

IN THE HIGH COURT OF JUDICATURE AT MADRAS
RESERVED ON : 03.10.2019
PRONOUNCED ON : 04.11.2019
CORAM
THE HONOURABLE MR. JUSTICE T.RAVINDRAN
A.S.No.703 of 2009

1. Arasakumar
2. Amudha Raja ... Appellants/Plaintiffs
Vs.

1. S.Nallammal (deceased)
2. Manoharan
3. The Lakshmi Villas Bank Ltd,
Salem Town Branch,
rep. by its Manager
62-63 Bazaar Street, Post Box No.111
Salem Town. ... Respondents/Respondents

(R1 died, Appellants 1, 2 & R2 are the surviving
legal representatives of the deceased R1
recorded as per the order dated 06.12.2017)

Prayer: Appeal Suit filed under Section 96 of Civil Procedure
Code as against the judgment and decree dated 07.03.2007 made in
O.S.No.235 of 2004, (Salem Sub Court O.S. No.511 of 2002), on
the file of Additional District Judge, (Fast Track Court No.1),
Salem.

For Appellants : Mr.J.Ramakrishnan

For Respondents : No Appearance/set exparte
vide order dated 03.10.2019

JUDGMENT

Aggrieved over the judgment and decree dated 07.03.2007,
passed in O.S.No.235 of 2004, on the file of the Additional
District Judge, (Fast Track Court No.1), Salem, 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 and permanent injunction.

4. The case of the plaintiffs, in brief, is that the
plaintiffs and the second defendant are the daughter and sons of

the first defendant and one Siddhaiya Gounder and his family owned ancestral agricultural lands at Periya Goundanoor, Omalur Taluk, Salem District and the first plaintiff and the second defendant constituted an undivided Hindu Joint Family. Out of the income yields derived from the agricultural lands, Siddhaiya Gounder's family purchased the suit properties. However, they were purchased in the name of the first defendant due to sentimental reasons and the suit properties had been impressed with and treated as the joint family properties of Siddhaiya Gounder and his two sons and after purchase, the RCC terraced building construction was put up in the suit properties and leased out to third parties and the building was also constructed out of the income derived from the ancestral lands and the residential house was constructed in item 2 of the suit properties from the rental and agricultural yields derived from the ancestral lands as well as the loan availed by the plaintiffs and the defendants 1 and 2 and Siddhaiya Gounder had also executed mortgage deed for availing house loan in favour of the Salem Fairlands House Building Society and Siddhaiya Gounder died intestate on 26.11.2000 and the plaintiffs and the second defendant and Siddhaiya Gounder being the coparceners and subsequent to the demise of Siddhaiya Gounder, the first plaintiff and the second defendant are each entitled to 5/12th share in the suit properties. The second plaintiff and the first defendant are each entitled to 1/12th share in the suit properties. The first plaintiff is running a public telephone booth and he is paraplegic from the year 1986 onwards and the second defendant is running a vessel store in the name and style of M/s.Salem Metals. The business of Salem Metals has nothing to do with the plaintiffs and their family. The plaintiffs and the defendants 1 and 2 are in the separate portions of item 2 of the suit properties without any division. The plaintiffs had been repeatedly demanding the defendants for effecting the division of the suit properties and allot their lawful shares. Whiles, during the second week of September 2002, the third defendant and its subordinates visited the first plaintiff's telephone booth and threatened that they are armed with enormous power and in the process of recovery of loan amount from the defendants 1 and 2, on verification, the plaintiffs came to know that for the purpose of running the business of M/s.Salem Metals, the first defendant had procured a huge loan on the security of item no. 1 of the suit properties alleged to be belonging to the first defendant only and the loan had been secured by projecting as if the first defendant is the absolute owner of the item no.1 of the suit properties. Item no.1 of the suit properties is the joint family property purchased in the name of the first defendant and the first defendant had no source to purchase the same independently and the third

defendant is also attempting to bring the first item of the suit properties for sale towards the satisfaction of the loan and therefore, according to the plaintiffs, they had been necessitated to lay the suit against the defendants for appropriate reliefs.

