

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 18.11.2019
PRONOUNCED ON : 12.12.2019

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

A.S.No.268 of 2013

1. Vasanthi
 2. Minor Vivek
 3. Minor Jagan Vikki
- Minors Rep. by their mother
and natural guardian Vasanthi ... Appellants/Plaintiffs

Vs.

1. Thulasimani
 2. Saraswathi
 3. Mallikadevi
 4. K.Vijaya
- ... Respondents/Defendants

Prayer: Appeal Suit filed under Section 96 of Civil Procedure Code as against the judgment and decree of the First Additional District Judge, Erode in O.S. No.267 of 2007 dated 16.09.2008.

For Appellants : Mr.S.Kaithamalai kumaran

For R1 to R3 : No appearance/set exparte

For R4 : Mr.T.Murugamanickam, Senior Counsel
for M/s. Zeenath Begum

JUDGMENT

Aggrieved over the judgment and decree dated 16.09.2008, passed in O.S.No.267 of 2007, on the file of the First Additional District Court, Erode, the plaintiffs have preferred the first appeal.

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

3.Suit for partition, maintenance, creation of charge and permanent injunction.

4.The case of the plaintiffs, in brief, is that the third defendant is the first plaintiff's husband and the plaintiffs 2 and 3 are the children of the first plaintiff and the third defendant. The defendants 3 and 4 are the son and daughter of the first defendant. The second defendant is the daughter of

the deceased Sengoda gounder and sister of the third defendant's father. The suit properties originally belonged to the third defendant's grand father Sengoda gounder by way of five registered sale deeds dated 15.03.1962, 03.05.1962, 23.10.1963, 06.09.1965 and 11.09.1973 respectively and Sengoda gounder died intestate on 08.12.1989 leaving behind his son Kuppusamy and daughter Saraswathi as his legal heirs to succeed his estate. His wife predeceased him. Kuppusamy died intestate on 13.12.2003 leaving behind his wife, daughter and son, namely, the defendants 1,3 and 4 as his legal heirs to succeed his estate. Thus, it is put forth that the plaintiffs 2 and 3 and the third defendant are entitled to common 4/54 share and the first defendant is entitled to common 3/54 share and the second defendant is entitled to 27/54 share and the fourth defendant is entitled to 12/54 share in the suit properties. After the birth of the 2nd plaintiff, the third defendant became addicted to liquor and was leading a wayward life and spent the family income for illegal purposes and failed to maintain the family and neglected the plaintiffs and therefore, the plaintiffs took shelter in the family of the first plaintiff's parents and living apart from the third defendant and the third defendant is liable to provide maintenance and the first plaintiff has restricted her claim of maintenance at Rs.500/- per month and reserves her right to file a separate suit for past maintenance and the income from the family properties was sufficient to meet the family needs. Taking advantage of the abovesaid weakness of the third defendant, the husband of the fifth defendant, namely, S.S.Kailasam obtained the documents from the third defendant styled as agreement for sale with reference to his alleged 3/8 share and based on the same, the fifth defendant secured a decree in O.S.No.21 of 2002, on the file of the Additional District Judge, Fast track Court No.1, Erode, by way of specific performance and filed an execution petition and obtained the sale deed in her favour and however, the fifth defendant had not taken the possession of the suit properties. There is no necessity on the part of the third defendant to sell the 3/8 share of the suit properties in favour of the fifth defendant. On the date of the alleged agreement for sale, the value of the suit properties is more than Rs.50,00,000/- and therefore, the sale price of Rs.7,80,000/- fixed under the alleged sale agreement is false. The plaintiffs 2 and 3 had not obtained any benefit by way of the abovesaid sale agreement. The plaintiffs 2 and 3 are not parties to the same. The plaintiffs are not parties in O.S.No.21 of 2002 and therefore, the decree passed in O.S.No.21 of 2002 is not binding on the plaintiffs. The plaintiffs demanded their lawful share in the suit properties. However, the same was not acceded to and hence, according to the plaintiffs, they had been necessitated to lay the suit for

appropriate reliefs. Pending suit, it is found that the third defendant had died.

