IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 31.01.2018

CORAM

THE HONOURABLE MR.JUSTICE M.DHANDAPANI

S.A.Nos.1219 and 1220 of 1998

1.Govindasamy
2.Mohan ... Appellants in both S.As/Plaintiff OS.212 defendant 4,5 in OS.321/83

Vs.

1.N.P.K.Velusamy
2.Arumugha Gounder
3.Ramayammal
4.Somasundaram
5.S.M.Easwaran
6.Chidambaram
7.Thilagamani

8.State of Tamilnadu
Rep. by District Collector
Periyar District, Erode-11.

9.N.P.K.Selvam @ Shanmugasundaram
10.N.P.K.Nagamanickam
11.Gnanammai
12.Pushpavathi
13.Dhanabakkiam ... Respondents in S.A.1219/1998

1.N.P.K.Velusamy
2.Arumugha Gounder
3.Ramayammal
4.Somasundaram
5.Shanmugasundaram P.K
6.N.P.K.Nagamanickam ... Respondents in S.A.1220/1998/ D1 to D3

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COMMON PRAYER: Second Appeals filed under Section 100 of C.P.C. against the Judgment and Decree dated 29.06.1998 made in A.S.Nos.39 and 40 of 1997 on the file of the Subordinate Judge, Bhavani, reversing the judgment and decree dated 07.04.1997 made in O.S.Nos.651 of 1982 and 321 of 1983 on the file of Principal District Munsif, Bhavani.

For Appellants (in both S.As.) : Mr.T.Muruga Manickam Senior Counsel for Ms.Zeenath Begum

For Respondents : Mr.S.Parthasarathy Senior Counsel for Mr.N.Damodaran for R1 (in both S.As.)

Mr.S.Sivakumar for R9 & R10 in S.A.1219/1998 for R5 & R6 in S.A.1220/1998

Mr.M.Easan for R4 (in both S.As.)

R2 - died in S.A.1219/1998(T/E)

RR2 to 4 -given up in Sa.1220 of 1998 : R3 & 8/ Served - No appearance in SA.1219/98

RR4, 12 & 13 -given up in SA.1219/98 R11- Not ready in Notice in SA.1219/98

C O M M O N J U D G M E N T

The plaintiffs in O.S.No.651 of 1982 filed the suit for declaration, permanent injunction and for partition. The seventh defendant in O.S.No.651 of 1982 filed a suit in O.S.No.321 of 1983 for permanent injunction. During the pendency of the suits, the seventh defendant in O.S.No.651 of 1982 / plaintiff in O.S.No.321 of 1983 died. Thereafter, as per the order dated 24.09.1993 made in I.A.No.2622 of 1993, the plaintiffs 2 to 4, legal heirs of the deceased first plaintiff were brought on record in O.S.No.321 of 1983. The plaintiffs 2 to 4 in O.S.No.321 of 1983 are the defendants 9, 10 and 11 in O.S.No.651 of 1982. The plaintiffs in O.S.No.651 of 1982 are the defendants 4 and 5 in O.S.No.321 of 1983. The appellants herein are the plaintiffs in O.S.No.651 of 1982/ defendants 4 and 5 in O.S.No.321 of 1983.

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2.The sum and substance of the case of the appellants as well as the defendants are as follows: The appellants / plaintiffs in O.S.No.651 of 1982 are the sons of the first and the second defendant in O.S.No.651 of 1982. The first defendant due to wayward activities borrowed loan from the fourth defendant in O.S.No.651 of 1982 and spent lavishly. Thereafter, the first defendant was unable to pay the debt, for which the fourth defendant filed a suit in O.S.No.63 of 1971 for recovery

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of Rs.7,952/- due on a promissory note dated 12.12.1968. Though the appellants herein were minors at that relevant point of time, they participated in the case proceedings and they have again filed the present suit for partition in respect of their shares in the suit schedule property in O.S.No.651 of 1982 against the defendants. The said suit in O.S.No.63 of 1971 was decreed on 19.03.1971 on the ground that the first defendant had borrowed money for his wayward activities. Thereafter, the fourth defendant filed an execution petition in E.P.No.135 of 1971. After the contest, the property was brought for auction on 10.08.1972.

