

Judgment Reserved on: 03.04.2017

Judgment Pronounced on :17.04.2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Coram:

The Hon'ble Mr.Justice N.SATHISH KUMAR

Appeal Suit No. 962 of 2007

1. Gurunatha Mudaliar
2. Minor Soundararajan
3. Minor Sibi Chakravarthy ... Appellants/plaintiffs
(Minors rep.by mother
Banumathy)

Versus

1. G. Rajamanickam
2. K.G.Chandran
3. M.K.Jaya ... Respondents/defendants

Appeal Suit filed under Section 96 of Civil Procedure Code,
against the judgment and decree dated 16.02.2006 made in
O.S.No.6 of 2004 by the Additional District Court- Fast Track
Court No.4, Erode at Bhavani.

For Appellant ... Mr.T.Murugamanikkam
Senior Counsel for Mr.V.Rajesh

For R1 and R2 .. Mr. L.Mouli

For R3 ... No Appearance

J U D G M E N T

Aggrieved over the judgment and decree passed by the learned
Additional District Judge, Erode at Bhavani in O.S.No.6 2004
dismissing the suit for partition, the present appeal came to be
filed by the appellant/plaintiffs.

2. For the sake of convenience, the parties are referred to
as per their ranking before the trial Court.

3. Brief facts of the instant appeal are as follows:-

(i) The defendants 1 and 2 are the sons of the 1st plaintiff. The plaintiffs 2 and 3 are the children of the 1st defendant. According to the plaintiffs, item No.1 of the suit properties is ancestral property. The plaintiffs and the defendants constituted a Hindu undivided joint family in which, the 1st plaintiff is the head. Item No.1 of the suit properties was allotted to the 1st plaintiff in a family partition effected on 01.4.1977. Out of the income derived from item No.1 of the suit properties, the 2nd and 3rd items of the suit properties were purchased in the name of the defendants 1 and 2 in the year 1994. It is stated that the 1st defendant is acting against the interest of the minor sons. The defendants 1 and 2 also sold item Nos. 2 and 3 of the suit properties to the 3rd defendant on 11.2.2002 and 17.09.2002 respectively. There is no legal necessity or family necessity to sell the 2nd item of the properties.

(ii) According to the 1st plaintiff, the sale effected in respect of the share of the plaintiffs 2 and 3 is not binding upon them and as such, the sale is liable to be set aside. Hence, the suit for partition directing the division of item No. 1 of the suit properties into 9 equal shares and allot 5 such shares continuously to the plaintiffs jointly and divide the item Nos.2 and 3 of the suit properties into 6 equal shares and allot two such shares to the plaintiffs and to set aside the sale deed dated 17.9.2002 and also for permanent injunction.

(iii) Admitting the relationship as well joint family status and properties, it is the contention of the defendants 1 and 2 that in the year 2002, the 2nd defendant orally relinquished his share in the ancestral properties and hence, the defendants 1 and 2 have partitioned the entire properties. There is no cause of action for the suit. Thus, the defendants 1 and 2 prayed for dismissal of the suit.

(iv) Denying the allegations made by the plaintiffs, it is the contention of the 3rd defendant, who is the purchaser of certain extent of joint family properties, that item Nos. 2 and 3 of the suit properties were purchased by her on 11.2.2002 and 17.9.2002 respectively from defendants 1 and 2 and after the said purchase, she has been in possession and enjoyment of the aforesaid properties by effecting mutation in revenue records in her name. According to the 3rd defendant, the suit itself is coercive in nature. Hence, she prayed for dismissal of the suit.

4. Based on the above pleadings, the following issues have been framed by the Trial Court :

1. Whether the plaintiffs are entitled for partition as prayed for?

2. Whether the Sale Deed dated 17.9.2002 executed in respect of 2/9 share of the plaintiffs 2 and 3 is liable to be set aside?

3. Whether the 1st plaintiff is entitled for permanent injunction in respect of item No.1 of the suit properties?

4. To what relief the plaintiffs are entitled to?

5. On the side of the plaintiffs, 1st plaintiff examined himself as P.W.1 and Exs. A2 to A11 were marked. On the side of the defendants, 3rd defendant examined herself as D.W.1 and Exs. B1 to B13 were marked.

6. On the basis of evidence and materials adduced by both sides, the trial Court has dismissed the suit. Aggrieved over the same, the present appeal came to be filed by the plaintiffs.

