

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 4.8.2017

CORAM

THE HON'BLE MR.JUSTICE D.KRISHNAKUMAR

S.A.No.359 of 2015

Manickam ... Appellant/4th Defendant

Vs.

1 Chinnammal
2 Periyasamy ... Respondents 1&2/Plaintiffs
3 Manickam @ Chellappan
S/o Periyanna Gounder

4 Periyanna Gounder
5 Ganesan
6 Senthil Kumar ... Respondents 3 to 6/Defendants
1 to 3 & 5

Second appeal filed under Section 100 of the Civil Procedure Code to set aside the judgment and decree of the Additional District Judge cum Fast Track Court No.1, Salem, dated 22.08.2011 made in A.S.No.29 of 2009 confirming the Judgment and Decree of the Subordinate Judge, Sankari, dated 30.6.2008 made in O.S.No.37 of 2005.

For Appellants : Mr.C.Kulanthaivel
For Respondents 1&2 : Mr.N.Manokaran
For Respondents 3to6 : No appearance

सत्यमेव जयते

JUDGMENT

The brief facts of the case as follows:

The respondents 1 and 2/plaintiffs filed a suit in O.S.No.37 of 2005 for partition of the suit property in respect of the suit schedule properties in item No.1 to 4. According to the plaintiffs/respondents 1 & 2, the suit properties belongs to the second defendant. The second defendant has three wives by name Periyammal, Nallammal and Kannupillai. The first defendant is the son of Periyammal and Periyanna gounder, second defendant. The 3rd defendant is the son of Nallammal and the second defendant. Kannupillai has no issues. Item 1 to 3 properties belongs to Periyammal and Nallammal through their father and the same were divided by way of family partition. Pursuant to the said partition,

properties were divided among the family members and the first defendant was allotted 'C' schedule properties and the third defendant was allotted 'D' schedule properties. The properties allotted to the defendants 1 to 3 as undivided $\frac{1}{2}$ share, the parties were unable to enjoy their respective shares allotted by way of partition, again there was a partition on 29.5.2001 wherein Item 1 to 3 suit schedule properties were allotted to the defendants 1 to 3 alone. Subsequently, the first defendant sold the $1\frac{1}{2}$ acres of land in item No.1 of the suit property on 20.6.2001 to the 4th defendant through Ex.A1 partition deed. The first plaintiff is the wife of the first defendant and the second plaintiff is minor son of the first plaintiff and the first defendant. The suit is filed for partition by dividing item 1 to 3 of the suit properties into two equal shares and allot one share to the 2nd plaintiff and divide item 4 property into 6 equal shares and allot one share to the 2nd plaintiff by metes and bounds, maintenance and also for cancellation of sale deed dated 25.11.2004 (Doc. No.2674/2004). Except 4th defendant, other defendants have filed written statement before the Court below by denying the averments made in the plaint.

2. After considering the oral and documentary evidence adduced by both sides, the trial Court has allotted half share to the second plaintiff in respect of item No.1 to 3 suit schedule properties. In so far as the 4th item of suit schedule property, the trial Court has rejected the claim of the plaintiffs.

3 Challenging the aforesaid judgment and decree in respect of item 1 to 3 suit schedule properties, the 4th defendant/appellant herein has filed an appeal in A.S.No.29 of 2009 before the Additional District Judge cum Fast Track Court No.1, Salem. Plaintiffs 1 and 2 have filed an appeal in A.S.No.22 of 2011 before the appellate Court as against the rejection of their claim in 4th item of suit schedule property.

4 The Appellate Court by holding that item 1 to 3 of suit schedule properties are concerned, the appellate Court has considered the fact that the defendants 1 to 3 and 5 filed their written statement to contest the suit. However, 4th defendant/ appellant has not filed written statement to defend his case and he simply filed memo adopting the written statement filed by the second defendant. The appellate court has also held that there is not even a single averment in the written statement filed by the second defendant that the first defendant sold item No.1 of the suit properties to the 4th defendant for family necessity and for discharging a legal debt. Further, the 4th defendant has not chosen to give evidence to substantiate his case before the trial Court. Therefore, the appellate court came to a conclusion that the 4th defendant/ appellant has no legal right over the item Nos.1 to 3 of the suit properties. The other defendants have not filed any appeal challenging the judgment and decree of

the trial Court. Hence, the appeal filed by the fourth defendant was dismissed and the judgment and decree of the trial court is confirmed. Challenging the judgment and decree of the appellate court, the 4th defendant has filed the present second appeal.

5 The appellate Court by holding that item No.4 of the properties were self acquired property of the second defendant. Therefore, appeal filed by the plaintiffs/respondents 1 and 2 was dismissed in so far as item No.4 of the suit schedule properties and upheld the judgment and decree of the trial court.