3.The fifth defendant in O.S.No.651 of 1982, who participated in the auction sale, purchased the property. After the purchase of the suit schedule property from the Court auction, the second defendant Ramayammal in O.S.No.651 of 1982 filed a suit for general partition in O.S.No.70 of 1973 and the same was dismissed for default on 19.03.1971. Thereafter, the fifth defendant sold the property in favour of the sixth defendant on 04.08.1977. In the meanwhile, the third defendant, who is none other than the son of the first and second defendants filed a suit in O.S.No.752 of 1977 for declaration and rights in the suit schedule property and the same was dismissed for default on 06.09.1979. Thereafter, the sixth defendant sold the property to the seventh defendant on 21.05.1981.

4.In the meanwhile, the seventh defendant in O.S.No.651 of 1982 who purchased the property from the sixth defendant filed a suit in O.S.No.321 of 1983 for permanent injunction, restraining the plaintiffs and other defendants from interfering with the peaceful possession and enjoyment of the property.

5.Both the suits i.e., O.S.No.651 of 1982 and O.S.No.321 of 1983 were clubbed together and common evidence were adduced. The Trial Court by a common order decreed the suit in O.S.No.651 of 1982 filed by the appellants herein and dismissed the suit in O.S.No.321 of 1983. Aggrieved by the same, the ninth defendant in O.S.No.651 of 1982/ second plaintiff in O.S.No.321 of 1983 preferred appeals in A.S.Nos.39 and 40 of 1997. The lower Appellate Court by a common judgment dated 29.06.1998 allowed the appeals and set aside the order passed by the Trial Court. Aggrieved by the same, the appellants/ plaintiffs in O.S.No.651 of 1982/ defendants 4 and 5 in O.S.No.321 of 1983 have filed the present second appeals.

6.At the time of entertaining the second appeals, this Court has framed the following substantial questions of law:

1. Whether the judgment of the lower Appellate Court is vitiated in that it has held, that, the suit

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in O.S.No.651 of 1982 is barred by limitation without taking into consideration the provisions of Section 7 of the Limitation Act?

2.Whether the eldest son of the joint family, who is not in management of the joint family abdicates his responsibility by not prosecuting the suit which had been filed to protect the interest of his minor brothers, whether such action will bind the minors?

3.In a suit for only permanent injunction when the original plaintiff dies, whether the cause of action will survive or whether the legal representative will have to independently prove that he came into possession of the suit property by filing a separate suit to protect his possession?

4.Whether mere production of kist receipts can be considered proof of possession of a property?

7.The learned senior counsel appearing for the appellants submitted that the first defendant borrowed money from the fourth defendant for the purpose of wayward activities and spent it lavishly. Since the money was borrowed for his illegal activities and the same was not repaid, the fourth defendant had to institute a suit against the first defendant and it would not bind on the other members of the family, that too, when the appellants are minors at the relevant point of time, unless the first defendant proves that the money borrowed from the fourth defendant was spent for the welfare of the joint family. In the absence of any materials or documents to show that the money was spent only for the well being of the family, the same will not bind on the other coparcener of the Hindu Joint Family. To support his contentions, the learned senior counsel relied upon the decision reported in (1943) 56 Law Weekly 141 (Lakshmanaswami (deceased) and others v. Srimat Thirumala Peddinti tiruvengala Raghavacharyulu, minor by maternal grand-mother and guardian Molugu Tiruvengalamma and others)

It is no doubt settled law that in the case of a loan advanced to the manager of a Hindu joint family if the lender makes due inquiry into the necessity for the loan and lends the money bonafide, the debt is binding on the interest of all the members in the family estate, although the reasonably credited necessity did not in fact exist. This rule is based on the qualified power of the manager or the representative of the family to borrow so as to bind all the members of the family only under certain circumstances which are in their nature variable and are often compendiously referred to as family necessity or benefit. In such a case if the creditor lends

