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Devendran and Two Others Vs. Munuswamy Reddiar (Died) and Nine Others

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SooperKanoon Citation : sooperkanoon.com/806565

Court : Chennai

Decided On : Jun-13-2000

Reported in : 2000(4)CTC728

Judge : K.P. Sivasubramaniam, J.

Acts : [Hindu Minority and Guardianship Act, 1956](#) -- Sections 8; [Limitation Act, 1963](#) -- Sections 7 -- Schedule -- Article 65; [Code of Civil Procedure \(CPC\), 1908](#) -- Orders 20, 32 -- Rules 3, 5, 12

Appeal No. : S.A. No. 882 of 1986

Appellant : Devendran and Two Others

Respondent : Munuswamy Reddiar (Died) and Nine Others

Advocate for Def. : Mr. R.G. Narendhiran and ;Mrs. Latha Maheswari, Adv.

Advocate for Pet/Ap. : Mrs. Pushpa Sathyanarayanan, Adv.

Judgement :

ORDER

1. This second appeal is directed against the judgment of the learned Subordinate Judge, Vellore, in A.S.No.93 of 1984 reversing the judgment of the learned District Munsif, Vellore, in O.S.No.1189 of 1981. Plaintiffs in the suit are the appellants in the above second appeal.

2. The suit was filed for cancelling a registered sale deed dated 30.5.1968 so far as it relates to the right, title, interest of the plaintiffs, to direct division of the suit properties into six equal shares and allot three such shares to the plaintiffs for appointing a Commissioner to divide the property and for the enquiry into the mesne profits under Order 20, Rule 12, C.P.C. According to the plaintiff, the schedule mentioned property originally belonged to Venugopal Reddiar, father of the plaintiffs who died intestate in the year 1966 leaving behind his widow, mother of the plaintiff, Loganathan, brother of the plaintiffs, Vasantha - sister of the plaintiffs and the plaintiffs as his heirs at law who had inherited the property. The plaintiffs and the said Loganathan, Vasantha and their mother Thanjammal are equally entitled to the plaint schedule property as co-owners. The plaintiffs are entitled to 3/6th shares in the plaint schedule property. The defendant is the maternal uncle of the plaintiffs and he had obtained a sale deed surreptitiously without informing the purport and import of the sale deed dated 30.5.1968 in respect of the suit property for a recited consideration of Rs.6,000 from the plaintiff's mother, Thanjammal as their guardian by sharp practice and deception, abusing his position and relationship. The said sale deed is a fraudulent one and not binding on the plaintiffs. Hence, mother had no power to convey and the said sale deed is a fraudulent one and not binding on the plaintiffs. Hence, mother had no power to convey the interest of the plaintiffs in any event. The property was worth more than Rs.15,000 even on the date of the sale and the property had been sold for ludicrously low amount. The defendant was bound to render income from the said property to the plaintiffs and to pay their share of income. The plaintiffs issued lawyer's notice on 6.12.1980 calling upon the defendant to surrender the share of the plaintiffs. The defendant sent a reply on 10.12.1980 containing false and frivolous allegations. The father of the plaintiffs never left any debts and the recitals contained in the sale deed are not binding on the plaintiffs. Hence, the plaintiffs were obliged to pray for cancellation of the said registration of the sale deed.

3. The defendant filed three written statements. In the first written statement, he contended that he had helped the family of the plaintiffs and other sharers by coming to their rescue and purchased the property for their family necessity and their benefit and the sale in his favour was valid and for valuable consideration.

The plaintiffs ought to have impleaded the vendor of the defendant. The sale deed executed by the Thanjammal for herself and on behalf of her minor children was true and binding on the plaintiffs. The father of the plaintiffs left behind considerable debt at the time of his death. After his death, various creditors got their promissory notes executed in their favour. The widow Thanjammal mortgaged the property to Kandhamal for the sake of maintaining her children and various creditors were requested for the return of the promissory notes. The defendant was afraid that all the lands and house properties may be brought to sale in execution and she offered the defendant to sell the property. The value of the property purchased by the defendant was very much low and considering the plight of the family, the defendant agreed to buy the property for Rs.6,000 and it was false to allege that the property was worth more than Rs.15,000. The defendant discharged the mortgage debt of Kanthammal besides the promissory debts of Srinivasa Reddiar, Govindasamy Mandiri and others. All these debts were contracted for family necessities and for the welfare of the minors. Ever since the purchase, the defendant was in exclusive and continuous possession of the property investing heavy amounts and had effected lot of improvements. He had also dug the well and got electricity service connection. Suit has been filed at the instigation of the evil advisers.