7. The learned Senior counsel for the appellants/ plaintiffs submitted that item No.1 of the suit properties, which is ancestral property, was allotted to the 1st plaintiff and he constituted a joint family along with his sons, namely, the defendants 1 and 2, and out of the income derived from the joint family properties, item Nos. 2 and 3 of the suit properties were purchased in the name of defendants 1 and 2. The learned Senior counsel for the appellants/ plaintiffs further submitted that the alleged oral relinquishment by the 2nd defendant has not been established. It is submitted by the learned Senior counsel for the appellants/ plaintiffs that the 3rd defendant, who is the purchaser of certain extent of properties from the defendants 1 and 2, cannot claim exclusive possession over the suit properties. It is also submitted that the nature of the property has been clearly established. It is the submission of the learned Senior counsel for the appellants/ plaintiffs that since the minor children, namely, the plaintiffs 2 and 3, also became coparceners along with 1st defendant, their rights have to be protected even though the father acted against their interest. Therefore, it is the contention of the learned Senior counsel that the judgment and decree of the trial Court dismissing the suit for partition, is without any basis. Hence, the learned Senior counsel prayed for allowing the appeal.

8. On the contrary, the learned counsel appearing for the respondents/ defendants 1 and 2 submitted that as per the oral partition made in the family, the defendants 1 and 2 are enjoying the property separately and that, they have also purchased property out of their own income. Hence, it is

submitted by the learned counsel that the purchase made by the 3rd defendant cannot be assailed by the plaintiffs by way of this suit.

9. No representation was made on behalf of the respondent No.3/defendant No.3.

10. In the light of the above submissions, now the points that arise for consideration in this appeal are:

1. Whether the plaintiffs are entitled to partition in the suit properties? and
2. Whether the sale in favour of the 3rd defendant is not binding on the minor appellants/plaintiffs?

Point No.1:

11. The suit itself was originally filed by Gurunatha Mudaliar, the 1st plaintiff herein, i.e., the father of the defendants 1 and 2. The plaintiffs 2 and 3 are the minor children of the 1st defendant. It is stated by the 1st plaintiff that the suit properties are ancestral properties and the 1st item of the suit properties was allotted to him by way of partition on 01.4.1997 and he constituted a joint family along with two sons, namely, the defendants 1 and 2 and thereafter, item Nos. 2 and 3 were also purchased in the name of the defendants, out of the joint family nucleus.

12. When the matter stood thus, the 1st defendant, acting against the interest of minors, has started selling the property to the 3rd defendant. Hence, the plaintiffs have come forward with the present suit. The defendants filed the written statement admitting the character of the properties and also purchase of item Nos.2 and 3 in his name as well as in the name of 1st defendant from the joint family nucleus. From the nature of the aforesaid written statement, it could be easily seen that they are supporting the plaintiffs' case.

13. Whereas, only third party purchaser, namely, the 3rd defendant has contested the suit on the ground that item No. 2 of the suit properties purchased by her is separate property of the defendants 1 and 2. It is also clearly admitted by both sides that the 1st plaintiff, namely, father of the defendants 1 and 2, died leaving behind his two sons as legal heirs. The legal heirs of the 1st plaintiff are already on record, i.e. the defendants 1 and 2.

14. Before the trial Court, the 1st plaintiff, who was

examined as P.W.1, has stated in his evidence that the properties are ancestral properties and item No.1 of the suit properties was allotted to him in view of partition that took place in the year 1977. He has also stated in his evidence that item Nos. 2 and 3 of the suit properties were purchased in the name of the defendants 1 and 2 out of the joint family nucleus. Ex.A1, partition deed dated 01.4.1977 shows that item No.1 of the suit properties allotted to the 1st plaintiff is the ancestral property. In view of such allotment, sons of the 1st plaintiff by birth, became coparceners along with their father. The defendant Nos.1 and 2 jointly purchased item 2 and 3 of the suit properties under Exs.A2 and A3. In their written statement, they admitted that the properties stood in their name and the same was purchased out of joint family nucleus.

15. When the evidence of P.W.1 and D.W.1 is carefully perused, it is seen that originally, the suit properties are ancestral properties. Though item Nos. 2 and 3 were originally purchased in the name of the defendants 1 and 2, they themselves admitted in the written statement that those properties were purchased out of joint family nucleus. Similarly, they have not come forward to give evidence to establish that they had independent income to purchase the properties, particularly, when the properties were in joint possession at the relevant point of time.

16. Ex.A1 clearly shows that the family had sufficient nucleus. Therefore, the only inference that could be made by this Court, in case of any purchase of the property made by any member of the joint family should have been from the joint family nucleus. P.W.1, who is the elder member of the family has also spoken about the above fact. Though the fact remains that defendants 1 and 2 themselves have entered into partition in the year 2003, under Ex.B3, the recitals of the documents itself would clearly show that they are members of the joint family at the relevant point of time.

