

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Delivered On: 08.03.2018

Reserved On: 01.03.2018

CORAM

THE HONOURABLE MR.JUSTICE M.DHANDAPANI

S.A.No.1768 of 2000

And

C.M.P.No.16594 of 2000

Angappa Gounder

...Appellant/3rd Defendant

Vs.

1.Bhavani

2.Minor Revathi

3.Minor Rekha

4.Minor Manjula

... Respondent 1 & 4/Plaintiff 1 to 4

(Minors 2 to 4 rep.by next
friend mother Bhavani)

5.Sekhar

6.Sengothai Ammal

... Respondent 5 & 6/Defendant 1 & 2

Prayer:

Second Appeal filed under Section 100 of Code of Civil Procedure, against the judgment and decree in A.S.No.8 of 2000 dated 31.07.2000 on the file of Principal District Judge, Tiruvannamalai reversing the judgment and decree of the Principal District Munsif Court, Tiruvannamalai made in O.S.No.1497 of 1995 dated 25.11.1999.

Appellant : Mr.G.Rajan

Respondents : Mr.R.Sidharth for R1 to R4
for Mr.T.R.Rajaraman
R5 & R6 No Appearance

J U D G M E N T

The un-successful third defendant who lost his case before the lower Appellate Court is the appellant herein. The respondents 1 to 4 are the plaintiffs 1 to 4 in the suit and respondents 5 and 6 are the defendants 1 and 2 in the suit. For

the sake of convenience, the appellant and the respondents will be hereinafter referred to as per their rank in the suit.

2.The plaintiffs filed a suit in O.S.No.1497 of 1995 seeking to direct division of suit 'A' and 'B' schedule properties into five equal shares taking good and bad soil into consideration and allot four such shares to the plaintiffs by appointing an Advocate Commissioner; directing the defendants to put the plaintiffs in possession of their 4/5 share in the suit 'A' and 'B' schedule properties and if the defendants fail to do so, the plaintiffs 4/5 share in the suit 'A' and 'B' schedule properties may be delivered to the plaintiffs through the process of the Court and to order enquiry under Order 20 Rule 12 of C.P.C. for ascertaining the mesne profits payable by the third defendant for the

plaintiffs 4/5 shares in the suit 'A' schedule properties from the date of the suit till the date of delivery of possession and to direct the third defendant to pay such mesne profits to the plaintiffs.

3.The sum and substance of the plaint averments are as follows: The first defendant married the first plaintiff as per the Hindu Rites and Customs. Thus, the first plaintiff is the legally wedded wife of the first defendant. From the date of marriage, the first defendant and first plaintiff have been living together as husband and wife in the house of the first defendant. Out of the wedlock, the first defendant begot plaintiffs 2 to 4 through the first plaintiff. The first defendant also begot a male child through the first plaintiff and the said male was alive for 5 days and thereafter, died leaving behind his mother as the legal heir according to the Hindu Succession Act, 1956.

4.The plaintiffs further aver that one Manna Gounder/ father - in - law of the first plaintiff, his step-brothers Pachaiyappa Gounder and Krishnamoorthy and their father Annamalai Gounder partitioned their ancestral Hindu Joint Family properties under registered partition deed dated 07.08.1961. The properties set out in 'A' and 'B' schedule of the plaint and several other properties were allotted to the share of Manna Gounder under the said partition. The said Manna Gounder married the second defendant as per the Hindu Rites and Customs long ago and out of the lawful wedlock, he begot two sons namely, Thirumalai, Sekhar/ first defendant and one daughter namely, Janaki, through the second defendant. The first defendant, his brother Thirumalai and their father Manna Gounder were originally constituting members of undivided Hindu Joint Family, owing, possessing and enjoying several items of ancestral properties.

5.The plaintiffs further aver that during the year 1975,

the said Manna Gounder and his sons orally partitioned their ancestral joint family properties into two shares, of which, one share was allotted to Thirumalai and one share was allotted to the first defendant/ Sekhar. The said Manna Gounder out of his free will and volition did not take any share for himself in the said partition. The understanding was that his two sons should provide meals to manna Gounder in rotation for one month each in his life time. Through the said oral partition, suit 'A' and 'B' schedule properties were allotted to the share of the first defendant. Therefore, suit 'A' and 'B' schedule properties are the ancestral Hindu Joint Family properties of the first defendant, plaintiffs 2 to 4 and the deceased son of the first defendant.

