IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 09.01.2018

PRONOUNCED ON : 31.01.2018

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S.A.No.1035 of 2003

Muthusamy ... Appellant/2nd Defendant

Vs.

1. Pappathi,
2. Minor Mani,
represented by his mother,
and next friend Papathi.
... Respondents 1 to 2 / plaintiffs 1 & 2

3. Palanisamy ...3rd Respondent/1st Defendant

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 12.09.1997 and made in A.S.No.2 of 1992 on the file of Sub-Court, Namakkal, confirming the judgment and decree dated 19.8.98 and made in O.S.No.428 of 1983, on the file of District Munsif Court, Rasipuram.

For Appellant : Mr.V.R.Rajasekaran

For Respondents: Mr.N.Subramani for R1 & R2

: No appearance for R3

JUDGMENT

Challenge in this second appeal is directed against the judgment and decree dated 12.09.1997 passed in A.S.No.2 of 1992, on the file of Sub-Court, Namakkal, confirming the judgment and decree dated 19.8.98 passed in O.S.No.428 of 1983, on the file of District Munsif Court, Rasipuram.

2. Parties are referred to as per their rankings in the trial Court.

3. Suit for maintenance, charge, partition and declaration.

4. The case of the plaintiffs, in brief, is that the first plaintiff is the legally wedded wife of the first defendant and out of the said wedlock, the second plaintiff was born to them and for the past one year the first plaintiff started indulging in immoral and illegal activities without any care and regard for the family and accordingly, the first defendant started illtreating the first plaintiff and thereby, the first defendant drove the first plaintiff from the matrimonial home and resultantly, the first plaintiff along with her son, namely, the second plaintiff had been forced to live in her parents house and the first defendant in connection with his illegal and immoral activities and having no concern for the family started disposing of the family properties, in which, the second plaintiff has a lawful share and it is learnt that the second defendant had purchased the family property from the first defendant without any legal necessity, however claiming that the said sale transaction had been entered into for discharging the antecedent debts of the family of the first defendant and for other necessities. But there is no need for incurring any debt by the first defendant towards the family purpose or for any other necessities and the alienation of the family property by the first defendant in favour of the second defendant on 13.05.1982 for a sum of Rs.15,000/- is invalid and the same is against the welfare of the second plaintiff and the said sale transaction is not binding on the second plaintiff and inasmuch as the first defendant had neglected the plaintiffs and did not provide maintenance for their support and also started wasting the family properties for his nefarious activities and as the sale transactions created in favour of the second defendant in respect of the family properties is invalid, according to the plaintiffs, they had been necessitated to lay the suit for appropriate reliefs and the first plaintiff sent a legal notice to the defendants and with reference to the same, only the second defendant sent a reply containing false allegations and hence, the suit.

5. The case of the second defendant, in brief, is that the suit is not maintainable either in law or on facts. It is false to state that the first defendant indulged in illegal and immoral activities and thereby, illtreated the first defendant and drover her out of the matrimonial home. It is false to state that the first defendant in order to serve his illegal and immoral purposes had alienated the family properties in favour of the second defendant without any necessity and on the other hand, the first defendant had been indebted and accordingly, in order to discharge the antecedent debts, he had alienated the first item of the B schedule properties in favour of the second defendant for a valid consideration, on 12.05.1982, and for

other family necessities and minor welfare and accordingly, pursuant to the sale transaction above stated, it is only the second defendant, who has been in possession and enjoyment of the said property absolutely and only at the instigation of the first defendant, the plaintiffs had preferred the present suit in collusion. It is false to state that the sale transaction dated 12.05.1982, is not binding on the second plaintiff and in any event, the second plaintiff is bound by the above said sale transaction under the theory of pious obligation and the suit laid by the plaintiffs without any cause of action is liable to be dismissed and the second defendant has also raised the defence in the additional written statement that the first defendant had already contracted a marriage with one Rasammal, his aunts daughter and out of the said wed lock, a baby girl was born to them and the said marriage is still in force and therefore, the alleged marriage between the first plaintiff and the first defendant is invalid and therefore, the suit laid by the plaintiffs suppressing the true facts is liable to be dismissed.

6. In support of the plaintiffs' case PWs 1 to 3 were examined, Exs.A1 to A4 were marked. On the side of the second defendant DWs 1 to 5 were marked, Exs.B1 to B5 were marked.

7. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the Courts below were pleased to accept the plaintiffs' case and accordingly decreed the suit as prayed for. Impugning the same, the present second appeal has been preferred by the second defendant.

8. At the time of admission of the second appeal, the following substantial questions of law were formulated for consideration:

> 1. Whether the Courts below are correct in decreeing the suit as prayed for without rendering a finding as to the 'pious obligation' of the second respondent herein to discharge the antecedent debts incurred by the third respondent herein for the benefit of joint family?
>
> 2. Whether the Courts below are justified in going into the question of valuation of item 1 of the suit property when there was no pleading as to under valuation of the said property alienated in favour of the appellant herein?

3. Whether the Courts below have not committed a patent error in not dismissing the suit for misjoinder of cause of action?

9. As regards the judgment and decree of the Courts below granting maintenance in favour of the first plaintiff and creating charge for the same, in respect of the B schedule properties, excepting the first item, no challenge has been made by the second defendant in this second appeal. According to the counsel appearing for the second defendant, he has no say with reference to the above said determination of the Courts below, in respect of the plaintiffs' case and therefore, the aspects of the above case of the plaintiffs are not dealt with in this second appeal.

10. However, a plea has been taken in the second appeal that the Courts below had failed to dismiss the plaintiffs action on the ground of misjoinder of causes of action. According to the second defendant, the Courts below should have ordered a separate trial as regards the claim of maintenance of the first plaintiff from the first defendant and therefore, the clubbing of causes of action for the reliefs sought for by the plaintiffs i.e., for maintenance and partition and for declaration is not sustainable in the eyes of law. However, the above contention does not merit acceptance. As far as the plaintiffs are concerned they have all the cause of action for the reliefs sought for in the plaint against the first defendant and they also had a cause of action against the second defendant as far as the relief of declaration sought for with reference to the sale transaction dated 12.05.1982 executed in favour of the second defendant, as according to the plaintiffs, the said sale transaction has been made by the first defendant without any legal necessity and made only to serve his illegal and immoral activities and therefore, not binding on the second plaintiff, as according to the plaintiffs, the second plaintiff also has a share in the property alienated in favour of the second defendant under the above said sale transaction. Thus, when it is found that the plaintiffs had the cause of action for all the reliefs sought for in the plaint against the defendants concerned and in such view of the matter, it is found that on mere footing that the plaintiff had sought for the reliefs to which they are entitled to from the defendants by way of a single suit, it cannot be concluded that the plaintiff's suit should fail and in such view of the matter, it is seen that there is no error, as such, in the plaintiffs joining the causes of action available to them in respect of the subject matter of the suit as against the defendants 1 and 2 and therefore, it is seen that there is no flaw as such in the institution of the suit by the plaintiffs for joining the various causes of action

available to them against the defendants. In such view of the matter, the Courts below had not committed any error in not rejecting the suit laid by the plaintiffs on the plea of misjoinder of causes of action as projected by the defendants. The third substantial question of law formulated in this second appeal is accordingly answered in favour of the plaintiff and against the second defendant.

11. As far as the second defendant is concerned, he is only concerned with the first item of the B schedule properties, which he had claimed to have purchased from the first defendant by way of a sale deed dated 12.05.1982 ,marked as Ex.B2. According to the plaintiffs, the first defendant had been indulging in illegal and immoral activities for the past one year, prior to the institution of the suit and accordingly, did not have any concern and regard for the family and on account of his above said activities, illtreated the first plaintiff and drove her out of the matrimonial home, along with the second plaintiff and thereby, the plaintiffs had been forced to live in the residence of the first plaintiff's parents home and further, according to the plaintiffs, for meeting the illegal and immoral needs and without any legal necessity, the first defendant had alienated the first item of the B schedule properties in favour of the second defendant, by way of Ex.B2 and therefore, according to them, inasmuch as the said property is also the family property of the plaintiffs and the first defendant and the second plaintiff also has a equal share in the said property, the sale effected by the first defendant in favour of the second defendant as regards the said item of the suit properties is not binding on the second plaintiff and invalid, so far as the share of the second plaintiff in the said property is concerned and therefore, according to the plaintiffs, they had been necessitated to institute the suit for appropriate reliefs against the defendants.

