

Judgment Reserved on: 21.03.2017

Judgment Pronounced on : 03.04.1017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Coram:

The Hon'ble Mr.Justice N.SATHISHKUMAR

Appeal Suit No.470 of 2011
and
M.P.No.1 of 2011

Senguttuvan ... Appellant/Plaintiff

Versus

1. Muthukalli
2. Santhappan ... Respondents/Defendants

Appeal Suit filed under Section 96 of Civil Procedure Code read with Order 41 Rule 1&2 of Civil Procedure Code, against the Judgment and decree dated 14.11.2007 passed in O.S.No.141 of 2006 by the learned Additional District Judge (Fast Track Court-I), Salem.

For Appellant .. Ms.T.Surekha
For Respondents .. No Appearance

JUDGMENT

Aggrieved over the dismissal of the suit filed for partition, the present appeal came to be filed by the plaintiff. The parties are arrayed as per their own ranking before the trial Court.

2. Brief facts of the plaintiff's case is as follows:- The plaintiff is the son of the second defendant. The suit properties are the ancestral properties, allotted to the second defendant in a partition on 19.10.1981. The second defendant is a man of having bad characters. He is a drunkard and used to spent more amounts for thirst of flesh and drinks. He is a spent thrift and he is leading a wayward life. He did not maintain the family consisting of the plaintiff and his mother. When the matter stood thus, the plaintiff came to know that the first defendant has filed a suit in O.S.No.1 of 1999 on the file of the Sub-Court, Mettur for recovery of sum of Rs.40,000/- from

the second defendant with interest at the rate of Rs.2/- per hundred per month and obtained ex parte decree and Execution Proceedings also taken against him for recovery of decree amount by sale of the suit properties. The suit properties were purchased by the first defendant himself for a sum of Rs.1,13,073.50 without following any procedure. It is the contention of the plaintiff that since he is a coparcener of the suit properties, the suit properties could not have been sold in an auction. The sale proceedings are not carried out properly.

3. The second defendant remained ex parte. The first defendant denying the entire allegations of the plaintiff that the second defendant is the drunkard and leading wayward life. It is the contention of the first defendant that the second defendant has borrowed Rs.40,000/- from him on 8.12.1996 for his urgent family necessity agreeing to repay the loan amount with interest at Rs.2/- per hundred per month. As he failed to repay any amount either towards principal or interest, he filed a suit for recovery of money in O.S.No.1 of 1999, on the file of the Sub-Court, Mettur. The above suit was decreed ex parte on 8.4.1999. The petition filed to set aside the ex parte decree by the second defendant was also dismissed for default. It is also denied the allegation that the sale was not properly conducted. It is the contention of the first defendant that even after ex parte decree the second defendant has failed to pay the amount. Therefore, Execution Petition was filed in E.P.No.23 of 2000 and in the Execution Proceedings the properties were brought into auction. The first defendant with the permission of the Court, purchased the properties and he alone is in possession of the properties and the suit is filed by the plaintiff in collusion with the second defendant. Hence, prayed for dismissal of the suit.

4. On the basis of the above pleadings, the following issues are framed by the learned trial Judge:-

1. Whether the suit properties are joint family properties?
2. Whether the partition deed dated 19.10.1981 is valid one?
3. Whether the loan borrowed by the defendant is binding on the joint family?
4. Whether the plaintiff is entitled to preliminary decree as prayed for?

5. To what relief?

5. The plaintiff examined himself as P.W.1 and marked Exs. A1 to A3. On the side of the defendants first defendant examined himself as D.W.1 and marked Ex.B1.

6. On the basis of the oral and documentary evidence and materials, the learned trial Judge dismissed the suit. Aggrieved over the same, the present appeal came to be filed.

7. The learned counsel appearing for the appellant submitted that admittedly, under Ex.A1 the suit properties and other ancestral properties were divided between the second defendant and his brothers and mother in which the suit properties were allotted to the second defendant as 'E' schedule under Ex.A1. The plaintiff being the only son of the second defendant, by birth, became a coparcener in the suit properties. Therefore, it is the contention of the learned counsel for the appellant that he is entitled to half share in the suit properties. When that being so, the father namely the second defendant was contracted some debt with the first defendant and allowed the properties to be auctioned. In fact the first defendant has purchased the properties in a Court auction for the lesser value. The pleadings of the first defendant itself clearly show that the value of the properties is more than five lakhs but it has been purchased for the lesser value. At any event, it is the contention of the learned counsel for the appellant that the loan borrowed by the father is not for legal necessity of the family. Hence, the plaintiff's share cannot be subjected to the above loan. Hence, the plaintiff being the coparcener is entitled to half share in the suit properties. Therefore, he prayed for allowing the appeal by granting preliminary decree in favour of the plaintiff.

