pointed out that that provision did not contemplate that the plaintiff should himself ask for the cancellation and delivering up of the instrument and that it would be sufficient if the plaintiff asked that it should be adjudged void or voidable. He said that it was the function of the Court to order that it should be delivered up and cancelled and, if it was registered, to send a copy of its decree to the Registrar who should note on the copy of the instrument contained in his books the fact of its cancellation. In this view the learned Judge held that the prayer relating to cancellation was unnecessary and superfluous and that it was not obligatory on the plaintiff to have the will set aside, that therefore Article 91 did not apply but the ordinary 12 years period governed the case. With regard to the court-fees payable, it was found that Article 17-A(1) of the Court-Fees Act was applicable and not Section 7(iv)(c). Thus it would be seen that the suit was treated virtually as a suit for a declaration alone where no consequential

relief was prayed and not a suit for a declaratory decree where consequential relief was required. The second point of distinction is that in this case also the document that was in dispute was not executed by the plaintiff.

13. The next case that I would refer to is the decision of Wadsworth, J., in *Vellayya v. Ramaswami* : AIR1939 Mad894 That was a suit by a creditor under Section 53 of the Transfer of Property Act for a declaration that an alienation made by the debtor was void against the creditors and the question was whether it was a suit for cancellation of a document under Section 7(iv-A) of the Court-Fees Act or a suit where no consequential relief was prayed falling under Article 17-A. It was held that the case fell under Article 17-A. The learned Judge was at pains to point out that in cases under Section 53 of the Transfer of Property Act, the relief asked for is a declaration that the sale is not binding upon the creditors to the extent of their debts and not a prayer for the cancellation of the instrument of alienation, because not being a party thereto, the plaintiff cannot ask for its being cancelled. This aspect was effectively brought out in a clear distinction that the learned Judge drew between the two sets of cases. The first set is one where the plaintiff seeks to establish a title in himself and cannot establish that title without removing an insuperable obstruction such as a decree to which he has been a party or a deed to which he has been a party and the second set of cases is where the plaintiff is seeking to establish a title and finds himself threatened by a decree or a transaction between third parties, and he is not in a position to get that decree or that deed cancelled in Mo. It was pointed out that in the former class of cases he must get a declaration that the decree is void in toto and whatever actual relief may be that he asked for, his suit is in substance a suit for the cancellation of the decree or deed even though it is framed as a suit for a declaration. In the latter category of cases, the proper remedy would be in order to clear the way to establish his title to get a declaration that the decree or deed is invalid so far as he himself is concerned and he must therefore sue for such a declaration and not for the cancellation of the decree or deed. This distinction, it was pointed out, was made clear in *Unni v. Kunchi Amma* (1890) I.L.R. 14 Mad. 26 and in *Chathu Kutty Nair v. Chathu Kutly Nair* (1923) 19 L.W. 249. In that case and *Vellayya v. Ramasmami* : AIR1939 Mad894 also neither was the plaintiff a party to the impugned document nor was a declaration or cancellation of the said document

asked for.

14. Next is the Full Bench decision of this Court in *Ramaswami Aiyangar v. Ranga-chariar* : AIR1940 Mad118 . That was a suit for partition by an undivided member of a joint Hindu family inter alia questioning the alienation made by the father; there was no prayer for declaration or cancellation of the instruments, the prayer asked for being an account of the moveable and immoveable joint family properties and partition by metes and bounds of the plaintiff's one-fifth share. The main question there was whether Article 17-B of the Court-Fees Act applied or Section 7(v) or 7(iv)(b). With regard to certain decrees passed against the plaintiff in suits in which he had been eo nomine impleaded as a party, however, it was held that the fee prescribed under Section 7(iv-A) would have to be paid, that such decrees were binding on him until set aside, and that therefore he cannot seek to obtain a decision on the footing that his interest in the joint family property is not affected by them. It was further observed that the plaintiff must be held to have impliedly asked for a cancellation of the decrees passed against him and must accordingly stamp his plaint ad valorem on the amount of the decrees and not merely on his share fraction, as his liability is for the full amount, though necessarily limited to the extent of his share in the joint family assets. There were certain other deeds to which he appears to have been made a party by his father and with regard to them the Full Bench held by a majority:

that the plaintiff could not be required to pay separate court-fee as regards any of them even though he had impleaded the several creditors or alienees and even if the plaint had contained prayers for declarations or cancellations' in respect of the said transactions.

The last mentioned dictum was based on the observations of the Privy Council in *Bijoy Gopal Mukerji v. Krishna Mahishi Debi* (1907) 17 M.L.J. 154 : L.R. 34 IndAp 87 : I.L.R. 34 Cal. 329 (P.C.) which I have already adverted to in brief in the earlier portion of this judgment. After setting out the relevant passage, the learned Chief Justice said:

In such cases even if the plaint contains a prayer for a declaration or cancellation, there is good reason for holding it to be one for a purely incidental, but

unnecessary relief. As I have indicated there is no such prayer in the plaint and in the light of the principles explained there is no justification for implying them and then demanding a fee for it.

