

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 16.07.2019

C O R A M

THE HONOURABLE MRS.JUSTICE R.HEMALATHA

S.A.No.151 of 2010 and  
M.P.No.1 of 2010

1. Gnanavel  
2. Rajeswari  
3. Uma Maheswari ... Appellants

Vs.

A.Mani ... Respondent

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure against the decree and judgment dated 18.09.2009 passed in A.S.No.41 of 2007 by the Additional Subordinate Judge, Tiruvannamalai reversing the decree and judgment dated 26.03.2007 passed in O.S.No.310 of 2005 by the Additional District Munsif, Tiruvannamalai.

For Appellants : Mr. P.Mani

For Respondent : Mr.R.Rajarajan

ORDER

The appellants are the plaintiffs in O.S.No.310 of 2005 on the file of the Additional District Munsif, Tiruvannamalai and the respondents in A.S.No.41 of 2007 on the file of the Additional Subordinate Judge, Tiruvannamalai.

2. The parties are referred to as per their ranking in the original suit and at appropriate places, their ranks in the present appeal would also be indicated, if necessary.

3. The appellants/plaintiffs filed the said suit for partition of the suit property into 4 equal shares and to allot three such shares to them and also for ascertaining mesne profits. The suit property as described in the plaint is a land in S.No.84/4c of Vengikkal Village, Tiruvannamalai District measuring 0.80 acres and irrigation right in the well in S.No.84/4 of Vengikkal Vilage.

4. The case of the plaintiff in nutshell is as follows.

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The suit property and several properties originally

belonged to one Chinnathambi gounder and his two sons namely Ranga gounder and Arunachalam. The said Chinnathambi gounder and his two sons partitioned their properties through a registered partition deed dated 07.11.1985 and 'C' schedule property mentioned in the partition deed was allotted to Arunachalam. The plaintiffs are the son and daughters of Arunachalam. The properties allotted to the share of Arunachalam are the joint family properties and they were enjoying the properties as co-owners. Arunachalam was addicted to alcohol and he was also involved in illegal and immoral activities. Arunachalam did not take care of the plaintiffs' family and infact was living separately. He borrowed certain amount from one Vijaya and executed a promissory note to meet his illegal needs. In order to realise the amount due under the promissory note, the said Vijaya filed a suit in O.S.No.805 of 1995 on the file of the Additional District Munsif, Tiruvannamalai and the suit was decreed exparte. In the execution proceedings, the suit property was brought for sale and the respondent / defendant purchased the suit property in the court auction sale for meagre amount of Rs.22,100/-, even though the value of the property was more than Rs.80,000/- on the date of sale. The act of the plaintiffs' father in allowing the suit to be decreed exparte and allowing the sale of the suit property in the execution proceedings would clearly go to show that the plaintiffs' father never showed any interest in the welfare of the plaintiffs, who were minors. The purchase made by the defendant in the court auction sale, therefore cannot be sustained. Hence the plaintiffs had prayed for the division of the suit properties into 4 equal shares and to allot three such shares to them.

5. The suit was resisted by the defendant on the following grounds.

(i) Late Arunachalam, his wife and children were living together and he was taking care of his family.

(ii) Late Arunachalam had borrowed certain amounts from one Vijaya, who filed the suit in O.S.No.805 of 1995 on the file of the Additional District Munsif, Tiruvannamalai and the suit property was brought for sale in court auction.

(iii) The defendant was a successful bidder in the court auction and he is a bonafide purchaser for value.

(iv) It is false to allege that Vijaya and Arunachalam colluded together. On the contrary, the said Vijaya is closely related to the plaintiffs.

(v) It is also false to contend that the defendant purchased the suit property for a very low price of Rs.22,100/-, when the actual market value of the property is Rs.80,000/-.

(vi) The upset price was fixed by the court and the defendant who is the auction purchaser did not quote any low price.

(vii) Since Arunachalam did not have any valid defence in O.S.No.805 of 1995, he remained absent and was set exparte.

(viii) The suit property was sold in court auction sale for the discharge of the antecedent debts incurred by the father of the plaintiffs, who is also manager of the joint family and the plaintiffs have the pious obligation to discharge the antecedent debts.

(ix) The plaintiffs did not file a suit within 3 years from the date of attainment of majority. Therefore, the suit is not maintainable.

6. The trial court framed the following issues.

(i) Whether the plaintiffs are entitled for 3/4 share in the suit properties?

(ii) Whether the plaintiffs are entitled for mesne profits as prayed for by them?

(iii) To what relief are the plaintiffs entitled?

7. In the trial court, the first plaintiff examined himself and one another witness and marked Ex.A1. The defendant examined himself and marked Ex.B1 to Ex.B4.

8. The learned Additional District Munsif, Tiruvannamalai after full contest decreed the suit in favour of the plaintiffs on the following grounds.

(i) The defendant has not proved the fact that the plaintiffs' father borrowed loan for the welfare of the plaintiffs' family.