12. Per contra, it is the contention of the second defendant that only for discharging the antecedent debts and for other needs, the first defendant had alienated the first item of the B schedule properties in his favour by way of Ex.B2 sale transaction and therefore, the said sale transaction is binding on the second plaintiff and also the second plaintiff is bound by the said transaction on the principle of pious obligation and therefore, the plaintiffs cannot obtain the relief as regards the above said sale transaction as prayed for. It is not in dispute that the property covered under Ex.B2 is the joint family property of the first defendant and the second plaintiff and accordingly, it is seen that the second plaintiff also has a share in the said property. Now, according to the second defendant, the said property had been alienated in his favour by the first defendant by way of Ex.B2 sale transaction. According

to the second defendant, only for legal necessity the said sale transaction had come into existence and therefore, in the light of the above said defence projected by the second defendant, as regards Ex.B2 sale transaction, it is evident that it is only the second defendant, who has to establish that the said sale transaction has been made only for legal necessity as pleaded by him. Now, according to the second defendant, Ex.B2 sale transaction has come into existence for discharging the antecedent debts and for other family purposes. According to the plaintiffs, the said sale transaction has been effected only for meeting the illegal and immoral needs of the first defendant without any family necessity or without any antecedent debts in existence and therefore, according to them, the same is not binding on the second plaintiff as far as his share is concerned.

13. In order to establish that antecedent debts was in existence and only for discharging the said antecedent debts, Ex.B2 sale transaction has come to be effected, the second defendant relies upon the documents marked as Exs.B3 and B4 and the evidence of DWs 2 and 3. According to the second defendant, the first defendant had incurred debts for the family needs and for his avocation, by way of Exs.B3 and B4, promissory notes from DWs 2 and 3 and only for discharging the said debts, according to him Ex.B2 sale transaction has come to be effected. Ex.B3 promissory note is found to be dated 12.08.1979 and Ex.B4 promissory note is found to be dated 26.08.1978. Ex.B2 sale transaction has been effected on 12.05.1982, therefore, according to the second defendant, for the debts incurred by the first defendant by way of Exs.B2 and B3 incurred during the years 1978 and 1979, he had chosen to alienate the first item of the B schedule properties in his favour under Ex.B2 sale deed. Therefore, it has to be seen that the said debts are really antecedent debts of the first defendant as claimed by the second defendant.

14. As regards the Ex.B4 debt, DW2, Ramasamy has been examined, who according to the second defendant had advanced the amount to the first defendant under the said Ex.B4 promissory note. DW2 would claim that he had advanced a sum of Rs.7,500/- to the first defendant under Ex.B4 promissory note in the year 1978 for the purpose of his pannai activities. However, he has admitted during the course of chief examination itself that he does not remember as to how much amount had been repaid by the first defendant with reference to the debt and also admitted that there is no proof to show that the interest had been paid. During the course of cross examination, he has also admitted that he does not remember as to how much amount had been repaid towards interest and according to him, the first defendant use to pay interest several years and admitted that no endorsement has been made in the promissory note as regards the receipt of

the amount paid towards interest and further, according to DW2, when he was paid the amount due under Ex.B4 promissory note, he had not made any endorsement of discharge on the reverse of the promissory note and also does not remember whether such an endorsement has been made and he has further admitted that usually when the promissory note is discharged, they use to deface the stamp affixed on the note or they would make endorsement of the discharge on the reverse side of the promissory note. Such being the evidence of DW2, when it is found that the first defendant had been making periodically payments of amounts towards interest for the debt incurred under Ex.B4 promissory note, however, it is found that as regards the said payment of amount towards interest, no endorsement has been made in the promissory note Ex.B4. DW2 is unable to state clearly as to how much amount had been paid by the first defendant so far towards the interest. The promissory note is found to have come into existence during the year 1978. If really any amount had been paid by the first defendant towards interest atleast to save the point of limitation, necessary endorsement would have been obtained in the promissory note or by way of other means in the manner known to law by DW2. However, it is found that no such endorsement or proof had been obtained by DW2 from first defendant. Further, there is no material to hold that really DW2 advanced the amount recited in Ex.B4 promissory note to the first defendant. The persons associated with the said promissory note have not been examined. Therefore, to state that for the debt incurred by the first defendant during the year 1978, the first defendant had chosen to alienate the family property in favour of the second defendant during the year 1982 as such cannot be readily accepted. When it is found that the said debt had become time barred on the date of Ex.B2 sale transaction and when there is no proof to hold that the said promissory note transaction had been revived in the manner known to law, it is found that the case of the second defendant that for discharging the said debt, the first defendant had alienated the family property in his favour under Ex.B2 as such cannot be readily accepted. Now, according to the second defendant, it is he who had discharged the debt as regards Ex.B4 promissory note is concerned. According to DW2, when the debt incurred under the promissory note is discharged, it is usual to deface the stamp affixed on the same or necessary endorsement would be obtained as regards the discharge on the reverse of the promissory note. However, on a perusal of the Ex.B4, it is found that neither the stamp affixed had been defaced nor any endorsement had been made by DW2 for the discharge of the debt in the promissory note through the second defendant. In such view of the matter, it is found that inasmuch as no debt, as such, had been incurred by the first defendant from DW2 under Ex.B4 promissory note, it is found that DW2 is unable to throw a clear picture as to whether at all the first defendant had executed the same in his favour and subsequently the same had been lawfully discharged by the second defendant. Accordingly, it is seen that Courts below based on the unreliable and unacceptable evidence of DW2, held that Ex.B4 debt has not been shown to be a real antecedent debt of the first defendant and resultantly held that the same cannot be determined to be a legal necessity for enabling the first defendant to alienate the family property in favour of the second defendant. No exception could be taken for the above determination of the Courts below in rejecting the above aspects of the second defendant's case.