4. In the first additional written statement, the defendant contended that the other sharers who are necessary parties to the suit should have been impleaded as parties and therefore, the suit was bad for non-joinder of necessary parties. The defendant had also perfected his title by adverse possession and the suit was hopelessly barred by limitation.

5. In the second additional written statement the defendant contended that the deceased Venugopal Reddiar owned certain other properties which were now in the possession and enjoyment of the plaintiffs and their brother, sister and mother who were had not parties to the suit. The plaintiffs' elder brother Loganathan was in management of the entire property from the date of his attaining majority on behalf of others. The other properties were more than sufficient to meet the claims of the plaintiffs and that the suit properties are included and if the other sharers are impleaded, the valuable right of equity in favour of the defendant can be worked

out in this suit. Even if the plaintiffs are able to succeed in respect of their shares, the defendant shall be allowed to retain the property in equity and no prejudice will be caused to the plaintiffs by the defendant being allowed to retain the property sold to him. He is not liable to render any account to the plaintiffs.

6. The trial Court held that the contention that the sale in favour of the defendant was to meet his family expenses cannot be accepted. The trial Court accepted the contention of the plaintiffs that they were maintained by their grandmother and not by their mother Thanjammal. It was further held that Thanjammal was only a member of the family not kartha of the family and not entitled to convey the property on behalf of the minors. It was further held that the sale had not been effected on 30.5.1968. Under Article 65 a period of 12 years was permissible to file the suit which came to an end only on 30.5.1980 and the suit having been filed on 14.4.1981 within three years after the attainment of majority, the suit was not barred by limitation. The appellate Court however, held that the suit was a collusive and speculative one filed by the plaintiffs at the instigation of their mother and P.W.1 and that there was no material to come to the conclusion that the suit sale was not supported by consideration. However, the appellate Court held that the suit property being joint family property, the mother had no authority as a guardian to alienate the property and hence the sale deed was void ab initio and will not bind the plaintiffs. As regards the limitation, the appellate Court held that P.W.2, the elder brother of the first plaintiff having attained majority in the year 1973 itself and he being the manager of the joint family, did not choose to file the suit in the year 1973 or subsequently. As far as the other younger brother, the first plaintiff was concerned, he having attained majority only on 1.6.1982, the suit having been filed on 14.4.1981 itself was not valid. Hence, the appellate Court held that since the elder brother could not have filed the suit in the year 1981, the suit now filed would be hit by limitation. The appellate Court also held that in view of not including the other properties belonging to the family, the suit was also bad for partial partition. With the result, the appeal was allowed and the suit was dismissed. Hence, the second appeal.

7. Learned counsel for the appellants contends that some of the findings rendered by the appellate Court were not consistent with the basic principles relating to the

rights of the minors and the law of partition. On facts also, the finding that there was no material to hold that the sale was not supported by consideration was opposed to the evidence on record. Even according to the appellate Court the sale by the mother was not enforceable and hence the judgment of the trial Court should have been confirmed. She would further submit that the principle relied upon by the appellate Court with reference to a judgment reported in *Subramanyam v. Venkatraman*, : AIR1972 Mad3 to hold that the eldest brother in the family having failed to file the suit within the period of limitation, after time -limit under Article 65 of the Limitation Act, would apply only to joint family property and not separate property and therefore, reliance placed on the said judgment was erroneous. As regards the minor having filed the suit without being properly represented, learned counsel contends that the suit does not become void only on that account. As at present, he had attained majority and hence the defect if any had been removed. It is further contended that the objections not having been taken at the earliest, it has to be held that the objection had been waived.

