

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 10.04.2019

PRONOUNCED ON : 23.05.2019

CORAM

THE HONOURABLE Mr.JUSTICE P.RAJAMANICKAM

S.A.Nos.233 and 234 of 2013

S.A.No.233 of 2013

1.Aruna
2.V. Maragatha Prabha
3.V. Vidya Prabha
4.K. Gayathri
5.Kumar

... Appellants

Vs.

1.R. Balamurugan
2. R. Kavitha
3. Srividhya
Respondents

PRAYER : Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 19.10.2012 passed by the First Additional District Court, Coimbatore made in A.S.No.20 of 2012 confirming the judgment and decree of Principal Subordinate Court, Coimbatore dated 22.12.2011 made in O.S.No.678 of 2007.
S.A.No.234 of 2013:

1.V. Maragatha Prabha
2. V. Vidya Prabha
3.K. Gayathri

...Appellants

Vs.

1.R. Balamurugan
2. R. Kavitha
3. Srividhya

... Respondents

PRAYER : Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 19.10.2012 passed by the First Additional District Court, Coimbatore made in A.S.No.22 of 2012 confirming the judgment and decree of Principal Subordinate Court, Coimbatore dated 22.12.2011 made in O.S.No.648 of 2007.

For Appellants
in both the appeals

: M/s.V.Raghavachari
in both Appeals

For Respondents
in both the appeals

: Mr.A.Thiyagarajan &
Mr.K. Srinivasan
Senior Counsels
for Mr.S. Ramesh Kumar
in both Appeals

COMMON JUDGMENT

S.A.No.233 of 2013 has been filed by the defendants in O.S.No.678 of 2007 on the file of the Principal Sub-Judge, Coimbatore, against the judgment and decree passed by the first Additional District Judge, Coimbatore in A.S.No.20 of 2012 dated 19.10.2012 confirming the judgment and decree passed by the Principal Sub-Judge, Coimbatore in O.S.No.678 of 2007 dated 22.12.2011.

S.A.No.234 of 2013 has been filed by the plaintiffs in O.S.No.648 of 2007 on the file of the Principal Sub-Judge, Coimbatore, against the judgment and decree passed by the First Additional District Judge, Coimbatore in A.S.No.22 of 2012 dated 19.10.2012 confirming the judgment and decree passed by the Principal Sub-Judge, Coimbatore in O.S.No.648 of 2007 dated 22.12.2011.

2. The appellants in S.A.No.234 of 2013 had filed a suit in O.S.No.648 of 2007 on the file of the Principal Sub-Judge, Coimbatore, to declare that the sale deed dated 15.04.1988 as fraudulent document and will not bind upon them and to divide the suit property into four equal shares and allot three such shares to them. The defendants in that suit had filed a suit in O.S.No.678 of 2007 on the file of the Principal Sub-Judge, Coimbatore, for permanent injunction restraining the defendants therein, their agents etc., from interfering with their peaceful possession and enjoyment of the suit property. The learned Principal Sub-Judge, Coimbatore by the common judgment dated 22.12.2011 dismissed the suit in O.S.No.648 of 2007 with costs and decreed the suit in O.S.No.678 of 2007. Aggrieved by the same, the defendants in O.S.No.678 of 2007 had filed an appeal in A.S.No.20 of 2012 and the plaintiffs in O.S.No.648 of 2007 had filed an appeal in A.S.No.22 of 2012 on the file of the First Additional District Judge, Coimbatore. The learned First Additional District Judge, Coimbatore, by the common judgment dated 19.10.2012 had dismissed both the appeals thereby confirmed the judgments and decrees passed by the trial court. Feeling aggrieved, the defendants in O.S.No.678 of 2007 have filed the second appeal in S.A.No.233 of 2014 and the plaintiffs

in O.S.No.648 of 2007 have filed the second appeal in S.A.No.234 of 2013.