5.The second defendant filed a written statement admitting the relationship between the parties and the nature of the suit properties and put forth the case that she is not aware of the proceedings in O.S.No.21 of 2002 and finally stated about her lawful share instead of stating that her share in the suit properties should be allotted to her and accordingly, prayed for appropriate reliefs.

6.The fourth defendant has also filed the written statement on similar lines as that of the second defendant.

7.The fifth defendant resisted the plaintiffs' suit contending that the plaintiffs have instituted the suit only at the instigation of the third defendant. The plaintiffs and the third defendant are living together under one roof. The third defendant is looking after the plaintiffs and the allegations put forth against the third defendant as if he has become a drunkard and leading a wayward life after the birth of the second plaintiff are totally false and the abovesaid allegations have been made only for the purpose of the case and the third defendant is the Karta of the family and looking after the necessities of the family and according to her, for the family necessities and other expenses, the third defendant entered into an agreement of sale with the fifth defendant in respect of his 3/8 share of the suit properties for a sum of Rs.7,80,000/- and received Rs.7,00,000/- as advance on the date of the sale agreement and as he had failed to execute the sale deed, the fifth defendant had preferred O.S.No.21 of 2002 and the said suit ended in a decree in favour of the fifth defendant and following the same, the fifth defendant levied the execution proceedings and obtained the sale deed executed from the Court on 22.03.2007 and thereafter, preferred the execution petition seeking the possession and only to prevent the fifth defendant from realizing the fruits of the decree, the present suit has been laid by the plaintiffs at the instigation of the third defendant. The quantum of the share claimed by the plaintiffs is incorrect. The sale agreement executed by the third defendant in favour of the fifth defendant and the decree obtained by the fifth defendant based on the same is valid and binding upon the plaintiffs and the plaintiffs are not entitled to maintain the suit without seeking the relief of setting aside the sale deed executed in favour of the fifth defendant by the Court. The plaintiffs' suit is bad for partial partition and accordingly, prayed for the dismissal of the plaintiffs' suit.

8. On the basis of the abovesaid pleas set out by the respective parties, the following issues were framed by the trial Court for consideration:

1. Whether the suit is maintainable which is filed by the mother when natural guardian namely, the father, the 3rd defendant is alive?

2. Whether the 1st plaintiff is entitled to maintenance or charge over the suit properties?

3. Whether the shares claimed by the plaintiff is correct?

4. Whether the decree and judgment in O.S.No.21 of 2002 on the file of the Sub Court is binding on the plaintiffs?

5. Whether the plaintiffs are entitled to dispute the sale agreement executed by the 3rd defendant and the decree passed in O.S.No.21 of 2002?

6. Whether the suit is maintainable without the reliefs of setting aside the decree in O.S.No.21 of 2002 and sale deed executed as per decree in O.S.No.21 of 2002 on the file of Fast Track Court of Erode?

7. Whether the plaintiffs are entitled to claim share in the properties sold as per decree in O.S.No.21 of 2002?

8. Whether the suit is filed in collusion between the plaintiffs and defendants 1 to 4?

9. In support of the plaintiffs' case, PWs 1 and 2 were examined, Exs.A1 to A9 were marked. On the side of the defendants, DWs 1 to 4 were examined, Exs.B1 to B14 were marked.

10. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial Court was pleased to dismiss the plaintiffs' suit. Impugning the same, the first appeal has been preferred by the plaintiffs.

11. The following main points arise for determination in this first appeal:

1. Whether the judgment and decree passed in O.S.No.21 of 2002, on the file of the Fast Track Court, Erode, is binding on the plaintiffs?

2. Whether the plaintiffs are entitled to seek the reliefs prayed for without setting aside the decree passed in O.S.No.21 of 2002 and the sale deed executed as per the abovesaid decree on the file of the Fast Track Court, Erode in favour of the fifth defendant?