6 According to the learned counsel for the appellant/ 4th defendant, prior to filing of the suit, vide registered sale deed, dated 20.6.2001, Ex.A7, the appellant/4th defendant purchased portion of the item 1 of the suit schedule property when the plaintiffs' family was in financial crisis to meet the family expenses and to settle the loan. Counsel for the appellant would submit that even though subsequent partition was entered into between the defendants 1 to 3, 4th defendant being the purchaser, entitled to the portion of the property as shown in the first item of suit schedule property. As per the judgment and decree, the first defendant is entitled to half share in the first item of suit schedule property. Therefore, no prejudice would be caused when the purchased property has been allotted to the first defendant. Therefore, Second appeal has to be allowed by setting aside the judgment of the Appellate Court.

7 On the contrary, the learned counsel for the respondents/plaintiffs would submit that 4th defendant has no locus standi to file an appeal before the appellate court as well as this Court. As per the judgment and decree of the trial court and the appellate court, the plaintiffs are entitled for half share in the first item of suit schedule property. If the 4th defendant is entitled, he shall work out his remedy, in respect of his shares allotted to the first defendant. Even assuming that the appellant/ 4th defendant has purchased more than half share in the first item of suit schedule property, the said share allotted to the first defendant is void as per the decision of the Hon'ble Supreme Court. Therefore, Second Appeal is liable to be dismissed.

8 At the time of admission of the Second appeal, the following substantial questions of law were framed by this Court:

(a) Whether the partition deed in Ex.P2 is valid and binding the subsequent purchaser when the same was made without necessary shareholders who were alive at the time of execution of the said partition deed ?

(b) Whether the Courts below justified in proceeding on the basis of partition in Ex.P2 to decide the share of

the 2nd plaintiff without deciding the validity of the said partition deed and the necessary parties having shares on the property ?

- (c) Whether the sale deed in Ex.P7 is binding on the 2nd plaintiff when he was a minor the same was executed by his father for valuable sale consideration and to discharge the legal debt ?
- (d) Whether the suit for partition is maintainable without questioning the transfer of the suit when the plaintiff admitting in the plaint about transfer and registered sale for the item 1 of the suit property ?

9 Firstly, this Court has to decide the point for determination that the 4th defendant/appellant herein being the purchaser of the suit property is entitled to claim the right in the suit ?

10 The learned counsel for the appellant/4th defendant would submit that even though the fourth defendant/appellant has not filed written statement nor he adduced any evidence in the suit, in the interest of justice, the 4th defendant/appellant being the purchaser of the portion of the item 1 of the suit schedule property, has right to file an appeal in respect of item 1 of the suit schedule property purchased by him.

11 The learned counsel for the respondents would submit that when the appellant/4th defendant has not filed written statement nor let in witness box before the trial Court, has no legal right to claim the right in the allotment of share in the suit property in the light of the decision of the Hon'ble Supreme Court. Hence, the appellate Court has rightly come to the conclusion that the appellant/4th defendant has no legal right to challenge the decree passed in favour of the appellant.

12. By common judgment, the appellate Court has considered the contentions of both parties by relying upon the evidence of both sides, held that there is no evidence to show that sale consideration of Ex.A15 was utilized for developing any other property immediately or towards the purchase of any other property and that property yielded sufficient income over a period of 10 years to purchase Ex.A4 and Ex.A5 properties. Further, the contention of the plaintiffs that there is no evidence to show that they were involved in Silk Weaving business and that money was used for purchasing Ex.A4 and A5 and the second defendant was only a minor at the time of purchase of Ex.A4 and A5 properties and thus he could not have contributed any money for the purchase Ex.A4 and A5 properties was rejected by the appellate court and held as under:

defendant was shown as a minor in Ex.A4 and Ex.A5 sale deeds. His age was shown as 15 years. It is not uncommon in those days that the boys aged about 15 years used to do physical and labour to earn money. The reading of D.W.2's evidence shows that Ex.A4 and A5 properties were purchased by him and his brother from the income derived from the weaving business. The reading of P.W.1's evidence shows that she did not know anything about the suit properties, the Ex.A15, Ex.A4 and A5 transactions were taken place even before her birth and she did not know anything about these sale deeds. Therefore, in the facts and circumstances of this case and evidence available, it can be decided without any doubt that Ex.A4 and Ex.A5 properties, that included item No.4 of the suit properties were purchased by the second defendant and his brother Nalliappan out of their physical exercise of labour and it was held by them as joint properties. Subsequently, item No.4 of the suit properties was allotted to the second defendant and he sold it to the 5th defendant through Ex.A8 sale deed.'

