THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

APPEAL SUIT No.911 of 2003

JUDGMENT:

This Appeal Suit, under Section 96 of the Code of Civil Procedure, 1908, is filed by the unsuccessful defendants 3 to 6 assailing the decree and judgment, dated 21.02.2003, of the learned Additional Senior Civil Judge, Eluru, made in O.S.No.187 of 1997.

2. I have heard the submissions of Sri M.V.S. Suresh Kumar, learned senior counsel representing Sri A.Sreenivasa Rao, learned counsel appearing for the appellants, and of Sri K. Sita Ram, learned counsel appearing for the respondents 1,2,4 & 5. I have carefully perused the material record. Respondents 1 & 2 were declared as majors *vide* orders, dated 19.02.2018, passed in IA.No.1 of 2018.

3. The parties in this Appeal Suit shall hereinafter be referred to as the plaintiffs and the defendants as arrayed in the suit for convenience and clarity.

4. Before proceeding further, it is necessary to refer to the pleadings of the parties.

5. The averments in the plaint, in brief, are as follows:-

The plaintiffs are the children of the 1st defendant and his wife, Ramadevi. The 2nd defendant is an alienee from the 1st defendant. In a partition amongst the 1st defendant, his brothers, mother and others, the plaint schedule property fell to the share of the 1st defendant. Therefore, it is the plaintiffs' ancestral property; and, they are entitled to a 1/3rd share each and the 1st defendant is entitled to the remaining 1/3rd. The 1st defendant became addicted to bad habits. Since about 4 years, he is not coming to the family house and not attending to the needs of the plaintiffs and their mother; and, not looking after their welfare. Under these circumstances, the mother of the plaintiffs felt it difficult to maintain herself and her children and left for her parents' house at Kuchempudi. The 2nd defendant is a friend of the 1st defendant; and, the 1st defendant utilized his co-operation in his vices. As the 1st defendant completely neglected his wife and children, the plaintiffs' mother, with a view to safeguard the minor-plaintiffs' interests, got issued a registered notice, on 07.12.1996, through an advocate to the 1st defendant demanding him to partition the plaint schedule property into three equal shares and allot two shares to the plaintiffs, and also to provide maintenance to her, creating a charge on his share of the property. The 1st defendant received the said notice, on 09.12.1996, and kept quiet. Subsequently, the plaintiffs' mother came to know that the 1st defendant made some alienation/s in favour of the 2nd defendant. Therefore, she again got issued another notice, on 15.02.1997, to the defendants 1 & 2 questioning about the collusive alienation/s and reiterating her demand for partition of the plaint schedule property and maintenance to her. The defendants received the said notice and kept quiet. The plaintiffs' mother came to know that the sale deeds, dated 13.04.1995 & 27.12.1996 and the mortgage deed, dated 25.10.1995, were brought into existence to deprive the minor plaintiffs of their due share in the properties covered by the said deeds. The said deeds are collusive and nominal documents and do not bind the plaintiffs. The recitals in those documents regarding consideration and discharge of debts are false. During the pendency of the suit, the 2nd defendant died, on 12.09.1998, leaving behind his wife, son and two daughters; and, the estate of the 2nd defendant devolved on them, they being the L.Rs of the deceased 2nd defendant. Therefore, they are impleaded as defendants 3 to 6. The 1st defendant died, on 31.03.2001. His mother and wife respectively are brought on record as defendants 7 & 8. The plaintiffs are entitled to ignore any alienation/s made by the 1st defendant and seek partition of the joint family property mentioned in the plaint schedule, as they are not willing to keep the property joint on account of their father's unconcern and detachment. The plaintiffs are entitled to seek to set aside the sale deeds, dated 13.04.1995 and 27.12.1996, executed by the 1st defendant, for himself and as guardian of the plaintiffs in favour of the 2nd defendant regarding the 2/3rds share of the plaintiffs in the plaint schedule properties. Hence, the suit is filed to set aside the sale deeds, dated 13.04.1995 & 27.12.1996, executed by the 1st defendant in favour of the 2nd defendant for himself and as guardian of the plaintiffs regarding their 2/3rds share in the property covered by the said deeds; grant a preliminary decree for partition of the plaint schedule property into three equal shares and allot two such shares to the plaintiffs; and, determine future profits on the plaintiffs' share on a separate application; and, for costs of the suit.