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honestly after satisfying himself that the borrower is acting within the limits of his authority, the borrowing is regarded as duly authorised and, therefore, as binding on the other persons on whose behalf he purports to borrow. The principle is embodied, as regards transfers of immovable property, in S.38 of the Transfer of Property Act, which has now been made applicable to Hindus. In so far as the father is also the manager of the family, the same rule of course applied when he purports to borrow for an alleged family purpose. But when he borrow for his own private purposes without any representation, express or implied that he is borrowing for the family, he does not act on behalf of his family and no question of his acting beyond the scope of his authority can arise and no question, therefore, of any bona fide lending. The Hindu Law no doubt casts a pious obligation on the son to discharge his father's debts except those falling within certain categories which are usually referred to as illegal or immoral. But this obligation, it is well to remember, was based on the religious duty of the son to relieve the father from the evil consequences arising from the non-payment of his debts and was not designed for the benefit or the protection of his creditors; and similarly, an examination of the Smrithi texts relating to the excepted categories shows that they are based solely on the impropriety of the father's conduct in contracting the debt and have no reference to the property or otherwise of the creditor's conduct in advancing the loan. The position, therefore, is that if the father's debt is free from taint, a pious duty is laid on the son to rescue the father from the penalties of indebtedness, the resulting advantage to the creditor being purely incidental; if on the other hand, the debt originates in the father's misconduct, the pious duty ceases to operate, and the son is not bound to pay off the debt however bonafide the creditor may have been in advancing the loan. It follows that all that the son has to prove to establish his immunity from the pious obligation in a suit by the creditor is the immoral character of the debt, and it is not incumbent on him to show further that the creditor lent with the knowledge that the debt was contracted for an immoral purpose.

It remains to see whether the authorities relied on for the appellant compel a different conclusion. As already observed reference was made to Mulla's Principles of Hindu Law where it is stated at page 339:

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"It is open to the son in such a suit (a creditor's suit against father and son) to show that the debt was incurred by the father to the knowledge of the lender for an immoral purpose and to resist a decree against his share on that ground".

The Privy Council decision in Sat Narain v. Behari Lal (1) is cited in support of this proposition. In that case their Lordships observe as follows:

"When the decree which was executed was made in a suit to which the sons were not parties and the property sold was the joint property of the father and the son, the sale was good on the principle of Hindu Law that it is the pious duty of a Hindu son to pay his father's debts, unless it is shown that the debt in respect of which the decree was made was contracted by the father to the knowledge of the lender for the purposes of immorality."

The reference in this passage to the lender is perhaps an inadvertent slip as it is difficult to see how the lender's knowledge of the immoral purpose can render the sale bad, if the execution purchaser had no knowledge of such purpose and purchased the property bonafide for valuable consideration. The knowledge of the purchaser, was held by their Lordships to be the determining factor in such cases (See Giridhari Lall v.Kanto Lall (2) and Suraj Bunsi Koer v.Sheo Proshad Singh (3)).

8.Per contra, the learned senior counsel Mr.Parthasarathy, appearing for the first respondent had referred to a passage of The Hindu Succession Act which reads as follows:

293B.Son's right after sale- (1) Money decree against father - Where the father has contracted a debt for his own personal benefit, the creditor may obtain a money decree against the father alone, and may enforce the decree by attachment and sale of the entire coparcenary property, including the son's interest therein. The sons, though not parties to the suit, are bound by the sale by reason of their pious duty to pay their father's debt, and they cannot recover their share of the property unless they prove (and the burden lies upon them to prove) that the debt was contracted by the father for an immoral or illegal purpose. This rests on the theory that as the father can effect a sale without suit of the entire joint family property, including his son's interest therein,

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in favour of the creditor for the payment of antecedent debt (294), so the creditor may legally procure a sale of it by suit. The fundamental principle is that where joint family property is sold in execution of a decree, though obtained against the father alone, and for a debt contracted by him for his own personal benefit, the sons cannot claim to recover their share of the property unless they show that the debt was contracted by the father to the knowledge of the lender for an immoral or illegal purpose and that the purchaser had notice that it was so contracted.

9.The sum and substance of the learned senior counsel's argument is that the first defendant borrowed a loan from the fourth defendant. Since the first defendant did not repay the loan amount, the fourth defendant instituted the suit in O.S.No.63 of 1971. The said suit was decreed on 19.03.1971 and the same is marked as Ex.A7 before the Trial Court. Through Court auction, the fifth defendant purchased the property. Thereafter, the fifth defendant sold the property to the sixth defendant on 04.08.1977. Again the sixth defendant sold the property to the seventh defendant who is the innocent purchaser, purchased the property and had challenged the same before the Trial Court, which is not permissible.

10.The learned senior counsel for the respondent further contended that unless the appellants / plaintiffs establish that the money has been borrowed for the purpose of wayward activities, it would not bind on the seventh defendant. The learned counsel further contended that the vendor's vendor of the seventh defendant purchased the property through Court auction on 10.08.1972, thereafter the vendor of the seventh defendant purchased the property on 04.08.1977 and thereafter only the seventh defendant purchased the property on 21.05.1981 and the plaintiffs have not taken any action. However, after ten years the appellants / plaintiffs have filed the suit against the defendants and it is not sustainable.