8. Learned counsel for the respondent however, seeks to support the judgment of the appellate Court by referring to the fact that the appellate Court has rendered a categorical finding that the property was a joint family property and hence the contention of learned counsel as regards the question of limitation, the elder brother not having filed the suit in time, has no basis at all. A perusal of Ex.A.1 clearly brings out the circumstances under which the property was sold and the existence of the legal necessity. He would also rely on the observation of the Division Bench of the Calcutta High Court reported in *Biswanath Charit v. Damodar Patra*, : AIR1982 Cal199 . Reference is made to the observation that it was competent for the guardian to enter into and execute an agreement for the benefit of the minors and such an agreement would not be void.

9. I have considered the mutual submissions with care and caution from the angle that the Court is the ultimate guardian of the interest of all the minors. The fact that the alienee/defendant is none other than the maternal uncle of the plaintiffs, adds to the said responsibility. The appellate Court in coming to the conclusion that there was no evidence to come to the conclusion that the suit sale deed was not supported by proper consideration appears to have been carried away by his

perception that there was collusion between the plaintiffs and their mother. The proper approach in this type of a case is to find out the legality and the circumstances under which the alienation had taken place. The appellate Court itself having found that the alienation effected by the mother was not legally valid, ought to have examined the evidence in detail as regards the consideration alleged to have been paid for the purchase of the property. As against the meticulous and very detailed examination of the evidence by the trial Court, the appellate Court has not at all devoted proper discussion as regards the proof of the recitals under Ex.A.1.

10. Three items of debts said to have been incurred by the family amounting to a total sum of Rs.3,850 have been recited in Ex.A.1 as having been the compelling circumstances behind the selling of the property and the defendant having allegedly undertaken to discharge the said loans. The said amount was due to Kanthammal, Srinivasa Reddy and Govindasamy Mandiri on different transactions. From the very nature of the disputed contentions between the parties, it is needless to emphasize that the burden of proof to substantiate the recitals in Ex.A.1 is very heavy on the defendant. The following features would reveal that not only the burden has not been properly discharged, but also there are certain features of evidence go very much against the case of the defendant:

(a) The recital in Ex.A.1 which is dated 30.5.1968 is clearly to the effect that the purchaser had only undertaken to discharge the loans namely, to be discharged in future. A perusal of the following extract under Ex.A.1 (Ex.B.3 original) is relevant:

But a perusal of Ex.B.1 which is alleged to be the discharge, endorsement of the loan due to Govindasamy Mandiri is dated 10.5.1968 which is 20 days prior to the execution of Ex.B.1.

(b) Ex.B.2 which is alleged to be the promissory note executed in favour of Srinivasa Reddiar does not contain any discharge endorsement. This is admitted by R.W.1 himself in his evidence.

(c) As regards the alleged loan due to Kanthammal no document had at all been filed either showing the date or any endorsement of discharge. P.W.1 would state

that he has handed over the document to Thanjammal.

(d) The above features clearly establish that the evidence adduced by the defendant is inconsistent with his own pleadings and do not in any manner establish even the existence of the debt alleged to have been left behind by the father of the plaintiffs. Though two witnesses are alleged to have signed Ex.B.1, promissory note, none of them had deposed as a witness. As far as cancellation endorsement is concerned, the defendant had signed only as a witness and there is no mention of the amount having been paid by him. As regards the other two debts, admittedly, no evidence is produced proving discharge and with reference to the loan due to Kanthammal neither the promissory note nor the evidence of discharge had been filed. If the defendant had handed over the suit promissory note to Thanjammal, there is no explanation as to how the other two promissory notes, Exs.B.1 and B.2 were available with him. The whole episode discloses that the defendant being brother of Than-jammal, had somehow managed to get possession of the other promissory notes and had filed them in evidence. As stated earlier, there is absolutely no proof of discharge of two of the three alleged loans.

(e) A perusal of the recital in Ex.B.2 shows that it is a promissory note executed by both Thanjammal and the defendant for the purpose of purchasing a property. There is no mention of any amount due towards discharging the loan due to Srinivasa Reddiar by the plaintiffs' father. No witness has been examined as regards the execution of Ex.R.2 also.