3. To what relief the plaintiffs/appellants are entitled to?

4. To what relief the fifth defendant is entitled to?

Point Nos.1 & 2:

12.The relationship between the parties is not in dispute. It is also not in dispute that the suit properties originally belonged to Sengoda gounder by virtue of the sale deeds which had been exhibited as Exs.A4 to A8. The plaintiffs and the defendants 1 to 4 claim right over the suit properties only through Sengoda gounder.

13.Materials placed on record go to show that the third defendant had entered into an agreement of sale with reference to the 3/8 share of the suit properties with the fifth defendant on 06.08.1998 for meeting the family necessities and other expenses for Rs.7,80,000/- and inasmuch as he has not come forward to execute the sale deed in favour of the fifth defendant, it is found that the fifth defendant had levied the suit against him in O.S.No.21 of 2002, on the file of the Fast Track Court, Erode and obtained decree on 06.1.2004. The certified copy of the decree passed in the abovesaid suit has been marked as Ex.B1 and it is also seen that following the same, the fifth defendant had levied the execution proceedings and obtained the execution of the sale deed in her favour from the Court on 22.03.2007 and accordingly, it is found that at that point of time, the present suit has come to be laid by the plaintiffs, particularly, against the third defendant. The defendants 2 and 4 who had filed the written statement are found to be supporting the plaintiffs' case in toto. The allegations had been made by the plaintiffs against the third defendant that he had become a drunkard and leading a wayward life after the birth of the second plaintiff and thereby, neglected the

plaintiffs and the same forced the plaintiffs to live separately away from the third defendant. However, as rightly found and determined by the trial Court, when it is not the case of the plaintiffs that by way of consuming liquor and other illegal activities, the third defendant had been ill-treating them in any manner and therefore, when there is complete absence of any ill-treatment on the part of the third defendant against the plaintiffs, on the other hand, the plaintiffs have barely and vaguely pleaded that the third defendant had become a drunkard and leading a wayward life after the birth of the second plaintiff, however, when with reference to the abovesaid case of the plaintiffs, there is no acceptable material placed on record, as rightly held and determined by the trial Court, the abovesaid case of the plaintiffs cannot be readily accepted. However, the plaintiffs have chosen to examine the witness and the said witness namely, PW2 would aver that the third defendant had been ill-treating the plaintiffs and drove away the plaintiffs from the matrimonial home. When the abovesaid version of PW2 has not even been pleaded by the plaintiffs and not deposed by the first plaintiff in the course of evidence, therefore, the evidence of PW2 that the third defendant had been ill-treating the plaintiffs and drove them away from the matrimonial home, as such, cannot be accepted and as rightly put forth by the counsel appearing for the respondents, PW2 seems more loyal than the King. That apart, when it is found that PW2 has not subjected himself for cross examination by the fifth defendant, in such view of the matter, his evidence cannot be relied upon and resultantly, the only conclusion that could be made is that as regards the case of the plaintiffs that the third defendant had been indulging in the consumption of alcohol and leading a wayward life is bereft of any material and accordingly, the abovesaid case of the plaintiffs had been rightly disbelieved by the trial Court.

14. It is the specific case of the fifth defendant that only with a view to prevent her from reaping the fruits obtained by her in O.S.No.21 of 2002, Fast Track Court, Erode, the plaintiffs have laid the suit against her in collusion with the third defendant. Further, according to the fifth defendant, the plaintiffs and the third defendant are living together under the same roof and it is only the third defendant who is looking after the plaintiffs. In this connection, it is found that the fifth defendant had lodged a complaint against the plaintiffs and the third defendant that they are unlawfully preventing her in measuring the property in question. Therefore, the abovesaid document would only go to show that inasmuch as both the third defendant and the first plaintiff had joined together and offered resistance to the endeavour of the fifth defendant to

obtain the possession of the property in question, resultantly, the complaint had been lodged by the fifth defendant against both of them and the abovesaid complaint has been marked as Ex.B13.