(ii) The defendants failed to examine the creditor namely Vijaya to show that the plaintiffs' father borrowed loan from her only for the welfare of the plaintiffs' family,

(iii) The defendant had purchased the suit property for a very low value of Rs.22,100/- in the court auction, and this case, he easily inferred from the fact that the suit property was subsequently mortgaged for a sum of Rs.55,000/-.

9. Aggrieved over the decree and judgment dated 26.03.2007 by the Additional District Munsif, Tiruvannamalai, the defendant filed an appeal in A.S.No.41 of 2007 on the file of the Additional Subordinate Judge, Tiruvannamalai. Learned Additional Subordinate Judge, reversed the findings of the trial court by concluding that the onus of proof is on the plaintiffs to show that their father borrowed loan for illegal purpose and since the defendant is a total stranger, his right as a court auction purchaser should be protected.



10. The further observation of the first appellate court is that the plaintiffs, without seeking a relief for setting aside the sale transaction, cannot maintain a suit for partition and under the doctrine of pious obligation, the loan obtained by the plaintiffs' father would bind the plaintiffs. It is further observed by the first appellate court that the defendant is a bonafide purchaser for value.

11. Now the present appeal is filed by the plaintiffs on the following substantial questions of law.

(i) Whether the lower appellate court erred in law in casting the burden on the plaintiffs to prove that the debt incurred by their father was not for family necessity when it is for the defendant/purchaser to prove his case that the plaintiffs' father availed the debt for family necessity and welfare of the minor children?

(ii) Whether the lower appellate court erred in law in absolving the defendant from proving his case that the plaintiffs' father incurred the debt for family necessity and welfare of the minor children merely because he happened to be the court auction purchaser?

(iii) Whether in law the present suit for partition and separate possession is maintainable without seeking the relief to set aside the court auction sale>?

(iv) Whether in law the present suit is not maintainable on the ground of non-joinder of necessary party for not impleading the plaintiffs' mother as a party to the suit?

12. Mr.P.Mani, learned counsel appearing for the appellants/ plaintiffs contended that the first appellate court committed error in shifting the burden of proof on the plaintiffs to prove that the debt incurred by their father was a avyavaharika debt and that admittedly when the very same property was mortgaged to the defendant's wife for higher amount, the first appellate court should not have held that the defendant is a bonafide purchaser for value. His further contention is that since the plaintiffs have not shown that the debt incurred by their father was not for the welfare of the plaintiffs, the first appellate court was wrong in concluding that the plaintiffs are liable to pay the debt incurred by their father under the doctrine of pious obligation.

13. His next contention is that the trial court was right in observing that the defendant did not examine the creditor, namely Vijaya, who advanced loan to the plaintiffs' father to show that the loan was not obtained by the plaintiffs' father for illegal or immoral purpose. He would therefore contend that the decree and judgment passed by the first appellate court should be set aside.

14. Per contra, Mr.R.Rajaraman, learned counsel appearing for the respondent raised the following points.

(i) The defendant was a successful bidder in the court auction sale and he has purchased the property for

valuable consideration.

(ii) The possession of the suit property has also been delivered to the defendant.

(iii) The plaintiffs cannot file a suit for partition without seeking a relief for setting aside the sale in favour of the defendant, the court auction purchaser.

(iv) If the plaintiffs were minors, they must seek for cancellation of the document within three years from the date of attainment of majority.

(v) The liability to pay the father's debt arises from the moral and religious obligation and only if it is established that the debt is tainted with immorality or illegality, the pious duty ceases to operate and the son is not bound to pay the debt. Since in the instant case the plaintiffs have not shown that the intention of their father was immoral purpose, the decree and judgment passed by the first appellate court is perfectly in order.

(vi) The father/ kartha is legally entitled to alienate the property of the joint family in the interest of minor members of the family and for his own requirements and it is for the plaintiffs to show that the transaction was tainted by any immoral or illegal purpose.

15. He relied on the following decisions in support of his above contentions.

(i) P.B.Ramjee and two others Vs. P.B.Lakshmanaswamy Naidu and 10 others reported in 1996(1) CTC 661.

(ii) A.C.A.Ganapathi Mudaliar and 7 others Vs. Arumugathammal (died) and another reported in 1997(3) CTC 445

(iii) Sunder Das and others Vs. Gajananrao and others reported in 1997(9) Supreme Court Cases 701

(iv) Dharmaraja Mudaliyar Vs. Beemaraj and another reported in 1992-2 Law Weekly 688

16. It is admitted that the plaintiffs' father borrowed loan from one Vijaya and executed a promissory note. It is also admitted that the said Vijaya filed a suit in O.S.805 of 1995 for realization of the said amount due under the promissory note and the said suit was decreed exparte. In the execution proceedings, the suit property was brought for sale and the defendant was the successful bidder and the possession of the suit property was handed over to the defendant on 17.07.1997. Now the plaintiffs have filed the suit in O.S.No.310 of 2005 for partition of the suit properties into 4 equal shares and to allot three such shares to them.