6.The plaintiffs further aver that as per the provisions of the Hindu Succession Act, 1956, as amended by the Tamil Nadu Act 1 of 1990, the plaintiffs 2 to 4 who are the spinster daughters of the first defendant are entitled to get equal share as that of the first defendant in the suit 'A' and 'B' schedule properties. The deceased son of the first defendant was entitled to 1/5 share in the suit 'A' and 'B' schedule properties and since the said male child died intestate, his share devolved upon his mother/ first plaintiff as per the provisions of Hindu Succession Act, 1956. Accordingly, the plaintiffs 1 to 4 are entitled to 4/5 share in the suit 'A' and 'B' schedule properties and the first defendant is entitled for 1/5 share in the suit 'A' and 'B' schedule properties.

7.The plaintiffs further aver that the first defendant is a spend thrift and he is addicted to alcohol. For meeting his immoral and illegal needs, the defendants 1 and 2 spuriously brought about the so called sale deed dated 27.06.1995 relating to suit 'A' schedule properties for the alleged consideration of Rs.84,600/- in favour of the third defendant. The actual market value of the suit 'A' schedule properties is not less than Rs.2,00,000/-. However, the defendants 1 and 2 sold the property for a grossly low and nominal amount to the third defendant and brought the sale deed dated 27.06.1995 with full of false recitals. All the recitals incorporated in the impugned sale deed dated 27.06.1995 are false, fictitious and invented ones.

8.The plaintiffs further aver that the second defendant is the mother of the first defendant. The second defendant has no manner of right over any of the suit properties. The first defendant is entitled to only undivided 1/5 share in the suit properties. Hence, the defendants 1 and 2 had no manner of right to sell the suit 'A' schedule properties. The first defendant had been getting an annual net income of not less than Rs.20,000/- from the suit 'A' schedule properties. Therefore,

there is no necessity for the first defendant to alienate any of the suit properties. There is no debt due by the joint family of the plaintiffs and the first defendant and hence, there is no legal necessity for the first defendant to alienate any of the suit properties.

9.The plaintiffs further aver that the sale deed dated 27.06.1995 is invalid and void which will not and cannot in any manner bind the plaintiffs and it will not and cannot affect the plaintiffs 4/5 share in the suit 'A' schedule properties since the plaintiffs are not parties to the said sale deed dated 27.06.1995 and they have not derived any benefit out of the alienation of the suit 'A' schedule properties.

10.The plaintiffs further aver that after having secretly and spuriously brought about the impugned sale deed dated 27.06.1995, the first defendant intensified the ill treatments which he meted out to the first plaintiff. Ultimately the first defendant kicked, beat and drove away the plaintiffs 1 to 3 from his house on 22.07.1995. Sensing danger to their lives and limbs, the plaintiffs 1 to 3 are living in the father's house of the first plaintiff. When the first defendant drove away the plaintiffs from his house on 22.07.1995, the first plaintiff was pregnant and she gave birth to the fourth plaintiff Manjula in the Jipmer Hospital at Pondicherry on 17.11.1995.

11.The plaintiffs further aver that after 22.07.1995, the first defendant has completely failed and neglected to provide maintenance to the plaintiffs. The first plaintiff came to know about the execution of the impugned sale deed dated 27.06.1995 only on 24.07.1995. The first plaintiff through her father Pachaiyappa Gounder applied and obtained a registration copy of the impugned sale deed dated 27.06.1995 on 24.07.1995. Thus, the impugned sale deed dated 27.06.1995 is invalid and void and it will not in any manner affect the plaintiffs 4/5 share in the suit 'A' schedule properties.

12.The plaintiffs further aver that the third defendant knew pretty well about the plaintiffs share in the suit properties. Infact, he should file only a suit for partition and separate possession of his 1/5 share in the suit 'A' schedule properties. Thereafter, the plaintiffs 1 to 3 issued a Lawyer's notice dated 03.08.1995 to the defendants, setting out the above facts and calling upon them to divide all the suit properties into five equal shares taking good and bad soil into consideration and allot four such shares to them. The defendants received the said notice. But they neither complied with the said notice nor did they issue any reply notice. The third defendant illegally took possession of the suit 'A' schedule properties from the first defendant on 01.12.1995 and since then he has been in

wrongful possession and enjoyment of the suit 'A' schedule properties. Hence, the suit has been filed.