17. Similarly, they stated in the aforesaid document that there was a oral partition between themselves and their father, wherein they were allotted certain properties. Therefore, according to the learned counsel, they are entitled for partition. To prove the alleged oral partition, no material, whatsoever, is forthcoming and the defendants also conveniently remained absent whereas in the written statement they have taken a stand that the properties were purchased out of joint family nucleus. Further, the very partition deed entered into between the defendants itself would clearly show that they were living in joint family. Ex.A1 also clearly shows that the properties were purchased from the joint family nucleus and the family had

sufficient nucleus at the relevant time. Therefore, when the properties were not divided, any male member at that point of time born to the coparcener, by birth would have become coparcener along with their father. As such, since the 1st defendant had two minor sons, namely, the plaintiffs 2 and 3, they also became coparceners along with their father in the coparcenary properties. Once it is established that the properties are joint family properties and when the alleged oral partition has not been established, this Court, has no other option except to hold that the properties are joint family properties.

18. Though the undivided co-sharer has a right to alienate the properties, the alienee cannot seek for joint possession. Therefore, his/her remedy is only to seek partition from the other co-owners. Further, the 3rd defendant has also not established the fact that the properties were purchased for any legal necessity. Normally, the onus is on the alienee to show that sale is for legal necessity. Therefore, this Court is of the view that since 2nd and 3rd plaintiffs, being minors, certainly, are entitled to partition in the joint family properties. Accordingly, this point is answered.

Point No:2:

19. Admittedly, under Ex.A2, item No.1 of the suit properties was allotted to Gurunatha Mudaliar, i.e., the 1st plaintiff, who had two sons, namely, defendants 1 and 2. As discussed in point No.1, the defendants 1 and 2 became coparceners along with the said Gurunatha Mudaliar, i.e. the 1st plaintiff. As such, it is clear that the said Gurunatha Mudaliar, i.e., the 1st plaintiff, and the defendants 2 and 3 each entitled to 1/3rd share in the entire joint family suit properties. Similarly, the minors, namely, the plaintiffs 2 and 3, who also became coparceners along with 1st defendant in respect of 1/3rd share of the 1st defendant.

20. It is not disputed by both sides that Gurunatha Mudaliar died leaving behind his two sons, namely, the defendants 1 and 2. Therefore, his 1/3rd share in the ancestral property would devolve only upon the defendants 1 and 2 since they being class - I legal heirs, and the rest of the properties alone will be in the nature of coparcenary properties.

21. In the above background, now if the shares are calculated, this Court is of the view that in the entire properties, plaintiffs 2 and 3 each are entitled to 4/36 shares, the 1st defendant is entitled to 10/36 share and the 2nd

defendant is entitled to 18/36 share. This calculation is based on the fact that 1/3rd share of Gurunatha Mudaliar would devolve as per Section 8 of the Hindu Succession Act. The minor plaintiffs, i.e. plaintiffs 2 and 3, who are the sons of the 1st defendant, would be coparceners only in their father's share in the entire joint family properties, i.e. 12/36. In that case, each of the minors, i.e. plaintiffs 2 and 3 are entitled to 4/36 share. Gurunatha Mudaliar's 1/3rd share would devolve upon his two sons, namely, the defendants 1 and 2. Accordingly, 1/2 share from 1/3rd share of the said Gurunatha Mudaliar will go to 1st defendant and the 1st defendant, being the coparcener, will get 10/36 shares in entirety in the suit properties including the share from his father's share. Whereas 2nd defendant, being the coparcener, is also entitled to 1/2 share from his father's share and he is entitled to 18/36 share in the entire properties. Therefore, this Court is of the view that the judgment and decree passed by the Trial Court in dismissing the suit on the ground that the partition took place, is not based on proper appreciation of evidence.

22. Admittedly, minor sons of the 1st defendant also became coparceners by virtue of their birth and they are entitled to claim share by filing partition. A statutory right cannot be denied merely on the ground of some collusive nature of lis between the parties. Though the 3rd defendant has filed revenue records to show that she has been in possession of the suit properties, the same were obtained only after the institution of the suit. Hence, the same cannot be given much credence. Therefore, the 3rd defendant, being the purchaser from the undivided coparcener, has to work out her remedy for separate possession. She cannot seek joint possession along with other coparceners. Accordingly, this point is answered.

In the result, the appeal is allowed by setting aside the judgment and decree of the Trial Court and the preliminary decree is passed for dividing the suit properties into 36 shares and allot 8/36 shares to the minor plaintiffs together and the 1st defendant is entitled to 10/36 share and the 2nd defendant is entitled to 18/36 shares. The 3rd defendant has to work out her remedy in the final decree proceedings. No costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

ga

To

1. The Additional District Judge,
FTC-4, Erode at Bhavani.
2. The Section Officer,
V.R.Section,
High Court, Madras.

+lcc to Mr.V.Rajesh, Advocate, S.R.No.23086

PRE DELIVERY JUDGMENT
in A.S.No.962 of 2007

SSI (CO)
RS (19/06/2017)



WEB COPY