17. Though it is admitted by the plaintiffs that the plaintiffs' mother is alive on the date of filing of the suit,

she has not been shown as a party to the suit. The main contention of the plaintiffs is that their father borrowed loan from one Vijaya for illegal and immoral purpose and that their father was also addicted to alcohol. The further contention of the plaintiffs is that their father did not take care of his family and was living separately.

18. In order to establish the contentions raised in the plaint, the first plaintiff examined himself as well as his mother. The mother of the plaintiffs (PW2) had categorically deposed that though her husband used to consume alcohol, he was taking care of the family and that he had never gone out of the house. The evidence of PW2 assumes importance, because the plaintiffs in their plaint have averred that their father was residing separately and was not taking care of their family. The admissions made by the PW2 clearly shows that the plaintiffs' father was in fact taking care of his family.

19. A careful perusal of the sale certificate (Ex.B1) clearly shows that the suit property was brought for sale in the court auction in E.P.No.21 of 1997 on the file of the Additional District Munsif, Tiruvannamalai filed by the creditor Vijaya against the father of the plaintiffs. The second defendant was the successful bidder in the court auction sale, that was conducted on 23.04.1997 and the sale was also confirmed on 08.07.1997. Subsequently, the possession of the property was delivered to the defendant on 17.07.1997. It is also seen from the records that the creditor Vijaya is not a stranger to the family of the plaintiffs. In fact, PW1 during the course of cross examination explained the relationship between their family and Vijaya's family.

20. The trial court was totally wrong in shifting the entire burden on the defendant to show that the loan obtained by late Arunachalam was not for illegal or immoral purpose. In fact, the trial court had observed that the defendant had failed to examine Vijaya on his side. In the decision in P.B.Ramjee and two others Vs. P.B.Lakshmanaswamy Naidu and 10 others reported in 1996(1) CTC 661 it has been held that an alienation by the father of the joint Hindu family, which is either for an antecedent would bind the son's interest in the property and that the burden of proving the same is on the alienee. But, if the challenge to the alienation is on the ground that the antecedent debts incurred by the father were tainted by immorality, it is for the sons to prove that the antecedent debts were immoral and also the purchaser had notice that they were so tainted.

21. The plaintiffs in the instant case had come to court with a specific plea that the debts incurred by their father were tainted by immorality. Therefore, the burden is on them to prove the same. But, there is no evidence to show



that the debts incurred by the father of the plaintiffs was not for the benefit of their family. As already observed, PW2 had clearly deposed that her husband used to take care of the entire family till his death.

22. In the P.B.Ramjee case (cited supra) it has been held that where possession has passed to the alienee, there should be a prayer for setting aside the transaction before the plaintiff could recover possession for the said alienee.

23. The Mulla's Hindu Law, 16th Edition, Paragraph No.256 reads thus.

256. Alienation by father. A Hindu father as such has special powers of alienating coparcenary property which no other coparcener has. In the exercise of these powers -

(i) he may make a gift of ancestral moveable property to the extent mentioned in paragraph 225, and even of ancestral immovable property to the extent mentioned in paragraph 226;

(ii) he may sell or mortgage ancestral property, whether moveable or immovable, including the interest of his sons, grand sons and great grandsons therein, for the payment of his own debt, provided the debt was an antecedent debt and was not incurred for immoral or illegal purposes (paragraph 295)

Except as aforesaid, a father has no greater power over coparcenary property than any other manager (a), that is to say, he cannot alienate coparcenary property except for legal necessity or for the benefit of the family (paragraph 242). This section must be read with what is stated under paragraphs 213-215 ante".

24. In the case on hand, the defendant is a court auction purchaser and the sale was also confined in his favour by the court. Therefore, as rightly observed by the first appellate court, his interest should be protected. It is also relevant to point out that the plaintiffs have not filed a suit seeking to set aside the sale in favour of the defendant and had filed a suit for partition. Further, the plaintiffs did not take any steps either to prevent the court auction sale or to set aside the court auction. When the possession of the suit property was handed over to the defendant, the plaintiffs cannot seek for recovery of possession, without setting aside the sale held in the execution proceedings in O.S.No.805 of 1995. The first appellate court assessed the entire evidence in proper perspective and in fact dealt with all the aspects in extenso. Therefore, I do not see any reason to repeat the same observations here in the second appeal and it is perfectly in order.

25. In the result, the second appeal is dismissed.  
No costs. The connected miscellaneous petition is closed and  
the decree and judgment passed by the first appellate court is  
upheld.

Sd/-  
Assistant Registrar (CS-IV)

//True copy//

Sub Assistant Registrar

mst

To

- 1) The Additional District Munsif, Tiruvannamalai.
- 2) The Additional Subordinate Judge, Tiruvannamalai

Copy To  
The Section Officer,  
VR Section, High Court, Madras

+1cc to Mr.P.Mani, Advocate SR.No.60153

+1cc to Mr.G.Rajan, Advocate SR.No.60171

S.A.No.151 of 2010 and  
M.P.No.1 of 2010

AD (CO)  
GMY (22/07/2020)



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