6. The averments in the statement of the 2nd defendant, in brief, are as follows:

It is true that the plaintiffs are the children of the 1st defendant and his wife, Rama Devi. This defendant purchased the plaint schedule property viz., an extent of Ac.4-69 cents for a consideration of Rs.1,29,600/- under registered sale deed, dated 13.04.1995; and, Ac.1-57 cents for a consideration of Rs.60,100/- under registered sale deed, dated 27.12.1996, executed by the 1st defendant for himself and as guardian of his minor children, plaintiffs 1 & 2. Under the sale deed, dated 13.4.1995, this defendant undertook to discharge the liability of the vendor/1st defendant to a tune of Rs.1,15,168/- under Long Term Loan Nos.251, 270 and Ag.No.45 due to the Primary Agricultural Co-operative Society of Yerrampalli (PACS) and paid cash of Rs.14,432/- to the vendor/1st defendant. So far this defendant paid Rs.80,480/- to the PACS, as borne out by the receipts issued by the PACS; and, he has to pay the balance. The 1st defendant being the father and manager of the joint family is entitled to sell the joint family property for the purpose of discharge of his antecedent mortgage debt; and, the alienation is clearly binding on the minor coparceners also. Under registered sale deed, dated 27.12.1996, out of the sale consideration of Rs.60,100/- a sum of Rs.38,400/- was adjusted towards discharge of a debt due under a simple mortgage bond, dated 25.10.1995, executed by the 1st defendant in favour of this defendant for a sum of Rs.30,000/-; and, cash of Rs.21,700/- was paid. As this alienation is also made for discharge of the antecedent debt, it is also equally binding on the minor vendors and the plaintiffs have no right to challenge or interdict the two alienations. The 1st defendant is not addicted to any bad habits. He alone is looking after the welfare of the minors and their mother by doing business in Pragadavaram village and running a kirana stores and cycle shop and is also doing business in livestock like goats etcetera. The allegations that this defendant is the friend of the 1st defendant and the 1st defendant utilised this defendant in his vices are not at all true. This defendant lost his left arm in a cycle accident 20 years ago. He inherited Ac.7.00 of land from his mother. He is also doing business of purchasing usufruct of mango garden during seasons. This defendant purchased Ac.3.41 cents from the mother of the 1st defendant, Gonuguntla Anasuyamma. As the plaint schedule land are adjoining the said Ac.3.41 cents, this defendant purchased the plaint schedule property also. This defendant is not aware of any notice said to have been issued, on 07.12.1996 to the 1st defendant. However, this defendant received the notice, on 15.02.1997. As he was unwell, he could not immediately send a reply to the said notice. In the meantime, this defendant received suit summons. The above documents cannot be challenged by the plaintiffs under any grounds whatsoever. As there is no other way to discharge the above debts due to the PACS and as the debts could not be discharged by the 1st defendant, he alienated the properties and the alienations are fully justified by legal necessity and benefit of the joint family. The suit is got filed by the 1st defendant to cause wrongful loss to this defendant. The suit may be dismissed with costs.

7. 1st defendant and his legal representatives remained *ex parte*.

8. Taking into consideration the above pleadings, the trial Court settled the following issues and additional issue for trial:

> **"1. Whether the second defendant is the *bona fide* purchaser of the schedule properties under sale deeds, dated 27.12.1996 and 13.04.1995?**
>
> **2. Whether the plaintiffs are entitled to partition of entire schedule properties?**
>
> **3. Whether the plaintiffs are entitled to future profits?**
>
> **4. To what relief?**

9. At trial, PWs.1 to 5 were examined and Exs.A-1 to A-11 were marked on the side of the plaintiffs. DWs1 to 6 were examined and Exs.B-1 to B-31 were marked on the side of the defendants 3 to 6.

10. On merits and by the judgment impugned in this appeal, the trial Court decreed the suit of the plaintiffs. Aggrieved thereof, the defendants 3 to 6, who are the legal representatives of the deceased 2nd defendant, preferred this appeal suit.

11. Learned counsel for the defendants 3 to 6 contended as follows:

The judgment and decree of the trial Court are contrary to law, opposed to evidence on record and probabilities of the case. The learned trial Judge erred materially in not taking into consideration, in proper perspective, the oral and documentary evidence available on record. The trial Court also erred in not taking into consideration the fact that the 2nd defendant purchased *bona fide* and for valid consideration, the plaint schedule property from the 1st defendant, who was the kartha of the joint family consisting of 1st defendant, the 8th defendant, that is, his wife, and the plaintiffs. The trial Court ought to have seen that the inheritance of plaintiffs to the ancestral property is subject to the liabilities and the debts incurred by the ancestors in respect of the property and that the alienations made by the deceased 1st defendant in favour of the deceased 2nd defendant towards discharge of the legally existing antecedent debts are binding on the plaintiffs.