5. The second defendant has filed the written statement and it is found that he has almost agreed with the various averments put forth by the plaintiff in the plaint as regards the nature of the suit properties and the acquisition of the same in the name of the first defendant out of the aid of the ancestral nucleus and the same had been purchased in the name of the first defendant and that the suit properties had been treated and enjoyed as the joint family properties and also admitted the share to which the plaintiffs and the defendants 1 and 2 are entitled to in respect of the same and disputed the claim of the plaintiffs that the second defendant had been delaying the process of the claim of partition put forth by the plaintiffs and according to the second defendant, he is ready to discharge his liability of repaying the loan amount due to the third defendant and infact, he has been regularly paying the loan amount due to the third defendant and paid a sum of Rs.3,00,000/- towards the loan amount. So, the second defendant had no intention to cheat the loan amount and therefore, prayed to dismiss the plaintiffs' suit.

6. The third defendant has filed the written statement contending that the suit laid by the plaintiffs is not maintainable either in law or on facts. The relationship between the plaintiffs and the defendants 1 and 2 is not in dispute. The third defendant disputed the claim of the plaintiffs that the suit properties are the joint family properties of Siddhaiya Gounder and the first plaintiff and the second defendant and also disputed the claim of the plaintiffs that the suit properties had been acquired out of the income derived from the ancestral properties situated at the Periya goundanoor village, Omalur Taluk, Salem district and the same had been acquired in the name of the first defendant out of sentimental reasons and also disputed the case of the plaintiffs that the suit properties are treated and enjoyed as the joint family properties belonging to Siddhaiya Gounder and his two sons and further disputed the case of the plaintiffs that the building put up in the suit properties had been raised out of the income derived from the ancestral agricultural lands and also disputed the claim of the plaintiffs that the residential house has been constructed out of the income from the agricultural yields and further disputed the alleged claim of share in the suit properties as put forth in the plaint. The

third defendant has admitted that the first plaintiff is running a public telephone booth and the second defendant is running a vessel store in the name and style of M/s. Salem Metals and according to the third defendant, the first defendant is the proprietrix of M/s. Salem Metals and approached the third defendant for financial assistance and obtained loan of Rs.8,00,000/- on 23.12.2000 by way of a secured overdraft and created an equitable mortgage in favour of the bank in respect of the first item of the suit properties. The second defendant and his wife have executed a deed of guarantee and other documents agreeing to repay the bank the liabilities under the aforesaid facility. As on 26.08.2002 the outstanding amount is Rs.11,44,585/- together with future interest. Despite repeated demands, the defendants 1 and 2 have failed to discharge the loan amount and the defendants 1 and 2 are jointly and severally liable to repay the amount due to the bank. Therefore, the third defendant had issued a notice dated 09.09.2002, to the defendants 1 and 2, under section 13(2) of the SARFAESI Act they should repay the loan amount within a particular time, failing which, the item 1 of the suit properties will be brought to sale for the realisation of the loan amount and the first defendant had also approached the bank for restricting the liability to Rs.5,00,000/- and sought five months time for settlement but the bank had refused and only with a view to prevent the sale of item 1 of the suit properties under the SARFAESI Act, the suit had come to be laid by the plaintiffs in collusion with the defendants 1 and 2. Items 1 of the suit properties has to be considered as the self acquired property of the first defendant and the same cannot be termed as the joint family property as alleged by the plaintiffs and therefore, the plaintiffs are not entitled to maintain the suit for partition as regards item 1 of the suit properties. The Civil Court has got no jurisdiction to pass any order of injunction against the third defendant restraining it from proceeding under the SARFAESI Act qua the first item of the suit properties which was offered as security for the loan amount. The third defendant is not concerned with the other items of the suit properties and disputed the claim of the plaintiffs that the third defendant and its subordinates had threatened the plaintiffs with dire consequences as alleged in the plaint. There is no merit in the claim of the plaintiffs and the suit is thereby liable to be dismissed.

7. 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 property is joint family properties?

2. Whether the plaintiffs are entitled for partition?

3. Whether the partition decree to be passed as prayed for by the plaintiffs?

4. Whether the order of permanent injunction to be passed against the 3rd defendant?

5. To what other reliefs the plaintiffs are entitled?

8. In support of the plaintiffs' case, PWs 1 and 2 were examined, Exs.A1 to A15 were marked. On the side of the defendants, no oral and documentary evidence has been adduced.

9. On the basis of the materials placed on record and the submissions made, the trial Court was pleased to grant the relief of partition in favour of the plaintiffs as regards the suit properties excepting item no.1 of the suit properties and declined the relief of permanent injunction prayed for and accordingly, disposed of the plaintiffs' suit. Impugning the same, the plaintiffs have preferred the first appeal.

10. The following points arise for determination in the first appeal:

1. Whether the first item of the suit properties is the joint family property of the plaintiffs and the defendants 1 and 2 as claimed by the plaintiffs?