8. There was no appearance for the Respondent. In spite of his name is appeared in the cause list, no argument has been advanced. On a perusal of the materials and having regard to the submissions made by the learned counsel for the appellant, the points that arise for consideration in this appeal are:

1. Whether the debt contracted by one of the coparceners is binding on the other?
2. Whether the amount was borrowed for legal necessity?
3. Whether the plaintiff is entitled for preliminary decree as prayed for?

9. Points 1 to 3:- A careful perusal of the entire pleadings it is the case of the plaintiff that the suit properties are ancestral in nature, allotted to the father namely the second defendant. The second defendant remain ex parte. The creditor namely first defendant took a defence denying the right of the plaintiff in the suit property. According to the first defenant the second defendant has borrowed a sum of Rs.40,000/- as loan. As the second defendant failed to repay either the principal amount or the interest, the first defendant has filed a suit in O.S.No.1 of 1999 for recovery of money and obtained ex parte

decree. To realize the above amount Execution Proceedings was also initiated and in the Execution Proceedings the entire suit properties have been brought for Court auction. The first defendant denied the allegation of the plaintiff regarding his share in the suit properties. The plaintiff in his evidence has stated that the suit properties are ancestral properties. To prove his contention, Ex.A1 registered original partition deed between the second defendant and his brothers and mother has been filed. When Ex.A1 carefully seen, it can be seen that by a partition between the second defendant and his brothers and mother, the ancestral properties have been divided among themselves. The suit properties were allotted to the second defendant herein, the father of the plaintiff shown as 'E' schedule in Ex.A1. It is also not in dispute that the plaintiff is the only son of the second defendant. Even though the ancestral properties were divided between the second defendant and his brothers and mother, the plaintiff being the son of the second defendant by birth, became the coparcener along with his father in the ancestral properties.

10. Though it is pleaded by the plaintiff that his father was leading wayward life, not maintaining the family and he was residing separately, in the chief examination in para 2 he has stated that his father was a drunkard and spent thrift and used to visit the native rarely. This evidence in its entirety has not been denied in the cross-examination. The specific evidence adduced in the chief examination about the character of his father was not denied in its entirety in the cross-examination of P.W.1. Though P.W.1 in the chief examination admitted that on the date of examination his father was also living with them, the character of the father was not even denied in the cross-examination. The plaintiff being the son alone is competent to speak about the father's character. But the above evidence has not been denied. Though the entire evidence of P.W.1 shows that he also aware of the Execution Proceedings, that itself is not a ground to hold that the plaintiff's share in the properties as a coparcener cannot be divested for the loan which was borrowed by his father.

11. Though the first defendant denied the entire allegation and contended that the second defendant has borrowed Rs.40,000/- for legal necessity of the family, no evidence whatsoever is available to show that the amount in fact was borrowed for legal necessity of the family. The first defendant himself pleaded in the written statement to the effect that the suit properties are valued about Rs.5.00 lakhs. In Para 6 it is pleaded that the second defendant is having immovable properties worth more than 5.00 lakhs and his yearly income is Rs.50,000/-. Having pleaded the valuation of the properties as more than Rs.5.00 lakhs, the properties have been purchased by him in the Court auction only

for a sum of Rs.1,13,073.50. Further, it is to be noted that Ex.A3 sale notice issued by the Sub-Court, Mettur in Execution Petition No.23 of 2000 in O.S.No.1 of 1999 the upset price of the suit properties were shown as Rs.1.00 lakh and thereafter it has been reduced to Rs.90,000/-, Rs.70,000/- and Rs.65,000/-. Thereafter, it appears that the first defendant himself purchased the properties for a sum of Rs.1,13,000/-. Of course, the son is also liable for the debts contracted by the father if it is for the legal necessity of the family and not for the illegality and immorality.