12. Learned counsel for the respondents supported the decree and judgment of the trial Court and contended that the trial Court appreciated the facts correctly and the evidence in proper perspective and correctly held that the transactions between the defendants 1 & 2 are illegal and immoral. He would further submit that the well considered judgment of the trial Court does not brook interference.

13. I have gone through the oral and documentary evidence. I have given earnest consideration to the facts and submissions.

14. The points that arise for determination in this appeal suit are:

> **1. Whether the alienations made by the 1st defendant in favour of the 2nd defendant in his personal capacity and as kartha of the family and on behalf of his minor children, the plaintiffs herein, are not true, valid and binding on the plaintiffs? And, if so, whether the plaintiffs are entitled to seek partition of the plaint schedule properties into three equal and equitable shares and allotment of two such separated shares to the plaintiffs after setting aside the sale deeds, dated 13.04.1995 and 27.12.1996 insofar as the 2/3rds share of the plaintiffs therein?**
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> **2. Whether the decree and judgment of the trial Court are unsustainable under facts and in law?**
>
> **3. To what relief?**

15. **POINT No.1**

15.1 The pleadings are already stated supra, in detail. The plaintiffs are declared as majors during the pendency of this appeal suit. Admittedly, during their minority, their mother representing them as mother and natural guardian brought the suit for the afore-stated reliefs *inter alia* contending as follows: 'The 1st defendant who is the father of the plaintiffs got addicted to vices about four years prior to the institution of the suit. He neglected to maintain her and the children, the plaintiffs. He stopped looking after them and abandoned them without considering the future of the plaintiffs. And, to safeguard the interests of the minor children, the mother of the plaintiffs got issued a notice to the 1st defendant. Further, she later got issued another notice to both the defendants 1 & 2, having come to know that the 1st defendant made certain alienations in favour of the 2nd defendant. No reply notices are issued to the said notices. The 1st defendant utilised the co-operation of the 2nd defendant, who is his friend. The sale deeds and the deed of mortgage were brought into existence to deprive the minors of their legitimate shares in the plaint schedule properties, that is, their shares in the properties that are covered by the sale deeds that are nominal and collusive.' Per contra, the defence of the 2nd defendant is in the nature of denial. His specific defence is this: - 'He purchased the properties for valuable considerations under two registered sale deeds executed by the 1st defendant for himself and on behalf of his minor children as guardian. Under the first sale deed, dated 13.4.1995, he paid Rs.14,432/- to the vendor and had further undertaken to discharge the liabilities of the 1st defendant to a tune of Rs.1,15,168/- due under a Long Term Loan and Agricultural loan payable to PACS, Yerrampally. Under the second sale deed, dated 27.12.1996, he paid Rs.21,700/- in cash to the 1st defendant. The remaining amount of Rs.30,000/- was adjusted towards the debt due under the simple mortgage bond, dated 25.10.1995. Thus, the alienations are made for discharge of antecedent debts and family necessities. Hence, the said two sale deeds are binding on the plaintiffs and their mother.'

15.2 In the light of the rival contentions, it is necessary to examine the oral and documentary evidence. The oral evidence is more or less in the nature of assertion of respective pleaded cases. The two registered sale deeds executed accordingly in favour of the