2. Whether the first item of the suit properties is the separate property of the first defendant?

3. Whether the plaintiffs are entitled to claim partition and separate possession of 6/12th share in the first item of the suit properties?

4. Whether the plaintiffs are entitled to claim the relief of permanent injunction as prayed for against the third defendant?

5. Whether the Civil Court has no jurisdiction to entertain the suit laid by the plaintiffs as regards the first item of the suit properties as claimed by the third defendant?

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

7. To what relief the third defendant is entitled to?

Point Nos.1 to 5:

11. The relationship between the plaintiffs and the defendants 1 and 2 is not in dispute. The suit has come to be laid by the plaintiffs claiming partition. The plaintiffs have laid the suit on the basis that the suit properties are the joint family properties belonging to the family of Siddhaiya Gounder. The first defendant is the wife and the plaintiffs and the third defendant are the children of Siddhaiya Gounder, since deceased. According to the plaintiffs' case, Siddhaiya Gounder owned agricultural lands at Periya goundanoor village, Omalur Taluk, Salem and out of the income derived from the agricultural lands, it is put forth by them that the suit properties had been acquired and the construction had also been put up in the suit properties and further, according to the plaintiffs, the suit properties had been acquired in the name of the first defendant due to sentimental reasons, however, the suit properties had been treated and enjoyed as the joint family properties and accordingly, the plaintiffs are entitled to their lawful shares in the suit properties and despite their demands for amicable partition, the defendants 1 and 2 had resisted for partition and further, it is put forth that the third defendant and its men had been threatening with dire consequences claiming that they are taking steps to sell item 1 of the suit properties for the loan incurred by the defendants 1 and 2. According to the plaintiffs, the third defendant is not entitled to proceed against the item 1 of the suit properties as the same is the joint family property and therefore, according to the plaintiffs, the need of the suit for appropriate reliefs.

12. Though the second defendant has filed a written statement, it is found that more or less he has supported the plaintiffs' case. That apart, the second defendant has not disputed the loan facility availed from the third defendant bank. He would also put forth the case that he had been taking steps to discharge the loan availed from the third defendant bank.

13. The third defendant has resisted the plaintiffs' suit contending that it is concerned with only the first item of the suit properties which had been offered as the security in respect of the loan availed from the bank by the first defendant

as the proprietrix of M/s. Salem Metals and according to the third defendant, the second defendant and his wife stood as guarantors to the abovesaid loan and therefore, according to the third defendant, the first item of the suit properties is the separate property of the first defendant and the plaintiffs are not entitled to claim any share in the same as put forth by them. Further, according to the third defendant, the first item of the suit properties had not been treated and enjoyed as the joint family property as claimed by the plaintiffs and therefore, according to the third defendant, with a view to prevent the third defendant from proceeding with the sale of the first item of the suit properties under the SARFAESI Act, the suit has come to be laid by the plaintiffs in collusion with the defendants 1 and 2. The third defendant had also put forth the case that once the proceedings had been initiated under the SARFAESI Act qua the first item of the suit properties, the Civil Court has no jurisdiction to entertain the suit laid by the plaintiffs and therefore, prayed for the dismissal of the plaintiffs' suit.

14. The trial Court seems to have held that the suit properties are the joint family properties of the plaintiffs and the defendants 1 and 2. Further, the trial Court has, after accepting the contention that the first item of the suit properties had been offered as security and mortgaged with the third defendant bank for the loan incurred by the defendants 1 and 2 and the third defendant bank had also initiated action under the SARFAESI Act with reference to the first item of the suit properties, on that premise, held that the plaintiffs are not entitled to claim share in respect of the first item of the suit properties and accordingly, declined the relief of partition prayed for by the plaintiffs in respect of the first item of the suit properties and however, granted the relief of partition in favour of the plaintiffs with reference to the other items of the suit properties and also declined the relief of permanent injunction prayed for by the plaintiffs.

15. The first defendant had conveniently remained ex-parte and did not contest the plaintiffs' suit.

16. From the materials placed on record, it is found that the suit properties had been acquired only in the name of the first defendant. Though the plaintiffs would come forward with the case that the family of Siddhaiya Gounder was owing ancestral agricultural lands at Periya Goundanoor village and out of the income derived from the agricultural lands the suit properties had been acquired, however, with reference to the abovesaid claim of the plaintiffs that Siddhaiya Gounder family

had owned agricultural lands at Periya Goundanoor village and the said lands are capable of yielding adequate income and the same was the source for purchasing the suit properties, absolutely there is no valid and acceptable materials placed by the plaintiffs pointing to the same. In this connection, the sale deeds marked as Ex.A2 to A4 with reference to the suit properties are found to be obtained only in the name of the first defendant. It is also admitted by the plaintiffs that the suit properties had been acquired only in the name of the first defendant, however, according to the plaintiffs, the same had been done out of sentimental reasons.