13.The sum and substance of the written statement filed by the first defendant is as follows: The defendant admitted his marriage with the first plaintiff and the birth of plaintiffs 2 to 4, however, denied the birth of the male child. The defendant contended that the birth of male child has been falsely stated in the plaint for the purpose of the suit.

14.The first defendant denied the partition stated to have been took place between Manna Gounder/ father of the first defendant, his step-brothers Pachaiyappa Gounder and Krishnamoorthy and their father Annamalai Gounder under the registered partition deed dated 07.08.1961. The defendant denied the plaint averment that the properties set out in 'A' and 'B' schedule of the plaint and several other properties were allotted to the share of Manna Gounder under the said partition.

15.The first defendant admitted that Manna Gounder married the second defendant as per the Hindu Rites and Customs long ago and out of the lawful wedlock, he begot two sons namely, Thirumalai and Sekhar. The defendant denied the plaint averment that the said Manna Gounder and his sons including the first defendant orally partitioned their ancestral joint family properties into two shares, of which, one share was allotted to Thirumalai and one share was allotted to the first defendant/ Sekhar and the said Manna Gounder out of his free will and volition did not take any share for himself in the said partition.

16.The first defendant contended that as a Kartha of the Hindu joint family, he along with the second defendant sold the suit 'A' schedule properties vide sale deed dated 27.06.1995 in favour of the third defendant for a sale consideration of Rs.84,600/- and contended the plaint averment that the actual market value of the suit 'A' schedule properties is not less than Rs.2,00,000/- as false. He further denied the plaint averment that the recitals incorporated in the impugned sale deed dated 27.06.1995 are false, fictitious and invented ones.

17.The first defendant further denied the plaint averment that he is getting an annual net income of not less than Rs.20,000/- from the suit 'A' schedule properties and there is no necessity for the first defendant to alienate any of the suit properties. He contended that the sale deed dated 27.06.1995 is binding on the plaintiffs. He further contended that during his lifetime, his father Manna Gounder executed a Will dated 10.01.1982 in favour of the second defendant and the second defendant has been in possession and enjoyment of the suit

property even during his lifetime and the first defendant has got 1/3 share in the family property. He further contended that the plaintiffs are entitled to seek share only in Acre 1.10 cent out of 0.61.0 Hectare in S.No.96/4 which was bought by him. Therefore, the suit filed by the plaintiffs is liable to be dismissed.

18.The sum and substance of the written statement filed by the second defendant is as follows: The second defendant contends that the suit properties are the absolute properties of the second defendant in view of the Will executed by Manna Gounder dated 10.01.1982. Most of the averments in the written statement filed by the second defendant are similar to that of the averments in the written statement filed by the first defendant. The second defendant further contends that if at all the plaintiffs are eligible for any share in the suit 'A' schedule properties, they are entitled to only from the share of the first defendant measuring an extent of 0.77 acres and they are not entitled to any mesne profits. The suit has been filed by the plaintiffs with bad intention and the suit is liable to be dismissed.

19.The sum and substance of the written statement filed by the third defendant is as follows: The third defendant do not agree with the entire facts as narrated in the plaint. However, he admitted the fact that the first defendant married the first plaintiff. The third defendant further contended that he is the bonafide purchaser of the suit 'A' schedule properties. The plaintiffs are not entitled to 4/5 share in the suit 'A' and 'B' schedule properties. Further, the third defendant pleaded for equity.

20.On the side of the plaintiffs, seven documents were marked as exhibits and three witnesses were examined. On the side of the defendants, six documents were marked as exhibits and two witnesses were examined. The lower Court after perusing the documents and after framing the issues, dismissed the suit. As against the same, the plaintiffs filed appeal before the lower Appellate Court and the lower Appellate Court set aside the judgment and decree of the lower Court. The lower Appellate Court allowed the appeal and decreed the suit in favour of the plaintiffs. As against the same, the purchaser/third defendant has filed the present second appeal.

21.At the time of admission, the following substantial questions of law were framed for consideration:

“(1)Whether the lower appellate Court is legally justified in holding that the sale of

the suit property by the first defendant who is the father and Kartha of the joint family, is vitiated on the ground that such sale is for immoral and illegal purposes especially in the absence of any acceptable and legal evidence?