15. In addition to that, when it is found that according to the case put forth by the plaintiffs, the plaintiffs would plead that the first plaintiff is entitled to claim maintenance at the rate of Rs.1,000/- per month, however, strangely, the first plaintiff has restricted her claim of maintenance at Rs.500/- per month. That apart, no maintenance claim has been made on behalf of plaintiffs 2 and 3. The abovesaid pleas put forth by the plaintiffs appears to be very strange and artificial.

16. To show that the plaintiffs and the third defendant are living together under the same roof, the defendants have examined the Deputy Tahsildar who has deposed that the third defendant and the first plaintiff are living in the same residence and in support of his version, he has produced the copy of the electoral and the voters list as Exs.B11 and 12. On a perusal of the same, it is found that as rightly put forth by the fifth defendant, the plaintiffs and the third defendant are found to be living together. Further a copy of the release deed executed by the first plaintiff has been marked as Ex.B5, wherein also, there is a clear reference that the first plaintiff has referred to her residence as belonging to the third defendant and therefore, the abovesaid factor would only go to expose that the first plaintiff and the third defendant are living together under the same roof. Therefore, to say that the plaintiffs are living separately from the third defendant cannot at all be accepted in any manner.

17. To sustain that the plaintiffs had been living separately and away from the third defendant, the plaintiffs have not chosen to mark the ration card. On the other hand, the ration card marked as Ex.B9 belies the case of the plaintiffs.

18. In the light of the abovesaid factors, it is evident that the plaintiffs and the third defendant are residing together under the same roof and only with a view to avoid the fifth defendant from executing the decree obtained by her in O.S.No.21 of 2002, Fast Track Court, Erode, the suit has come to be levied by the plaintiffs at the instigation of the third defendant as held by the trial Court. As above noted, the fifth defendant has obtained the decree against the third defendant in O.S.No.21 of 2002. No doubt, the abovesaid decree is an ex-parte decree. However, the endeavour made by the third defendant to set-aside the ex-parte decree has been rejected by the High Court in C.R.P.No.1419/2006 and the order passed in the

abovesaid C.R.P. has been marked as Ex.B2. Therefore, the decree passed in O.S.No.21 of 2002, Fast Track Court, Erode, having become final, accordingly, the fifth defendant has proceeded to execute the decree and also found to have obtained the sale deed in her favour from the Court. It is thus found that the fifth defendant is only required to take the possession of the property conveyed to her under the sale deed, at that stage of the matter, the suit had come to be levied by the plaintiffs.

19. When the materials placed on record go to disclose that the plaintiffs and the third defendant are living together and the third defendant is the Karta of the family, accordingly, it is found that the third defendant, for meeting the family needs and other needs, accordingly, found to have agreed to sell his share in respect of the suit properties in favour of the fifth defendant by way of an agreement of sale, in such view of the matter, when the Karta of the family is entitled to act on behalf of the children and when there is no material to hold that the third defendant was indulging in unlawful and illegal activities as such and when with reference to the above case of the plaintiffs, there is nil material and in such view of the matter, it is found that the sale agreement executed by the third defendant in favour of the fifth defendant in his capacity as the Karta of the family would be equally binding upon his children, namely, the plaintiffs 2 and 3 and when the sale agreement is found to have been executed only for family necessities, in such view of the matter, the plaintiffs are found to be not entitled to avoid the same without seeking the cancellation of the sale agreement in the manner known to law. When with reference to the same, the plaintiffs have not even moved their little finger in any manner, in such view of the matter, the trial Court is found to be justified in declining the reliefs prayed for by the plaintiffs and found to be right in holding that the plaintiffs have levied the suit with a view to prevent the fifth defendant from reaping the fruits of the decree obtained by her in O.S.No.21 of 2002, Fast Track Court, Erode, at the instigation of the third defendant.