(f) Less said about the evidence of R.W.1, Govindasamy Mandiri, is the better. The promissory note allegedly executed by the plaintiffs' father had not been filed in evidence. While in the evidence he has stated that Ex.B.1 was executed because the plaintiffs' father had not discharged the debt due under an earlier promissory note, the recitals in Ex.B.1 are to the effect that the amounts are received by Thanjammal for family expenses. In the cross-examination, he has admitted that he cannot say whether the thumb impression in Ex.B.1 was that of Thanjammal. He cannot say who wrote Ex.B.1 and who signed as a witness. He cannot say when the promissory note was discharged. He has also admitted that

he does not know about Venugopal's family, father of the plaintiffs.

11. Such is the quality of the evidence on the side of the defendant as regards proof of the alleged recitals in Ex.A.1 in spite of serious challenge by the plaintiffs as regards the existence of any debt left behind by Venugopal. None of the witnesses of Ex.A.1 had also been examined even as regards the passing of consideration as well as the alleged payment of balance of sale consideration. Under the said circumstances, I am forced to hold that the finding of the appellate Court that the sale was supported by consideration is perverse and based on no evidence. There is absolutely no basis or overwhelming material for the appellate Court to have reversed the well considered judgment of the trial Court. I have examined the evidence independently by ignoring the reasons given by the trial Court as regards the passing of consideration and the approach of the appellate Court is deplorable in dealing with the transaction involving minors which was found to be legally invalid even according to the appellate Court.

12. Learned counsel for the respondents attempted to justify the transaction under Ex.A.1 and relied on a judgment of a Division Bench of Calcutta High Court in *Biswanath Charit v. Damodar Patra*, : AIR1982 Cal199 , by referring to the observation contained in paragraph 9 of the judgment to the effect that contracts can be entered into on behalf of a minor by his guardian for legal necessity. Learned counsel had ignored the ultimate conclusion of the Bench itself namely, that it was competent for the natural guardian to enter into and execute such an agreement and it will not be void but would be voidable, if it can be shown to be not for his benefit. The fact that the minor had filed the suit would show that he had chosen to question the transaction and the facts analysed above would show that there is absolutely no evidence of legal necessity, nor even the discharges as pleaded by the defendants and that the defendant had miserably failed to establish the recitals in Ex.A.1.

13. In *Dhanasekaran v. Manoranjithammal*, : AIR1992 Mad214 , a Division Bench of this court held that where sale was effected of the joint family property by the mother of the plaintiff when plaintiff was a minor, Section 8 of the Hindu Minority and Guardianship Act would operate and the said sale in favour of the plaintiff's

share will have to be set aside on the ground that proper permission of the Court was not obtained. It was further held that the interest of the surviving coparceners in the joint family property to be treated as a separate property and Section 8 of the said Act was applicable to such interest.

14. In *Govindaraju Padayachi, P. and another v. V. V. V.O. Malavaraya Nayanar and others*, 1997 (3) L.W 586, S.S. Subramani, J. held in a case of the maternal uncle who was making alienations of a minor's property, acting as minor's guardian and along with the mother, the learned Judge held that the transaction was void and was required to be set aside.

15. I have therefore, no hesitation to hold that Ex A.1 is not only liable to be set aside due to non compliance of Section 8 of the Hindu Minority and Guardianship Act, but also not supported by valid consideration.

16. Learned counsel for the appellant also sought to set aside the finding by the appellate Court on the question of limitation. The appellate Court held that the elder brother of the first plaintiff, Loganathan had attained majority long prior to the institution of the suit. The suit had been filed only three years after the elder brother attaining of majority and in terms of the judgment of the Division Bench of this Court in *Subramanyam v. Venkatraman*, : AIR1972 Mad3 , the suit was barred by limitation. She would contend that the judgment would apply only to cases of joint family properties and not separate properties. On the other hand, learned counsel for the respondents seeks to place strong reliance on the judgment of the Division Bench.