(2) Whether the lower appellate Court is justified in granting preliminary decree for partition without giving finding regarding the availability of joint family property?

(3) Whether the reversing judgment of the lower appellate Court in granting the relief of partition without deciding the ownership of item 3 and a portion of item 4 of 'A' Schedule property is sustainable?

(4) Whether the suit for partial partition by wife and children against her husband for a portion of the family property is sustainable in law?

(5) Whether the non-inclusion of the property covered under Ex.B1, which was admittedly purchased by the first defendant, the Kartha of the family, out of the sale proceeds under Ex.B1 in the plaint schedule vitiates the claim of partition, and in other words, whether the partition suit is sustainable either in law or on facts?

(6) Whether the first appellate Court is correct in decreeing the suit for partition of the suit property in favour of the plaintiff without setting aside the alienation of the suit property in favour of the third defendant by the 1st and 2nd defendants through a registered sale deed dated 27.6.1995?

(7) Is not the first appellate Court wrong in not referring to the legal proposition that the setting aside of the alienation in favour of the 3rd defendant is a necessary postulate before granting the relief for partition in favour of the plaintiff, when the alienation in favour of the 3rd defendant is only voidable and not void?

(8)Whether the first appellate Court is correct by giving a finding to the effect that the setting aside of alienation dated 27.6.1995 in favour of the 3rd defendant by the 1st and 2nd defendants, is no necessary because the minors are made as "Eo nomie party" only through the rectification deed dated 28.9.1995 without holding the rectification deed as null and void in law?"

(9)Whether the first appellate Court is correct in granting the relief of partition to the property of the 2nd defendant also, when some of the items in the suit property are separate property without giving any findings as to the items alleged to be the separate property?

(10)Is not the findings of the first appellate Court vitiated by ignoring the material facts and evidence before it and in consequence non-considering the material fact and evidence and thereby landed in gross miscarriage of justice?

(11)Is not the first appellate Court wrong in not framing the relevant issue that is whether the entire suit property is the ancestral property of the 1st defendant alone when there is a contrary allegation by the 2nd and 3rd defendants that the part of the suit property is the separate property of the 2nd defendant?

22.The learned counsel appearing for the appellant/ third defendant would submit that the suit properties were purchased by the third defendant after paying valuable sale consideration on 27.06.1995. On the very same day, the first defendant purchased another property for valuable consideration of Rs.50,000/- and in the sale deed, the defendants 1 and 2 had categorically stated that the properties are sold for the purpose of clearing the debts and for family expenditure. Accordingly, the defendants received Rs.84,600/-. Apart from clearing the debts, the first defendant purchased another property from one Parvathy Ammal and the subsequent purchase clearly shows the said amount was invested for the well being of the family and for the betterment of the plaintiffs and the said sale was out of legal necessity.

23.The learned counsel appearing for the appellant/ third defendant would further submit that the first defendant being

Kartha of the Hindu Joint family executed sale deed in favour of the third defendant. The Kartha is entitled to alienate the joint family property for the well being of the Hindu Joint family. Though initially minors were not included in the sale deed, subsequently, they were included as eo nomine parties in the above sale deed. Accordingly, the said sale deed is binding on the plaintiffs 2 to 4.

24. The learned counsel appearing for the appellant/ third defendant would further submit that if at all, the plaintiffs want to set aside the sale deed, they have to establish that the said properties were not sold for the well being of the family. In the absence of any documents for such pleadings, the sale deed under which the third defendant purchased the properties from the defendants 1 and 2 is valid and binding on the plaintiffs. Hence, filing of suit against the defendants for partition is un-sustainable and the same is not maintainable.

25. In support of his contention, the learned counsel appearing for the appellant/ third defendant relied upon the following decisions:

(i) A decision of the Full Bench of this Court reported in MANU/TN/0132/1956 (Sankaranarayana Pillai and another Vs. Kandasamia Pillai), the relevant portion of which reads as follows:

"7. It is urged on behalf of the respondent by Mr. Natesan that in cases when a guardian purporting to act on behalf of a minor, whether it be with regard to the joint family properties of others and the minor or the properties belonging to the minor, it is open to the minor to ignore the transaction and recover possession of the properties on the footing of a void instrument in which case Court-fee is payable only under Section 7(v) of the Court-fees Act. He contends that in order that Section 7(iv-A) may be made applicable, it must be incumbent upon the plaintiff to seek a cancellation of the instrument and in the case of a Hindu minor when the alienation is by the guardian it is open to the minor to ignore the transaction and avoid it within three years of his attaining majority failing which the transaction becomes perfected. Such ignoring or avoiding need not necessarily be by a suit, but an unequivocal act of quondam minor to elect or avoid would be sufficient. It is further urged that the power of a

guardian under the Hindu Law is very limited and his alienation would be valid only under certain circumstances. It is open to the minor to go to the Court and allege that the transaction does not exist. The result of the analysis of the cases, according to the learned Counsel is that if it is found that the document is not binding on the minor it should be as if he was not a party to the instrument at all. The cases cited at the bar can be classified under two heads, namely, those in which the minor's properties are being dealt with by a guardian and the minor seeks a decision that such dealings are not binding on him and secondly, those in which the father or the manager of the joint family purporting to deal with the family properties acts as the guardian of the minor, who is only one of the members of the joint family. It seems to us that in the former case the minor is eo nomine a party to the transaction and he should seek to cancel the documents in which case Court-fees has to be paid under Section 7(iv-A) of the Act. But where the minor was only a member of a joint family and the transaction is on behalf of the joint family, he could always ignore the transaction as not binding on the family and seek to recover possession. Their Lordships of the Judicial Committee in Subrahmanyam v. Subba Rao (1948) 2 M.L.J. 22, in considering the question regarding the applicability of Section 53-A of the Transfer of Property Act, took the view that the minor should be deemed to be a party to the transaction eo nomine. In interpreting the word 'transferor' in Section 53-A of the Transfer of Property Act, the Judicial Committee held that where the mother and guardian of a minor enters into a contract of sale of immoveable properties of the minor to discharge the father's debts and puts the transferee in possession, the transferor in such a case, for the application of Section 53-A of the Transfer of Property Act, is the minor. The principle deducible from this case is that where the transaction is with regard to the properties of the minor, it should-be deemed as if he is eo nomine a

party. At page 24 we find the following Observation:

Their Lordships think it is clear that the words the 'transferor' refer back to the person who contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf. Thus the act of the mother and guardian in entering into the contracts of sale in the present case was an act done on behalf of the minor and finally it was held that 'the person who most aptly answers the description of the transferor' in the sense in which these words are used in Section 53-A of the Transfer of Property Act is the minor himself.

8. If the matter is looked at in this way there is no difficulty in reconciling the various cases and we do not propose to analyse at length the large body of case-law cited at the Bar. The distinction between a void and voidable transaction has been brought out in a number of cases and we need only refer to a few of them : Chingacham Vitil Sankaran Nair v. Chingacham Vitil Gopala Menon (1906) I.L.R. 30 Mad. 18, Bijoy Gopal Mukerji v. Krishna Mahishi Debi (1907) 17 M.L.J. 154 : L.R.34 I.A. 87 : I.L.R. 34 Cal. 339 (P.C.), Fakirappa Limmanna v. Lumanna Bin Mahadu (1919) I.L.R. 44 Bom. 742, Bali Reddi v. Khatipulal Sab (1935) 69 M.L.J. 458, Ankamma v. Kameswaramma (1935) 70 M.L.J. 352, Raja Ramaswami v. Govindammal (1928) 56 M.L.J. 332 and Vallabhacharyulu v. Rangacharyulu A.I.R. 1937 Mad. 449. There is no doubt whatever that a transaction entered into by a guardian relating to the minor's properties is not void and if the minor does not sue to set it aside within three years of his attaining majority it becomes valid under Article 44 of the Limitation Act. In such a case the minor is deemed to be a party to the transaction. But where the document is executed by a manager of the family and it is not binding on the family, the minor or any other member can ignore the transaction and recover possession of the property. To such a

case Section 7(v) of the Court-fees Act will apply. We are here not concerned with decrees to which the minor is eo nomine a party. Our answer to the first question is that if the minor is eo nomine a party to a sale-deed or other document of alienations, he must sue for the cancellation of the document under Section 7(iv-A) of the Court-fees Act and it is not enough if he applies for possession under Section 7(v) of the Act; and to the second question our answer is that there can be no distinction whether the father as guardian of the minor and not as the manager of the joint family executes the deed. Even in that case also the document has to be set aside."