15. As regards Ex.B3 Promissory note is concerned, reliance is made upon the evidence of DW3 Palani ammal, who according to the second defendant, had advanced a sum of Rs.5,000/- to the first defendant under the said promissory note during the year 1979. According to DW3, after the execution of the promissory note, the first defendant did not pay any amount towards interest and according to her, she had demanded the amount only after 6 years from the date of execution and further, according to her, she had not sent any notice to the first defendant claiming the amount and she has also admitted that she does not know who had all attested the said promissory note and further, according to her, the second defendant had not attested the same and she has also admitted that she does not remember whether any endorsement had been made in the promissory note on the discharge of the same and also admitted that she also does not remember that who had written the promissory note and does not remember whether on discharge, the stamp affixed on the promissory note had been defaced. It is thus found from the evidence of DW3 that she is not at all aware of the execution of the said promissory note by the first defendant and accordingly, unable to throw a clear picture as to who were all associated with the execution of the said note. Though it is found that the second defendant had attested the promissory notes, according to DW3, the second defendant had not attested the same. Further, according to DW3 also, on the discharge of the debt incurred under the promissory note, there use to be an endorsement of discharge, obtained on the reverse of the note and the defacing of the stamp affixed on the same. However, according to her, she does not remember whether the above said modes were employed at the time of discharge of the debt under the said promissory note. A perusal of Ex.B3 would go to show that no such endorsement of discharge had been obtained at the time of the discharge of the same by the second defendant and the stamp affixed on the same had also not been defaced. Therefore, to state that the said promissory note debt had been discharged by way of Ex.B2 sale transaction by the second defendant as such cannot be readily accepted. At the foremost, it has not been established by DW3 that the first defendant had

actually incurred the amount mentioned in the said promissory notes from her for the reasons stated therein. If really the said debt had been incurred by the first defendant, on noticing that the first defendant had not repaid any sum either towards principal or interest, DW3 would have initiated legal action against the first defendant with reference to the same. According to DW2, she had not sent any notice claiming the amount. She is also unable to state that as to whether any amount had been paid by the first defendant, since the date of the execution of the promissory note. As above stated, she is unable to state who were all present at the time of the execution of the promissory note Ex.B3 and when it is found that the said promissory note had not been duly discharged in the manner known to law, at the time of alleged discharge by the second defendant and when there is no material to hold that the first defendant had really incurred the debt for any family necessity, to contend that the same constituted the legal necessity for the sale transaction effected under Ex.B2, as such cannot be readily accepted. The Courts below accordingly on noting that the second defendant had failed to establish that the first defendant had really borrowed the said amount from DW3 for family purpose and further, noting that the plea of discharge of the said debt has not been made out by the second defendant and when it is further seen that DW3 is unable to throw any clear picture as to the execution of the said promissory note by the first defendant in her favour for the amount recited therein, it is seen that as rightly putforth by the plaintiff's counsel and also as rightly determined by the Courts below, the same could not be construed as a legal necessity for enabling the first defendant to alienate the joint family properties in favour of the second defendant. No exception could be taken to the determination of the Courts below for upholding that the debt incurred under Ex.B2 has not been established to be effected for any legal necessity.