17. A perusal of the judgment of the Division Bench in *Subramanyam v. Venkatraman*, : AIR1972 Mad3 , shows that it was a decision rendered in the context of Section 7 of the Limitation Act and the Division Bench held that a suit to set aside the alienation filed more than three years after the attainment of majority by the elder brother who was the manager of the family would be barred by limitation under Section 7 of the Limitation Act, even though the suit was filed within three years of the attainment of the majority of the younger brother. Learned counsel for the appellant contends that the interest of the surviving coparceners in the joint family property should be treated as if a separate property. Reliance is

placed on the observation of the Division Bench in *Dhanasekaran v. Manoranjithammal*, : AIR1992 Mad214 mentioned above. The observation of the Division Bench in the said judgment was rendered in the context of Section 8 of the Minority and Guardianship Act and not in the context of Section 7 of the Limitation Act. I am unable to uphold the contention of the learned counsel for the appellants that the suit properties are not the joint family properties of the plaintiffs. Not only both the Courts have held that the properties were joint family properties, but the facts also clearly establish that the properties are joint family properties of the plaintiffs. However, I am not inclined to uphold the finding of the appellate Court in this context at least for two reasons.

18. It is true that the suit had been filed three years after Loganathan, the elder brother of the first plaintiff had attained majority. Firstly, the present suit is not a joint claim or a joint suit by the elder brother and the younger brother where the suit had been filed within three years after the attainment of majority by the younger brother. The following extract from the judgment in *Subramanyam v. Venkatraman*, : AIR1972 Mad3 , signifies that the suit was liable to be rejected only if it was filed jointly alongwith the elder brother whose claim was clearly time barred:.

'But the Full Bench held that the claim being a joint claim and the suit having been brought more than three years after the attainment of majority by the elder brother (who was the manager of the joint family, competent to give discharge), the claim was barred by limitation even in respect of the share of the younger brother who had not yet completed 21 years. The present suit is, therefore, barred.' (Italics supplied).

19. Secondly, Section 7 of the Limitation Act is not at all applicable for the present case. The relevant facts in the present case are that the mother of the plaintiff was very much alive at the time of filing of the suit. The positive evidence of P.W.1 is that after the death of their father, the minors werelooked after by their grandmother and grandmother had died only two years earlier. In fact, the trial Court on an analysis of the evidence also held that it was the grandmother who was looking after the family. The plaintiff had also positively alleged in his

evidence that Loganathan and Vasantha had no interest over the suit property since they had sold their shares of the property. In the cross-examination also he has clearly stated that he was living with his mother and sister. There is also no suggestion in the cross-examination disputing P.W.1's evidence that Loganathan has no subsisting interest. On the other hand, the defendant had chosen to adopt conflicting stands as to who was managing the property after the death of plaintiffs' father. In the original written statement as well as the first additional written statement, the defendant had not mentioned anything about Loganathan having been managing the property after the death of his father. It is only in the second additional written statement, he has stated that Loganathan was in management of the property. This is evidently an after thought. Such a stand had not been taken in the reply notice also. Strangely in the oral evidence, the defendant has not stated anything about Loganathan managing the property after the death of his father. In the chief-examination, he has stated that after Venugopal's death he was managing the family. In the cross-examination he has stated as follows:-

There is no further mention of Loganathan having taken over the management of the property after attaining majority.

20. Therefore, in contrast to the assertion by the plaintiffs that till two years prior to the suit they were under the care and management of their grandmother and that presently he was living with his mother and sister and that his elder brother Loganathan had no interest in the suit property, the stand of the defendant is not consistent. Except for having stated in the second additional written statement, that Loganathan was managing the property, his oral evidence is silent as regards Loganathan and is also inconsistent.

21. In this background Section 7 of the Limitation Act has to be examined. It is true that the eldest male member after attainment of majority may actually become or by a fiction acquire the status of a manager of the family. But the said legal inference alone is not sufficient and under Section 7, there must be proof of actual management of the joint family property by the eldest member. Section 7 of the Limitation Act is as follows:

'7. Disability of one of several persons. Where one of several persons jointly entitled to institute a suit or make an application for the execution of a decree is under any such disability, and a discharge can be given without the concurrence of such person, time will run against them all; but, where no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others or until the disability has ceased.

Explanation I - This section applies to a discharge from every kind of liability, including a liability in respect of any immovable property.