From the last quotation it is clear that no prayer was contained in the plaint for a declaration or cancellation with regard to the alienations to which the plaintiff was a party, and that the decision on this point rested on the consideration that under the substantive law by which the plaintiff was governed, he was not bound to sue for a declaration or cancellation in respect of any of those transactions. Reliance was placed by the Full Bench on *Unni v. Kunchi Amma* I.L.R. (1890) Mad. 26 where the following words, which were taken from an unreported decision of this Court occur:

If a person not having authority to execute a deed or having such authority under certain circumstances which did not exist, executes a deed, it is not necessary for persons who are not bound by it, to sue to set it aside, for it cannot be used against them. They may treat it as non-existent and sue for their right as if it did not exist.

Adinarayana v. Rattammal (1944) 1 M.L.J. 497, decided by Horwill, J., was a case where the transaction was impugned as sham, nominal and inoperative and of no legal effect. It was alleged to have been executed nominally for the purpose of screening the donor's property from his creditors. The donor was subsequently dispossessed of this property and he sued for a declaration that in spite of the gift deed executed by him in favour of his first wife, he was still the owner and was entitled to a decree for possession. The question was whether it was a suit for a declaration and consequential relief or in substance a suit for the cancellation of the gift deed. The learned Judge held that Section 7(iv-A) did not apply and that it was a suit where a declaration was asked for with a consequential relief. Here, though the plaintiff was a party to the questioned document, he did not specifically ask it to be declared that the document was sham or nominal and of no effect against him. He asked for a declaration of his title to the property and for possession. The learned Judge examined a number of cases that were cited before him, most of which have already been adverted to in this judgment.

Referring to a decision in *Singarappa v. Talari Sanjivappa* (1904) 15 M.L.J. 228 : I.L.R. 28 Mad. 9 which was relied upon by the Government Pleader, the learned Judge remarked:

There, the deed with which the learned Judges were concerned, was alleged to be a sham sale deed in favour of the defendants; and the question was one of limitation. The learned Judges held that the suit had to be brought within three years from the date when the plaintiff apprehended that the defendants had set up title under the instrument; but that was a case in which the plaintiff specifically asked to have the deed cancelled; and the learned Judges did not. consider whether it was necessary for the plaintiff to pray for the cancellation of the document. Moreover, the matter did not arise, because the suit was held to be within time. If a plaintiff sues for a declaration, he would have to pay court-fees under Section 1 {iv-A) of the Court-Fees Act, whether it was necessary to have the deed cancelled or not.

The last sentence italicized by me very clearly indicates that even apart from the question whether the particular relief is necessary or not, it is open to a party even to seek unnecessary reliefs; and if he has chosen to ask for a particular declaration touching the validity and binding nature of a document, he will have to pay court-fees under Section 7(iv-A). This is as stated in *Unni v. Kunchi Amma* I.L.R. (1890) Mad. 26.on the principle of removing a cloud on the plaintiff's title and preventing further litigation. Horwill, J., referred to the decision of Wadsworth, J., in *Vellayya v. Ramaswami* : AIR1939 Mad894 and the distinction that he drew between the two classes of cases that have been already set out by me. With reference to the two categories of cases, the learned Judge pointed out that although the statement of the law as stated by. Wadsworth, J., was correct in all cases of decrees and with regard to voidable deeds, there is an exception to the general rule with regard to deeds which are intended to be inoperative and with reference to such documents unless the plaintiff expressly sued for a declaration even though he was a party to it, it was open to him to ignore the same and seek substantive relief against the property itself.

15. Lastly reference was made to a decision of mine in Ramanujam Pillai v. Ramaswami Pillai : AIR1946 Mad181 where I followed the decision of Horwill, J. In that case the plaintiff was not a party to the impugned document and no declaration was asked for concerning the document. That arose out of a suit by a mortgagee who contended that certain prior transactions between the defendant and third parties were nominal and never intended to be given effect to and were not binding on the mortgagee-plaintiff.

16. As I have already stated, in none of the cases referred to above was it held that where as in the present case the plaintiff himself was a party to a deed and where he specifically prayed in the plaint for a declaration that the deed in question was a benami one and that it was sham and nominal and was not valid in law, the plaint could be treated as merely for possession of the property, the relief asked touching the document being altogether ignored for court-fee purposes. The plaintiff's case as set out in the plaint is that it is essential to get rid of the document as if the sale deed should be allowed to stand, much injury would result to him. He also states that up to the date of the suit the properties were not in the plaintiff's possession nor were they in the defendant's possession. He further states that he has asked for possession more or less as a matter of formality since the defendant has obtained symbolical possession of the property through the Court. He definitely states that he claims possession as a consequential relief although the defendant has not obtained actual possession of the properties; in fact the very cause of action is based upon the execution of the deed and the only substantial relief that is asked for is that the obstruction caused by his sale deed dated 16th December, 1942, should be removed from his way. Far from treating the prayer for declaration as a mere unnecessary or superfluous prayer or as a surplusage, the plaint shows that that is in substance as well as in effect the main if not virtually the sole relief that he wants the Court to grant. I agree with the conclusion of the learned District Munsiff that Section 7(iv-A) governs the case and that court-fee should be paid on the actual market value of the property affected by the sale deed dated 16th December, 1942.

17. The civil revision petition is dismissed with costs (one set).