2nd defendant are respectively dated 13.04.1995 and 27.12.2006. The registration extracts of the said sale deeds respectively are exhibits A8 and A10. The respective original sale deeds are also marked as exhibits B1 and B2. A perusal of the same reflects that they are executed in favour of the 2nd defendant by the 1st defendant in his personal capacity and also as the father & natural guardian of the plaintiffs. Therefore, the documents were executed by the 1st defendant in his capacity as the kartha of the family representing him and also the minor children. In the first sale deed-exhibit A8, there are specific recitals to the following effect: 'The property thereunder was being sold for a consideration of Rs.1,29,600/- for meeting necessary expenses and expenses on education & maintenance of the minor children. Part of consideration, that is, Rs.15,168/- was paid at the time of execution of the document. Towards balance sale consideration, it was agreed that the 2nd defendant/vendee shall discharge the loan due to PACS under loan transactions nos. LT 251 & LT 270. That accordingly, the entire consideration was received'. It is also stated in the document that the property was delivered to the vendee. To the East of the property purchased under this document-exhibit A8, the 2nd defendant/ vendee is having his own property is undisputed. Further, this fact is evident form the Eastern boundary recital mentioned in the schedule of property of exhibit A8. It is apt to recall that one of the defences is that the 2nd defendant had already purchased some property from the mother of the 1st defendant and, therefore, this subject property which is adjacent to the said property was also purchased for valuable consideration. The further recitals in the document also reflect that the consideration was arrived at by fixing the value of the entire land of an extent of Ac.4.69 cents @ Rs.25,500/- per acre and that of the bore in the land at Rs.10,000/-. Turning to the recitals in the second sale deed, exhibit A10, it is to be noted that there are specific recitals to the following effect: 'That the property thereunder was being sold for meeting necessary expenses and expenses on education & maintenance of the minor children and for discharge of the mortgage debt in a sum of Rs.30,000/- besides interest till the date of the sale deed payable under registered mortgage deed bearing document no. 3295/1995. Part of the consideration was paid by means of discharge of the mortgage debt due to the 2nd defendant/vendee by duly making an endorsement made on the deed of mortgage. The balance consideration of Rs.21,700/- was paid at the time of execution of the document.' It was also recited in this document that the property was delivered to the vendee. To the East and North of the property purchased under this document-exhibit A10, the 2nd defendant/vendee is having his own properties is not in dispute. This fact is evident form the Eastern and Northern boundary recitals mentioned in the schedule of property of exhibit A10. The further recitals in this document also reflect that the consideration was arrived at by fixing the value of the entire land of an extent of Ac.1.57 cents @ Rs.25,500/- per acre and that of the bore in the land at Rs.20,000/-. Thus, the very recitals in both the documents lay bare that the properties are sold for family necessities, meeting the educational expenses & maintenance expenses of minor children and for discharge of antecedent debts, that is, two loans due to PACS and a loan due under a registered mortgage deed.

15.3 Therefore, the onus of proof which is on the plaintiffs and their mother to establish their pleaded case is heavy. Coming to the aspect that the 1st defendant, who is the father of the plaintiffs, is addicted to vices, apart from PW1, the other witnesses examined are PWs2 to 5. PW2 simply stated that he knows PW1 and that 1st defendant is residing at a place nearer to his house and that 1st defendant is addicted to bad vices and is not looking after his children and wife properly and that defendants 1 & 2 are friends. In his cross examination, he pleaded ignorance of the affairs of the family of the 1st defendant and stated that he does not know the purpose for which the 1st defendant sold the properties to the 2nd defendant. PW3 stated that his village is at a distance of 2 KMs from Timmireddypalli village and that he was earlier engaged by the 1st defendant for agricultural works in his lands and that the 1st defendant is not living with his wife and children and that the 1st defendant is addicted to heavy drinking and that the defendants 1 & 2 are acquainted with each other. In his cross examination he stated that he is a coolie under the 1st defendant and that the 1st defendant was raising chilly and turmeric crops in his lands and that the 1st defendant had also raised a thatched house in Timmireddypalli and that PW1 and 1st defendant were living together in Timmireddypalli and that 1st defendant is a well behaved person. PW4 is the younger brother of the 1st defendant. He stated that the 1st defendant is addicted to bad vices and is not looking after the welfare of his wife and children and that the defendants 1 & 2 are close friends. In his cross examination he admitted that 1st defendant is doing cultivation in Timmireddypalli and that he does not know the income & expenditure of the 1st defendant and about the borrowal of amounts by the 1st defendant from Yerrampally Co-operative Society and under mortgage deed. He admitted that the property sold by the mother is adjacent to the plaint schedule property. PW5 deposed that he knows PW1 and that 1st defendant is addicted to bad vices and heavy drinking and that the 1st defendant did not look after his wife and children properly and that defendants 1 & 2 are close friends. He deposed that he does not know the details of the debts incurred by the 1st defendant and also about the mortgage debt. He, however, asserted in his cross examination that he saw 1st defendant in a drunken state along with so many people.

15.4 In the considered view of this Court the above evidence is not sufficient to come to a safe conclusion that the 1st defendant is addicted to vices. Even otherwise, the evidence does not show that he sold the properties to meet the expenses he was incurring on his vices. Be that as it may. The above findings are reinforced by the evidence on the side of the defendant adverted to infra.