16. When it is found that the alleged antecedent debts incurred by the first defendant under Exs.B3 and B4 are not shown to be the real debts incurred by him, particularly, incurred for any legal necessity and when the persons who had been examined with reference to the same, namely, DW2 and DW 3 are unable to project a clear picture about the same and when their evidence are found to be unreliable and not trustworthy and when their evidence point out that the first defendant would not have borrowed the sum alleged to have been paid by them under the said promissory notes and accordingly, when it is further noted that there is no indication in the said promissory notes that they had been duly discharged by the second defendant, by way of Ex.B2 sale transaction, as above discussed, it is found that the alleged debts described in Exs.B2 and B3

cannot be determined as the real antecedent debts incurred by the first defendant and in such view of the matter, it is found that the case of the first defendant that in order to discharge the said antecedent debts, Ex.B2 sale transaction has been effected in his favour by the first defendant cannot at all be countenanced in any manner.

17. In the light of the above discussions, when the legal necessity projected by the second defendant on the part of the first defendant for effecting Ex.B2 sale transaction goes out and not established, it is obvious, as determined by the Courts below, that the sale transaction Ex.B2 has not been effected on account of any legal necessity, on the part of the first defendant and the same had been effected only for serving the immoral and illegal activities of the first defendant and as such found not to be binding on the second plaintiff as far as his share is concerned. When the second defendant has failed to establish that Ex.B2 sale transaction had been effected for any legal necessity, it is found that the second plaintiff cannot be made liable under the said sale transaction on the theory of pious obligation and therefore, it is seen that the above defence projected by the second defendant has been rightly discountenanced by the Courts below.

18. In the light of the above discussions, it is seen that the second defendant has failed to establish that any legal necessity was in existence, at the time of the execution of Ex.B2 sale transaction by the first defendant in favour of the second defendant, particularly, when it is found that the antecedent debts projected by way of Exs.B2 and B3 are not real debts as above discussed, it is further found that the second plaintiff cannot be made bound by the above said sale transaction on the principle of pious obligation and accordingly, when it is noted that the above said sale transaction had not been established to be made for the benefits of the family of the first defendant, the said sale transaction is found to be not binding in any manner on the second defendant.

19. The counsel for the second defendant in support of his contentions placed reliance upon the decisions reported in (1996) 9 SCC 53 (Gangadharan Vs. Janardhana mallan and others) and the decision of the Madras High Court dated 27.02.2017 passed in A.S.No.734/2008 (Nachimuthu Gounder Vs. 1. Sasikumar 2. Lakshmi 3. Gopalan). The principles of law outlined in the above said decisions are taken into consideration and followed as applicable to the case at hand.

20. In the light of the above discussions, it is found that the Courts below were right in holding that the second defendant

has failed to establish any legal necessity for effecting Ex.B2 sale transaction and accordingly, it is seen that the same is not binding on the second plaintiff and in such view of the matter, the first substantial question of law formulated in this second appeal is answered against the second defendant and in favour of the plaintiff.

21. The Courts below had also noted that Ex.B2 sale transaction has not been made for a valid consideration and accordingly, held that it is only made for meeting the nefarious needs of the first defendant. In this connection, according to the second defendant, Ex.B2 sale transaction was effected for a sum of Rs.15,000/-. However, it has been admitted by him that the value of the property at that relevant point of time was Rs.57,500/-. Therefore, to say that the first defendant had readily parted with the property comprised under Ex.B2 for a sum of Rs.15,000/- also go to show that the same would not have been effected for any legal necessity and accordingly, the Courts below found that the second defendant had deliberately under valued the sale transaction so as to grab the said property from the clutches of the family one way or the other. The above aspects of the case had been taken into consideration for determining that the said sale transaction had been not made by the first defendant for any legal necessity. Therefore, it is found that there is no error on the part of the Courts below for taking the aspects of the under valuation of the sale transaction Ex.B2 for the purpose of determining whether the same had been effected for legal necessity or otherwise. The second substantial question of law formulated in this second appeal is accordingly answered.

22. In conclusion, the second appeal fails and is accordingly dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar(CS VI)

//True copy//

Sub Assistant Registrar

sli

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S.A.No.1035 of 2003

VD(CO)
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