(ii) A decision of this Court reported in 2006 (5) CTC 169 (Chinnannan Vs. Paranimalai and others), the relevant portion of which reads as follows:

"12. When the minor is shown as eo nomine party, when the minors property is sold by the guardian, such alienation can be questioned by the minor, within three years from the date of his attaining majority, since the sale is only voidable. Because of the fact that the property was settled in favour of the minor and since the property was sold by guardian, it cannot be held that the sale deed itself is void and therefore, no prayer is necessary to set aside the sale deed. To support the above position, the learned counsel for the appellant drew my attention to a Full Bench decision of this Court in Sankaranarayana Pillai and another vs. Kandasamia Pillai, 1956 (2) MLJ 411, wherein while answering the points that if the minor is eo nomine party to a sale deed, is it necessary for him to sue for the cancellation of the document or is it suffice, if he files the suit for declaration, excluding the sale, as such, the Full Bench has arrived at an uniform conclusion and had held as follows:

"Where a minor is eo nomine a party to a sale deed or other document of alienation by a guardian which he seeks to set aside, it is not enough for him

to merely sue for possession and pay court-fee under section 7(v) of the Court-fees Act but he must sue for the cancellation of the document and pay court-fee under section 7(iv-A) of the Act. It makes no difference whether the sale deed is executed by the guardian of the minor as guardian or as manager of the joint family. In either case, the document has to be set aside. It is not open to the minor to ignore the transaction and seek possession of the property."

It is also answered

"But where the minor is not eo nomine a party to the transaction and the transaction is on behalf of a joint family of which the minor was a member, he could always ignore the transaction as not binding on the family and can seek to recover possession."

But, this kind of situation does not arise in this case. In view of the Ex.A.1 settlement deed, minor became the absolute owner and minors property was sold by the natural guardian, without obtaining the Court permission. As natural guardian, he is competent to sell the property also. Therefore, as held in the above decision, when the said alienation is challenged, within three years after attaining the majority of the erstwhile minor, who is a eo nomine party in the transaction, it is incumbent upon him to set aside the sale, paying the necessary court fee. But, as seen from the plaint, no prayer is sought for to cancel the document-Ex.A.2 and no Court fee has been paid.

13. The above position of law is strengthened by a decision of the Supreme Court in Divya Dip Singh and others v. Ram Bachan Mishra and others, AIR 1997 SC 1465, wherein also it is held that sale effected by natural guardian after guardian ad litem was discharged is not void and if the minor

want to challenge the sale within the limitation, he cannot ignore the sale deed executed by the guardian as void. Applying the above principle also, it is to be held, the contention of the plaintiff, that Ex.A.2 is void and it need not be set aside or cancelled, cannot be accepted and if at all, it is only a voidable document and this being the voidable document, it should be cancelled within the limitation i.e. within three years from the date of minor attaining the majority."

(iii) A decision of this Court reported in AIR 1971 Supreme Court 1028 (Smt.Rani and another v. Smt.Santa Bala Debnath and others), the relevant portion of which reads as follows:

"10. Legal necessity to support the sale must however be established by the alienees. Sarala owned the land in dispute as a limited owner. She was competent to dispose of the whole estate in the property for legal necessity or benefit to the estate. In adjusting whether the sale conveys the whole estate, the actual pressure on the estate, the danger to be averted, and the benefit to be conferred upon the estate in the particular insistence must be considered. Legal necessity does not mean actual compulsion: it means pressure upon the estate which in law may be regarded as serious and sufficient. The onus of providing legal necessity may be discharged by the alienee by proof of actual necessity or by proof that he made proper and bona fide enquires about the existence of the necessity and that he did all that was reasonable to satisfy himself as to the existence of the necessity.

11. Recitals in a deed of legal necessity do not by themselves prove legal necessity. The recitals are, however, admissible in evidence, their value varying according to the circumstances in which the transaction was entered into. The recitals may be used to corroborate other evidence of the existence of legal necessity. The weight to be attached to the recitals varies according to the circumstances. Where the evidence which could be brought before the

Court and is within the special knowledge of the person who seeks to set aside the sale is withheld, such evidence being normally not available to the alienee, the recitals go to his aid with greater force, and the Court may be justified in appropriate cases in raising an inference against the party seeking to set aside the sale on the ground of absence of legal necessity wholly or partially when he withholds evidence in his possession."