15.5 What is to be first noted is that DW4 is the licensed document writer, who scribed exhibit A8; DW6 is the scribe of exhibit A10; and, DWs2 & 3 are the attestors respectively of exhibits A10 & A8 sale deeds. The copy of the discharged mortgage bond is exhibited as exhibit A9. Further, exhibits B6 & B7 are the pattadar pass book and title deed pass book standing in the name of 2nd defendant. The said witnesses spoke about the due execution of the sale deeds and proved the execution of the said sale deeds and passing of considerations as recited in the said deeds. Apart from the evidence of the attestors and the scribes of the two documents, DW4 also deposed that exhibit A8 was attested by DW3 and the father-in-law of the 1st defendant. DWs2 & 3 spoke about the brother and the father-in-law of the 1st defendant respectively figuring as attestors of exhibits A10 & A8 and attesting the said documents, that is, the two registered sale deeds. Thus, exhibit A10 sale deed was admittedly attested by the brother of the 1st defendant. Similarly exhibit A8 sale deed was admittedly attested by one Uppala Sarveswara Rao, who is no other than the father of PW1, that is, the father-in-law of the 1st defendant. From the evidence it is also discernable that the entire family is aware of the sale transactions. If really the 1st defendant is addicted to vices and is selling away the properties for immoral purposes, his own brother and his own father-in-law would not have attested exhibits A8 & A10 ignoring the interests of the 1st defendant's wife and the minor children. These facts would indicate that the sale transactions under exhibits A8 & A10 are genuine and are not tainted with immorality. Neither the said brother nor the father-in-law of the 1st defendant was examined on the side of the plaintiffs. DW5 is the Secretary of the PACS. He deposed that the 1st defendant obtained loan of Rs.97,000/- from the society in the year 1992 agreeing to discharge the same with interest @ 16% per annum and that it is a long term loan payable within fourteen years period and that the amount was borrowed for digging a bore well, fixing motor and for plantation of coconut plants. In his evidence he stated that for granting loan for sinking tube well, they received loan application, geologist's report and a certificate from the VAO showing that the loanee is the owner of the land. As noted already, the two sale deeds contain recitals that there are bore wells in the lands. The said fact lends support to the defence that the amount was borrowed not for immoral purposes but for augmenting the income from the agricultural lands by establishing bore wells with motors. This witness also deposed that from 1998 onwards, the 2nd defendant, who purchased the properties under the two sale deeds, paid the instalments and that after his death his wife (DW1) is paying the instalments. He proved exhibits B8 to B28 receipts passed by the Society for payment of instalments and stated that the balance still due is Rs.75,000/-. Thus, a harmonious consideration of the entire evidence clearly reflects that the two sale deeds are supported by consideration and are not tainted with any immorality.

15.6 On the above analysis, this Court finds that the alienations made by the 1st defendant in favour of the 2nd defendant in his personal capacity and as kartha of the family and on behalf of his minor children, the plaintiffs herein, are true, valid and binding on the plaintiffs and that the plaintiffs are not entitled to seek partition of the plaint schedule properties. Point is accordingly answered in favour of the appellants-defendants 3 to 6.

16. <u>POINT No.2:</u>

I have gone through the judgment of the trial Court. The trial Court without adverting to the contents of the two sale deeds and the evidence of the scribes and the attestors, who proved the due execution of the sale deeds and also the passing of considerations as recited in the sale deeds, and without considering the evidence of DW5, the officer of the PACS, who deposed about the payment of instalments by the 2nd defendant during his life time and later by his wife, DW1, and by erroneously ignoring the vital facts that exhibit A10 sale deed was attested by the brother of 1st defendant and exhibit A8 sale deed was attested by the father-in-law of the 1st defendant arrived at erroneous conclusions. While arriving at such erroneous conclusions, the trial Court placed reliance upon oral evidence regarding gambling, which does not find support from the pleading in the plaint, and also on a consideration that the property was sold even though the PACS has not issued a notice for discharge of the loan, which is extraneous. The trial Court further made erroneous observations in the judgment that the properties were sold for lesser considerations than the market values prevailing, though it is not the pleaded case of the plaintiffs. On carefully going through the judgment of the trial Court, this Court finds that the appreciation of evidence by the trial Court is perverse; and, that the findings of the trial Court based on such extraneous material & irrelevant considerations and erroneous & perverse appreciation of evidence brook interference. For the said reasons and for the reasoned finding recorded under point no.1, this Court finds that the decree and judgment of the trial Court are unsustainable under facts and in law and are liable to be set aside. As a sequel to the said findings, this Court further holds that the appeal suit deserves to be allowed and that the suit of the plaintiffs is liable to be dismissed.

17. <u>POINT No.3:</u>

In the result, the appeal suit is allowed, however, without costs. And, the decree and judgment, dated 21.02.2003, in OS.No.187 of 1997 on the file of the Court of the learned Additional Senior Civil Judge, Eluru, are hereby set aside and the said suit is dismissed without costs.

Miscellaneous petitions pending, if any, shall stand closed.

M. SEETHARAMA MURTI, J

30.04.2018
Vjl