17. The second plaintiff has been examined as PW1 and PW1 during the course of cross examination has admitted that she has not filed any proof to hold that the first item of the suit properties had been acquired out of the income and yields derived from the ancestral lands and further admitted that at the time of the acquisition of the first item of the suit properties she was not born and that she does not have direct knowledge about the sale transaction. Therefore, when PW1 has clearly admitted that there is no material or proof to hold that the first item of the suit properties had been acquired from the income derived from the ancestral properties and pleaded complete ignorance with reference to the same, in such view of the matter, it is found that the plaintiffs, without any basis, has come forward with the case that the first item of the suit properties, in particular, had been acquired with the aid of the income derived from the ancestral lands.

18. Similarly, PW2 examined on behalf of the plaintiffs has also, during the course of cross examination, admitted that he does not know as to when and where the properties had been acquired in the name of the first defendant Nallammal and further admitted that he knew that it is only the first defendant who had been running the business of M/s. Salem Metals and does not know that the first item of the suit properties had been acquired out of the income derived from the ancestral lands and also would further state that he does not know whether the properties had been allotted in the name of the first defendant. Though during the course of cross examination he would claim that he had been enjoying the ancestral lands of Siddhaiya Gounder on lease basis and accordingly purchased the same, however, with reference to the abovesaid claim, there is no material worth acceptance. The evidence of PWs 1 and 2 being above, it is found that their evidence is of no use to hold that the first item of the suit properties had been acquired with the income derived from the ancestral agricultural lands.

19. Other than Exs.A2 to A4, the plaintiffs have filed the sale deed executed by Siddhaiya Gounder, the second plaintiff and the second defendant. The abovesaid sale deed is dated 07.04.1997 and therefore, from the abovesaid sale transaction, it is found that the same would not have constituted the source for the acquisition of the first item of the suit properties, in particular, when it is the case of the plaintiffs that the items 1 and 2 of the properties had been purchased in the year 1964 itself. It is thus found that the sale deed marked as Ex.A1 would not be helpful to hold that the first item of the suit properties had been acquired out of the income derived from the ancestral lands. Even assuming that the ancestral property/lands were owned by Siddhaiya Gounder and when there is no material on the part of the plaintiffs to show that the said lands were capable of yielding income and the said income constituted the source for the acquisition of the suit properties, particularly, the first item of the suit properties, in such view of the matter, when admittedly the first item of the suit properties stands in the name of the first defendant and when there is no material to hold that the first item of the suit properties had been treated and enjoyed as joint family property, in all, it is found that the trial Court had failed to consider the above aspects of the matter and without any basis and without any proof whatsoever on the part of the plaintiffs, proceeded to hold that all the suit properties inclusive of the first item of the suit properties are the joint family properties as put forth by the plaintiffs. In the light of the abovesaid discussions, it is found that the plaintiffs have miserably failed to establish that the first item of the suit properties is the joint family property. When it is found that the first item of the suit properties stand in the name of the first defendant, the inevitable conclusion that could be arrived is that the first item of the suit properties is the separate and independent property of first defendant in the absence of any reliable material pointing otherwise and therefore, the plaintiffs and the second defendant, as such, would not be entitled to claim partition with reference to the same claiming that the said property is the joint family property.

20. From the materials available on record, it is found that the loan facilities had been availed by the first defendant from the third defendant bank and the second defendant has stood as guarantor towards the said loan. The second defendant has not disputed the availment of the loan facilities from the third defendant bank and he has also admitted that he is endeavouring to pay the loan amount. The first defendant, as above noted, remained ex-parte and not contested the claim of the third defendant. It is found that the third defendant has initiated