12. When the son himself clearly stated that his father was leading wayward life and he is a drunkard, that evidence is not denied in the cross-examination of D.W.1, the same can be taken as admission. Further, the cross-examination of D.W.1. when carefully read it can be seen that the second defendant was working in the Milk Society which was run in the building belongs to the first defendant. A specific suggestion was put to D.W.1 that in the year 1995 as the defendant was suspended from service due to addiction of alcohol and also spending money for leading wayward life. The above specific suggestion was not denied by the first defendant. The very factum of non denial of the specific suggestion coupled with the evidence of P.W.1 that his father was leading wayward life clearly probabalize the plaintiff's case that the loan amount of Rs.40,000/- was not borrowed by the second defendant for any family necessity. Therefore, any amount borrowed by the second defendant for other than the legal necessity of the family, the other members of the family cannot be fastened with the liability to pay that amount.

13. Admittedly, when the suit properties were allotted to the second defendant which was ancestral in nature, the plaintiff being the son of the second defendant is also entitled to have equal share by way of birth. Therefore, his share in the properties cannot be sold. It is further to be noted that though the first defendant being the purchaser of the properties in Court auction, it is for him to establish that the loan amount borrowed by the second defendant is for legal necessity. He cannot simply contend that the amount borrowed is only for the legal necessity. There must be some evidence to show that the amount of Rs.40,000/- was utilized for legal necessity. The first defendant also during his evidence clearly admitted that he was aware of the fact that the properties are ancestral properties. He ought to have made reasonable enquiry with regard to the properties before purchasing the properties. Doctrine of Caveat emptor is also equally applicable to the Court auction purchaser. There is no warranty of title to the Court auction purchaser. After pleaded in the written statement that the second defendant is having properties for the value of more than Rs.5.00 lakhs, the first defendant has purchased the properties

for lesser value. In fact he could have brought the properties of the share of the second defendant alone for Court auction, for the realization of his debt of Rs.40,000/- with interest. Whereas the entire properties of the second defendant including the share of the plaintiff were also brought to sale and the first defendant himself purchased the properties for the lesser value.

14. The first defendant being the creditor of the second defendant also should establish that there is some connection between the money advanced by him and the amount spent by the second defendant is for the legal necessity of the family. But the first defendant has not brought out any circumstances to show that the amount borrowed by the second defendant has been spent for family necessity. Whereas in para 6 of the written statement he has pleaded that being the Kartha of the family the second defendant has borrowed the amount for the family necessity. Except this statement there is no evidence or other circumstances have been brought on record to show that the amount borrowed by the second defendant was used for the family necessity. Therefore, this Court is of the view that being alinee of the joint family properties, the first defendant has not established the legal necessity of the family. P.W.1's evidence that his father was a drunkard and spent thrift is also remained unchallenged and D.W.1 also admitted his ignorance about the suspension of the father second defendant while he was working in the Milk society.

15. All these facts in fact probablize the plaintiff's case that the loan of Rs.40,000/- borrowed by the second defendant is not for the legal necessity. Hence, this Court is of the view that the share of the plaintiff cannot be attached and brought for Court auction. Accordingly, this Court hold that the plaintiff is certainly entitled to preliminary decree for dividing the suit properties in to two equal shares and for allotment of one such share to the plaintiff. The learned trial Judge in para 6 in issue No.3 at page 12 having come to the conclusion that the properties allotted to the second defendant in the partition deed is one of the ancestral properties, and after such allotment the properties ceased to be the ancestral properties. Such finding is without any basis. "It is well settled that where ancestral properties have been divided between several joint owners, there can be no doubt if any of them have male issue living at the time of partition, the share which falls to him will continue to be ancestral in his hands, as regards his male issue, for their rights had already attached upon it, and partition only cuts off the claims of the dividing members." Therefore, in this case, the plaintiff is having right by birth became coparcener with that of his father.

16. In view of the same, this Court is of the view that when the alinee of the ancestral properties have not established that the loan was borrowed only for the family necessity, he cannot claim ownership on the entire ancestral properties merely on the basis of the Court auction sale. Accordingly, these points are answered in favour of the appellant/plaintiff.

17. In the result, the appeal is allowed. The judgment and decree of the learned trial Judge is set aside and the suit is decreed as prayed for. Preliminary decree is passed dividing the suit properties into two equal shares and allot one such share to the plaintiff. Considering the nature of the litigation there shall be no order as to costs. Consequently, M.P.No.1 of 2011 is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

1 The Additional District Judge,
(Fast Track Court No.1), Salem

2 The Record Keeper, VR Section,
High Court, Madras

+lcc to Mr.R. Devapasad, Advocate, S.R.No.19776

rj (CO)
md(24/04/2017)

A.S.No.470 of 2011

सत्यमेव जयते

WEB COPY