11.Heard the learned counsel appearing on either side and perused the materials available on record.

12.In the present case, the appellants' mother had already instituted a suit for general partition against the vendor and the same was dismissed for default. Again the appellants' brother/ third defendant instituted another case, which was also dismissed for default. After ten years, the appellants have instituted the suit against all the defendants who have innocently purchased the property is not maintainable. The appellants did not establish that the money was borrowed by the first defendant for his immoral activities, no documents

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were filed either before the Trial Court or before the First Appellate Court and no evidence has been adduced for the purpose of proving his wayward activities.

13.In the above said background, it is useful to extract hereunder the relevant portion of the decision of the Division Bench of this Court reported in (2002) 3 MLJ 43 (Minor S.Vijayakumar (Died) and others vs. R.Subbarayan):

> 30.Be that as it may, the fact remains that the first defendant was given to drinking and that there was a set back in his health and he was hospitalised. These things happened between 1969 and 1972. There is absolutely nothing to show that after 1972 the first defendant continued to drink. Apparently, he had got over the habit. As regards his affairs with other women, there is no reliable evidence. The plaintiffs have not placed any evidence worth the name for taking a view that the first defendant was given to immoral and illegal ways. In the absence of any acceptable evidence on this aspect, it is very unsafe to conclude that he was given to bad ways and that the alienations were for meeting the expenses relating to those bad ways.

14.It is also useful to extract hereunder the relevant portion of the decision of this Court rendered in the case of Kothanda Naidu and Ors. Vs. M.Kuppayya Naidu and Anr., dated 09.11.1959 reported in (1960) 1MLJ 329:

> 3.We think it is sufficient here to set forth the relevant passage from Mulla Principles of Hindu Law, twelfth edition (1959), page 455, Section 295 (2):
>
> The burden which lies upon the sons to prove the immorality of the debt is not discharged by showing that the father lived an extravagant or immoral life; there must be a direct connection, between the debt and immorality set up by the sons.
>
> The learned author supports this dictum by very many citations of case-law of all the High Courts, which we do not think it necessary to reproduce here, since the principle itself is very well-known.

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15.On a perusal of the findings of the Trial Court as well as the First Appellate Court, the respondents / defendants purchased the property through Ex.B3 on 21.05.1981 before that her vendor purchased the property on 04.08.1977 and the fifth defendant purchased the property from the Court auction on 10.08.1972 and even prior to that the appellants' mother and appellants' brother instituted suit and the same were dismissed for default. Interestingly, the appellants / plaintiffs also

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participated in the case proceedings as minors and they were represented by their next friend and mother and also brother, the same were dismissed for default. After ten years the appellants / plaintiffs have filed the present suit against the defendants in order to set aside the earlier sale deeds executed by the defendants.

16.Moreover, the appellants have not established any documents to show that the first defendant borrowed money from the fourth defendant and the fourth defendant was advancing loan to the first defendant for his wayward activities. In the absence of any material, the decisions cited by the learned Senior counsel appearing for the respondent squarely apply to this case.

17.In view of the above, this Court do not find any contra evidence to interfere with the of the judgment and decree dated 29.06.1998 made in A.S.Nos.39 and 40 of 1997 on the file of the Subordinate Judge, Bhavani, reversing the judgment and decree dated 07.04.1997 made in O.S.Nos.651 of 1982 and 321 of 1983 on the file of Principal District Munsif, Bhavani.

18.Accordingly, the substantial questions of law are answered against the appellants and the second appeals are dismissed. The common judgment and decree dated 29.06.1998 made in A.S.Nos.39 and 40 of 1997 on the file of the Subordinate Judge, Bhavani. is confirmed. No costs.

Sd/-
Assistant Registrar(CS II)

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Sub Assistant Registrar

kas/pri

To

1.The Subordinate Judge, Bhavani.
2.The Principal District Munsif, Bhavani.
3. The Section Officer,
VR Section, High Court, Madras. (2 Copies)

+1cc to Mr.Va.Vu.Si, Vazhakagam, Advocate SR.No.7332
+1cc to Mr.Zeenath Begum, Advocate SR.No.7111
+1cc to Mr.S.Siva Kumar, advocate SRNo. 8015

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GJ(CO)
GN(27/03/2018)

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