Explanation II - For the purpose of this section, the manager of a Hindu undivided family governed by the Mitakshara law shall be deemed to be capable of giving a discharge without the concurrence of the other members of the family only if he is in management of the joint family property.' (Italics supplied)

22. Explanation II is very clear to the effect that the manager shall be deemed to be capable of giving discharge only if he was in management of joint family property and not otherwise. In the present case, it is not necessary to repeat the facts already stated above and suffice it to say that as against the assertion by the plaintiff that his brother has no subsisting interest over the property and there being no evidence on the side of the defendant to show that Loganathan was in management of the property, it has to be held that Section 7 has no application to the facts of the present case.

23. Learned counsel for the respondents further contended that the suit was bad for partial partition and that all the properties have not been included for partition. It is settled proposition of law that such a plea is not open to alienee as against a non-alienating co-owner.

24. Learned counsel for the respondents also contended that the suit was filed by the minor without being properly represented by the competent person and that therefore, the appellate Court had rightly held that the suit was not maintainable. As regards the minor not being properly represented that it is true that the suit has been filed on 14.4.1981 whereas the first plaintiff had attained majority only on

1.6.1992. It is significant to note that no objection had been taken in the written statement by the defendant and naturally no issue was also framed by the trial Court. It is only at the appellate stage that said objection had been taken. It is not disputed that even during the pendency of the suit before the trial Court, the first plaintiff had become a major. There is also a further circumstance that there are two other plaintiffs who are competent to maintain the suit.

25. In *Narpat Raj v. Babulal*, a Division Bench of the Rajasthan High Court held that where a defendant against whom the suit was instituted against a minor, was aware of the minority of the plaintiff and yet chooses to proceed with the trial without raising any objection, he cannot be allowed after the trial to contend that the suit was not maintainable owing to minority of the plaintiff. Such a defect amounted only to mere irregularity which can be waived by the defendant. It was further held that the correct legal position was that whatever defect there might have been in the procedure adopted in passing the decree in favour of the minor that cannot have the effect of vitiating the decree and the minor was a good decree-holder who was entitled to execute the decree.

26. In *Keshav Deo v. Jagadish Prasad*, : AIR1973 Cal83 a learned single Judge of the Calcutta High Court held that a suit by the minor without his next friend or guardian will not by itself render the decree passed in his favour null and void. Therefore, the objection in this context by learned counsel for the respondents cannot be sustained.

27. Learned counsel for the respondents also pleaded that the defendant/purchaser would be at least entitled for allotment of share of the mother in equity. There are at least two reasons to reject the said contention. Firstly, this is a suit filed by the non-alienating coparcener questioning the alienation. He is not obliged to sue for a general partition and the Court is not called upon to decide the share, if any, available to all the members of the joint family and the mother/vendor. Nothing prevented the defendant from filing a separate suit by impleading the other sharers and by including all the properties and to have asked for a general partition and for allotment of the share of the mother in his favour in equity. Secondly, on facts I have already found that the transaction was not

supported by proper consideration and there is absolutely no evidence to prove the recitals in the document as regards consideration and discharge pleaded by the defendant. Hence, there is no question of any allotment on equity.

28. As stated earlier the appellate Court instead of examining the glaring pieces of evidence against the validity of and motive of the transaction under Ex.A.1 appears to have been carried away by the allegation of collusion by the mother and the sons. There was also no evidence namely that the plaintiffs and the mother/vendor had colluded. In fact, the defendant claims to have been managing the property after the death of the plaintiffs' father. If so the very purchase by him is all the more colourable and motivated, suggesting collusion only between himself and the mother of the minors. In fact, the failure on the part of the defendant to have filed a separate suit praying for a general partition by impleading all the sharers and including all the available joint family properties, and for allotment of the mother's share in equity, signifies lack of bona fides on his part and collusion between himself and the mother of the plaintiffs. This is apart from lack of evidence as regards the passing of consideration and the discharge of the debts as pleaded by the defendant. Therefore, this Court has to protect the interest of the minors.

29. Therefore, the suit has to be decreed in favour of the plaintiffs. As regards the prayer for enquiry under Order 20, Rule 12, C.P.C. with reference to future mesne profits, the plaintiffs are entitled to file appropriate application before the trial Court for such enquiry.

30. In the result, the second appeal is allowed and the judgment of the appellate Court is set aside. No costs.