action under the SARFAESI Act qua the loan transaction against the first item of the suit properties and only thereafter, the suit has come to be laid for partition. When it is found that the first item of the suit properties had not been established to be the joint family property by the plaintiffs and when the said property stands in the name of the first defendant, accordingly, it is found that the said property has been offered as the security and mortgaged with the third defendant bank for the loan availed by the first defendant. Accordingly no resistance has been offered to the same either on the part of the plaintiffs or the second defendant. As above pointed out, the second defendant has stood as the guarantor towards the said loan. Therefore, the plaintiffs, being the children of the first defendant, cannot plead ignorance about the loan facilities availed by the first defendant on the strength of the first item of the suit properties. The conclusion that could be drawn from the abovesaid discussions is that inasmuch as the first item of the suit properties is the separate and independent property of the first defendant, neither the plaintiffs nor the second defendant had put forth any objection to the same and the loan having not been discharged by the defendants 1 and 2, resultantly, the third defendant had initiated action as regards the first item of the suit properties under the SARFAESI Act and only thereafter, it is found that the suit has been laid by the plaintiffs and it is clear that the suit has been laid by the plaintiffs only at the instance of defendants 1 and 2. Accordingly, it is found that the first defendant has remained ex-parte and even the second defendant has not seriously challenged the plaintiffs' suit and only filed the written statement on illusory grounds almost admitting the plaintiffs claim. Therefore, it is found that as claimed by the third defendant, only with a view to prevent the third defendant from selling the first item of the suit properties towards the discharge of the loan amount under the SARFAESI Act, the plaintiffs and the defendants had colluded together and come forward with the present suit. In such view of the matter, according to the third defendant, once the action had been initiated under the SARFAESI Act, the Civil Court has no jurisdiction to entertain the suit and put forth that the Civil Court has no jurisdiction to restrain the third defendant bank from proceeding under the SARFAESI Act. In the decision reported in 2014 (1) CTC 652 (SC) (Jagdish Singh Vs. Heeralal & Others), the Apex Court has rejected the contentions of the joint family members of borrower that they have right and interest in secured assets and further held that no Civil Court shall have jurisdiction to entertain any suit or proceedings in respect of any matter for which the DRT or Appellate Tribunal is empowered to adjudicate under the Act and further held that the

person claiming interest in secured assets has to approach the DRT by filing the Appeal under the Act and consequently held that the Civil suit challenging measures taken by the secured creditor is barred under law. Therefore, when the suit laid by the plaintiffs is found to be laid in collusion with the defendants 1 and 2 and furthermore, the suit has come to be laid only to prevent the third defendant bank from proceeding with the sale of the first item of the suit properties and in the light of the abovesaid discussions, when the plaintiffs have miserably failed to establish that the first item of the suit properties is the joint family property and on the other hand, when it is found that the first item of the suit properties is the separate property of the first defendant and furthermore, when the third defendant bank had already initiated action under the SARFAESI Act against the first item of the suit properties for the loan secured by the first defendant for which the second defendant had stood as guarantor, in all, it is found that the plaintiffs are not entitled to claim any relief inclusive of the relief of partition insofar as the first item of the suit properties and also not entitled to claim the relief of permanent injunction as against the third defendant as prayed for.

21. In the light of the abovesaid discussions, I hold that the first item of the suit properties is not the joint family property of the plaintiffs and the defendants 1 and 2. I further hold that the first item of the suit properties is the separate property of the first defendant. I therefore hold that the plaintiffs are not entitled to claim partition and separate possession of 6/12th share in the first item of the suit properties and also not entitled to claim the relief of permanent injunction as against the third defendant as prayed for. Furthermore, I hold that the third defendant bank having initiated action under the SARFAESI Act as regards the first item of the suit properties, the plaintiffs' suit in the Civil Court is barred insofar as the first item of the suit properties is concerned and to that extent, I hold that the Civil Court has no jurisdiction to entertain the plaintiffs' suit. I further hold that the Civil Court has no jurisdiction to restrain the third defendant from initiating any action qua the first item of the suit properties under the SARFAESI Act and accordingly, the point Nos.1 to 5 are answered against the plaintiffs.

Point Nos. 6 and 7:

22. For the reasons aforestated, the judgment and decree dated 07.03.2007, passed in O.S.No.235 of 2004, on the file of the Additional District Judge, Salem (Fast Track Court No.1) are confirmed and resultantly, the first appeal is dismissed. No costs. Consequently, connected miscellaneous petition, if any, is closed.

s/d-
Assistant Registrar(CS-V)

True Copy
Sub-Assistant Registrar

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To:

1. The Additional District Judge,
(Fast Track Court No.1), Salem.

2.The Sub Court
Salem

Copy to:

The Section Officer,
V.R.Section,
High Court, Madras.

A.S.No.703 of 2009

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