(iv) A decision of this Court reported in AIR 1971 Supreme Court 776 (Raghubanchmani Prasad Narain Singh v. Ambica Prasad Singh (dead) by his legal representatives and others), the relevant portion of which reads as follows:

"5. In any event an alienation by the Manager of the joint Hindu family even without legal necessity is voidable and not void. On the findings of the Trial Court, respondent 1 and 2 were in possession of the land, since the year 1936. The appellant forcibly deprived respondent 1 and 2 of possession of the land. In the circumstances respondent 1 and 2 were entitled to be restored to possession of the land, unless the appellant in an action for partition of the joint family established his claim to the land in dispute. No such attempt was made by the appellant.

6. The appeal must therefore fail and is dismissed with costs."

26. The learned counsel appearing for the appellant/ third defendant would further submit that after elaborate trial, the lower Court arrived at a correct conclusion and dismissed the suit. However, the lower Appellate Court without considering the materials on record, erroneously set aside the judgment and decree of the lower Court and decreed the suit. Hence, the judgment and decree passed by the lower Appellate Court is unsustainable. Accordingly, he prayed for allowing the appeal.

27. The learned counsel appearing for the respondents 1 to 4/ plaintiffs would submit that the defendants 1 and 2 in their written statement have stated that Manna Gounder had executed a Will dated 10.01.1982 in favour of the second defendant and major portion of the property was allotted in favour of the second defendant. But the defendants have neither proved the same before the Courts below nor marked the said Will as an

exhibit. In the absence of such a Will, alienating the Hindu Joint family property by the second defendant/ mother of the first defendant is un-sustainable one and the family members have no right to alienate the joint family properties. The entire properties are joint family properties and the first defendant as Kartha of the family is not entitled to alienate the property for any other reason except for the welfare of the joint family. However the said alienation in favour of the third defendant was made for meeting the first defendant's immoral and illegal needs. The said sale is not binding on the plaintiffs since the same is void. Therefore, there is no need to set aside the judgment and decree passed by the lower Appellate Court as the said alienation is void and not voidable one.

28. In support of his contention, the learned counsel appearing for the respondents 1 to 4/ plaintiffs relied upon the following decision:

(i) A decision of the Full Bench of this Court reported in MANU/TN/0132/1956 (Sankaranarayana Pillai and another Vs. Kandasamia Pillai), the relevant portion of which reads as follows:

"21. So far as the objection to partial partition is concerned, the said objection can be raised only by a sharer and the seventh defendant not being the co-owner, it is not open to him to take the plea. The present suit is one between the co-owner and a alienee and not really between the members of the family. Therefore, the co-owner is entitled to recover his share of the property in the schedule item and an alienee cannot contend that the suit is barred for partial partition when that right is given only to the members of the family."

29. The learned counsel appearing for the respondents 1 to 4/ plaintiffs would further submit that apart from the above, immediately after the execution of the sale deed on 27.06.1995, the plaintiffs sent a notice to the third defendant. After receipt of the said notice, the third defendant filed rectification deed by including the names of the minor plaintiffs as eo nomine parties and the same is not binding on the plaintiffs since the properties were not sold for the well being of the Hindu Joint family. Accordingly, he prayed for dismissal of the appeal.

30. I have considered the rival submissions made on either side and also perused the entire materials available on record.

31.The un-disputed facts are that the first defendant's father Manna Gounder, the first defendant and his brother form members of the Hindu Joint family and the said Manna Gounder inherited the suit schedule properties through registered partition deed dated 07.08.1961. The certified copy of the said partition deed is marked as Ex.A1. The said Manna Gounder has got two sons and one daughter. The first defendant, his brother Thirumalai and their father Manna Gounder originally constituted the members of the undivided Hindu Joint family and during the year 1975, the said Manna Gounder and his sons orally partitioned their ancestral joint family properties. The suit schedule properties were allotted to the first defendant.

32.It is also not disputed that the first defendant married the first plaintiff and the other plaintiffs are the legal heirs of the first defendant and first plaintiff. Though the first plaintiff contend that a male child was born to her and the first defendant and the said male child died after five days, there is no document to prove the same. The first defendant husband also denied the said contention of the first plaintiff. In the absence of any document or material evidence to prove the same, this Court is not able to accept the said contention.