20. The counsel for the plaintiffs, in support of his contentions, placed reliance upon the decisions reported in (1972) 85 LW 99 (Venkatakrishna Reddy and others V. Minor Amarababu and others), (1991) 2 LW 635 (Dhanasekaran Vs. Manoranjithammal and 8 others) and 2002-4-L.W.330 (Madhegowda (D) by Lrs. V. Ankegowds (D) by Lrs. & Ors.) The principles of law outlined in the abovesaid decisions are taken into consideration and followed as applicable to the case at hand.

21. According to the fifth defendant's counsel, the abovesaid authorities are not applicable to the case at hand.

22. In the light of the abovesaid discussions, I hold that the judgment and decree passed in O.S.No.21 of 2002, on the file of the Fast Track Court, Erode, is binding on the plaintiffs. I further hold that the plaintiffs are not entitled to seek the reliefs prayed for without setting aside the decree passed in O.S.No.21 of 2002 and the sale deed executed as per the abovesaid decree, on the file of the Fast Track Court, Erode, in favour of the fifth defendant. Accordingly, the point Nos.1 & 2 are answered.

Point Nos.3 & 4:

23. For the reasons aforesaid, the judgment and decree dated 16.09.2008, passed in O.S.No.267 of 2007, on the file of the First Additional District Court, Erode are confirmed. Resultantly, the first appeal is dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-

Assistant Registrar (CCC)

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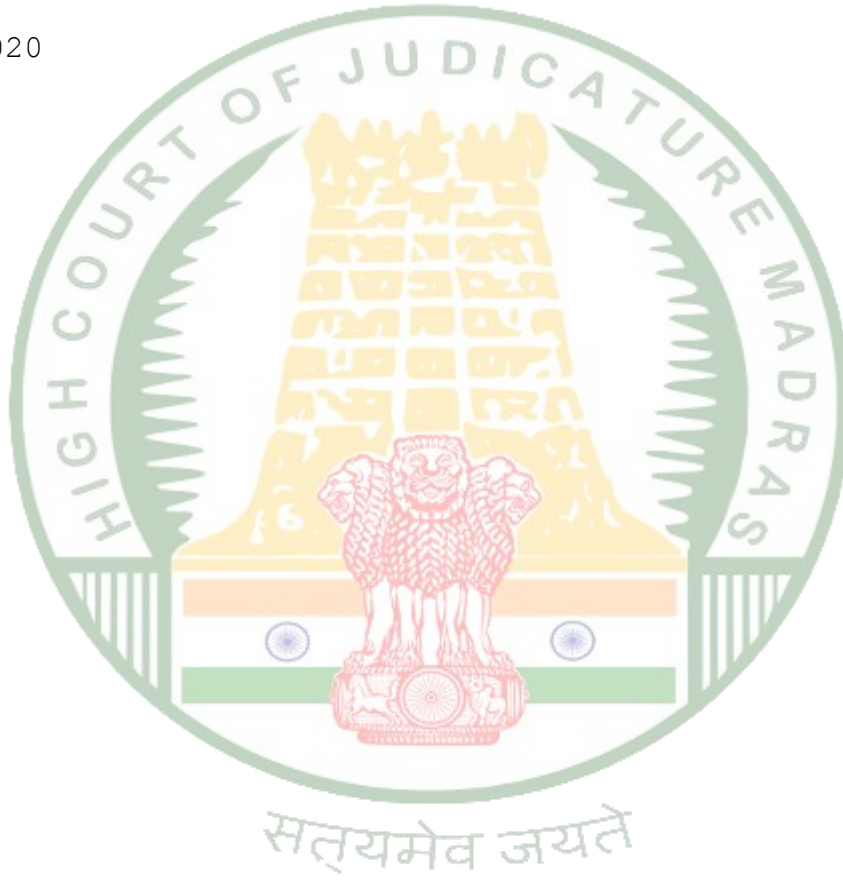
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