13 Admittedly, 4th defendant/appellant has not launched any allegation against the defendants 1 to 3 and the plaintiffs, who filed the partition suit. On the other hand, the 4th defendant has filed memo adopting the written statement filed by the second defendant. The appellate Court has rightly held that there is no single averment in the written statement filed by the second defendant that the first defendant sold item No.1 of the suit properties to the 4th defendant for family necessity and for discharging a legal debt. Further, 4th defendant has not entered into witness box before the trial court to adduce evidence in support of his stand. Therefore, it is clear that the 4th defendant/appellant being the purchaser of the portion of the suit schedule property, has not countered the suit by entering into witness box and marking the documents before the trial Court. Therefore, the 4th defendant/appellant have no legal right over the shares allotted to the plaintiffs. Further, in the decision relied upon by the learned counsel for the respondents/plaintiffs in Vidhyadhar vs. Mankikrao and another (AIR 1999 SC 1441) wherein the Hon'ble Supreme Court has held as follows:

'15. It was defendant No. 1 who contended that the sale deed, executed by defendant No. 2 in favour of the plaintiff, was fictitious and the whole transaction was a bogus transaction as only Rs. 500

were paid as sale consideration to defendant No. 2. He further claimed that payment of Rs. 4,500 to defendant No. 2 at his home before the registration of the deed was wholly incorrect. This plea was not supported by defendant No. 1 as he did not enter into the witness box. He did not state the facts pleaded in the written statement on oath in the Trial Court and avoided the witness box so that he may not be cross examined. This, by itself, is enough to reject the claim that the transaction of sale between defendant No. 2 and the plaintiff was a bogus transaction.

16. Where a party to the suit does not appear into the witness box and states his own case on oath and does not offer himself to be cross examined by the other side, a presumption would arise that the case set up by him is not correct as has been held in a series of decisions passed by various High Courts and the Privy Council beginning from the decision in Sardar Gurbakhsh Singh v. Gurdial Singh and Anr. . This was followed by the Lahore High Court in Kirpa Singh v. Ajaipal Singh and Ors. AIR (1930) Lahore 1 and the Bombay High Court in Martand Pandharinath Chaudhari v. Radhabai Krishnarao Deshmukh AIR (1931) Bombay 97. The Madhya Pradesh High Court in Gulla Kharagjit Carpenter v. Narsingh Nandkishore Rawat also followed the Privy Council decision in Sardar Gurbakhsh Singh's case (supra). The Allahabad High Court in Arjun Singh v. Virender Nath and Anr. held that if a party abstains from entering the witness box, it would give rise to an inference adverse against him. Similarly, a Division Bench of the Punjab & Haryana High Court in Bhagwan Dass v. Bhishan Chand and Ors., drew a presumption under Section 114 of the Evidence Act against a party who did not enter into the witness box.'

14. In the case of Rohit Chauhan vs. Surinder Singh and others reported in (2013)9 SCC 419) the Hon'ble Supreme Court has held as under:

'14. A person, who for the time being is the sole surviving coparcener as in the present case Gulab Singh was, before the birth of the plaintiff, was entitled to dispose of the coparcenary property as if it were his separate

property. Gulab Singh, till the birth of plaintiff Rohit Chauhan, was competent to sell, mortgage and deal with the property as his property in the manner he liked. Had he done so before the birth of plaintiff, Rohit Chauhan, he was not competent to object to the alienation made by his father before he was born or begotten. But, in the present case, it is an admitted position that the property which defendant no. 2 got on partition was an ancestral property and till the birth of the plaintiff he was sole surviving coparcener but the moment plaintiff was born, he got a share in the fathers property and became a coparcener. As observed earlier, in view of the settled legal position, the property in the hands of defendant no. 2 allotted to him in partition was a separate property till the birth of the plaintiff and, therefore, after his birth defendant no. 2 could have alienated the property only as Karta for legal necessity. It is nobodys case that defendant no. 2 executed the sale deeds and release deed as Karta for any legal necessity. Hence, the sale deeds and the release deed executed by Gulab Singh to the extent of entire coparcenary property are illegal, null and void. However, in respect of the property which would have fallen in the share of Gulab Singh at the time of execution of sale- deeds and release deed, the parties can work out their remedies in appropriate proceeding.''

15 In the light of the above judgment, the appellant/4th defendant has no legal right over the item 1 of the suit schedule property allotted to the first and second respondents.

15 In view of the above facts and the decision cited supra, there is no error or illegality in the judgment passed by both the Courts. The questions of law are answered against the appellant.

16 The Second appeal fails and accordingly dismissed. No costs.

Sd/-
Assistant Registrar(CCC)

//True Copy//

To

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

2 The Subordinate Judge,
Sankari

3. The Section Officer, VR Section,
High Court, Madras.

+1cc to Mr.Kulanadaivelu, Advocate, S.R.No.56624

+1cc to Mr.N.Manoharan, Advocate, S.R.No.56382

S.A.No.359 of 2015

CNR(CO)
GN(13/10/2017)



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