33.Though the first plaintiff aver that the first defendant sold the suit 'A' schedule properties to the third defendant for his wayward and immoral activities, the said allegation is not proved by any documentary evidence or through oral evidence. On a perusal of the contentions in Ex.B2, it is known that the defendants 1 and 2 sold the property in favour of the third defendant for a sale consideration of Rs.84,600/- in order to clear the debts and for meeting the family expenditure. However, the written statement filed by the third defendant discloses that out of Rs.84,600/-, a sum of Rs.50,000/- was spent by the first defendant for purchasing another property on the very same day. The said sale deed dated 27.06.1995 executed by one Parvathy Ammal in favour of the first defendant is also marked as Ex.B1.

34.It is true that initially, the names of the legal heirs of the first defendant and first plaintiff were not included in the disputed sale deed dated 27.06.1995. However, on 28.09.1995, the names of the legal heirs of the first defendant and first plaintiff namely, the plaintiffs 2 to 4 were included by way of rectification deed. It is also admitted that the plaintiffs filed the suit for partition only in respect of the properties sold in favour of the third defendant. However, they have not filed suit for partition in respect of the property purchased by the first defendant on 27.06.1995.

35.The decision of the Full Bench of this Court reported in MANU/TN/0132/1956 (Sankaranarayana Pillai and another Vs. Kandasamia Pillai), relied upon by the learned counsel appearing for the respondents 1 to 4/ plaintiffs is not applicable to the present case on hand. In the present case on hand, the plaintiffs have filed the suit for partition against defendants 1 and 2 who are none other than the husband and mother - in - law of the first plaintiff and the third defendant who purchased the property on 27.06.1995. On the very same day the first defendant invested major portion of the sale consideration for purchasing another property.

36.The third defendant contended that the first defendant sold the property in favour of the third defendant for the well being of the Hindu Joint family and out of legal necessity, the said sale deed was executed in favour of the third defendant. No contra evidence were adduced by the plaintiffs for proving that the first defendant sold the properties in favour of the third defendant for meeting out his wayward and immoral activities. In the absence of any document for proving that the properties were sold to meet out the immoral activities of the first defendant, the said contention is un-sustainable.

37.Even assuming that the plaintiffs 2 to 4 were shown as eo nomine parties in the sale deed executed by the defendants 1 and 2 in favour of the third defendant, the said alienation can be questioned by the minors and members of the joint family if the property is sold against the interest of joint family and the said allegation has to be pleaded or established before the lower Court. Even then the sale is only voidable and not void. In the present case, the first defendant sold the property only for the well being of the Hindu joint family and the said amount was invested in purchasing another property. The said action of the first defendant cannot be said as illegal. Further, the alienation of the suit schedule property in favour of the third defendant is for the well being of the family and the third defendant established that the sale consideration was invested in purchasing another property in the name of the first defendant and still the property is available for the benefit of the plaintiffs.

38.In view of the above, I am of the opinion that the decisions relied upon by the learned counsel appearing for the appellant/ third defendant squarely apply to the case on hand and the plaintiffs did not establish their case. The sale of the suit schedule properties in favour of third defendant was for legal necessity and not for immoral purposes and there is also no proof or documents to prove that the sale was for meeting out the immoral activities of the first defendant. Accordingly, the findings of the lower Appellate Court warrants

interference.

39.In view of the above discussions and the decisions cited, the substantial questions of law are answered in favour of the appellant. The second appeal is allowed. The judgment and decree in A.S.No.8 of 2000 dated 31.07.2000 passed by the learned Principal District Judge, Tiruvannamalai, is set aside. The judgment and decree passed by the learned Principal District Munsif, Tiruvannamalai in O.S.No.1497 of 1995 dated 25.11.1999, is restored. No costs. Consequently, the connected miscellaneous petition is also closed.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

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To

- 1.The Principal District Judge,
Tiruvannamalai.
- 2.The Principal District Munsif,
Tiruvannamalai.
- 3.The Section Officer,
V.R.Section,
High Court of Madras,
Chennai 600 104.

+1cc to Mr.G.Rajan, Advocate, S.R.No.17832

+1cc to Mr.T.R.Rajaraman, Advocate, S.R.No.17864

S.A.No.1768 of 2000

And

C.M.P.No.16594 of 2000

JM(CO)
CS/13/04/18

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