3. For the sake of convenience, the parties are referred to as described before the trial court in O.S.No.648 of 2007.

4. The averments made in the plaint in O.S.No.648 of 2007 are in brief as follows:-

The suit property was a joint family property of late Natarajan which was allotted to his family as per partition deed dated 29.01.1980. Natarajan's joint family which includes Natarajan and his daughters viz., the plaintiffs herein were in possession and enjoyment of the entire joint family property including the suit property. Natarajan died on 08.12.1995. After his death, the plaintiffs are in possession and enjoyment of the joint family property including the suit property. The fact remains so, on 13.10.2007, the defendants attempted to dispossess the plaintiffs from the suit property. The plaintiffs came to know about the sale deed on 15.04.1988 said to have been executed by late Natarajan. The said Natarajan have no right to deal with the joint family property. On reading the contents of aforesaid sale deed, the plaintiffs came to know that the entire sale consideration was not paid. The defendants have committed fraud. The plaintiffs came to know about the fraud only on 13.10.2007. The possession of the suit property viz., vacant land remains with the plaintiffs. They are using it as parking land for the automobile workshop. Since the sale deed dated 15.04.1988 is an act of fraud, fraud vitiates the entire transaction and not binding on the plaintiffs. The plaintiffs are entitled to 1/3rd share each and all the three plaintiffs jointly entitled to 3/4th share in the suit property. Hence, the plaintiffs filed the above suit to declare the said sale deed dated 15.04.1988 as fraudulent document and not binding on the plaintiffs and to divide the suit properties into four equal shares and allot three such shares to them.

5. The averments made in the written statement filed by the first defendant and adopted by the third defendant are, in brief, as follows:

a) The property allotted to Nataraja Gounder under a partition deed dated 29.01.1980 was an ancestral property and not a joint family property. Originally, the suit property along with other properties belonged to one Arumuga Gounder. After his death, his three sons viz., Maruthachala Gounder, Chinnaswamy Gounder and Nataraja Gounder had divided their family properties under a registered partition deed dated 29.01.1980 and in the said partition, the suit property and other properties were allotted to the share of Nataraja Gounder. Ever since the date of partition, he was in possession and enjoyment of the same. On 15.04.1988, the said Nataraja Gounder sold an extent of one acre

in the front portion out of 1.48 acre in favour of the defendants and put them in possession and enjoyment of the same. There is a common passage proceeds from Sathy road towards east and turns towards north as a common access to all the three schedule properties. As per the terms of the sale deed dated 15.04.1988, the said Nataraja Gounder has to form a 30 feet East-West road on the south in between the defendants' property and Sanganoor pallam to be used as a common passage to both the defendants' property and rest of Natarajan's property on the east. But as per the terms, he did not form the road on the southern side. So, the defendants have retained the balance sale price. They are entitled to retain the amount till the conditions fulfilled. But they have taken steps to deposit the amount into the court. The said Natarajan died on 10.02.2004 leaving behind his wife Aruna and daughters (plaintiffs) as his legal heirs.

b) The said Natarajan sold 20 cents of land under sale deed dated 23.12.1991 in favour of one Uthrakumari on the eastern side of the defendant's property by mentioning and confirming the sale in favour of the defendants. During his life time, he did not raise any objection with regard to the sale deed dated 15.04.1988 executed in favour of the defendants. During the year 1989, the adjacent owners viz., Krishnakumar and Venkitaswamy tried to disturb the peaceful possession and enjoyment of the present defendants. Hence, they filed a suit for permanent injunction in O.S.No.1071 of 1989 on the file of the first Additional Sub-Judge, Coimbatore and obtained an order of injunction in I.A.No.1207 of 1989 and the same was made absolute on 01.09.1992. Subsequently, it was transferred to the court of Principal District Munsif, Coimbatore and re-numbered as O.S.No.3175 of 1996 and the same is still pending. In the above suit, the said Krishnakumar filed a petition in I.A.No.238 of 1999 to implead the said Natarajan as a necessary party. The said Natarajan filed a counter stating that he sold one acre of land in favour of the defendants and thereby confirming the same. He further stated that he was an unnecessary party to the said proceedings and need not be impleaded. So, it is clear that the sale transaction in favour of the defendants was a genuine and valid one.

c) As per the partition deed dated 15.04.1988, the said Natarajan was the absolute owner of the suit property and no right was accrued to the plaintiffs during the life time of their father Natarajan. All the properties not included in the suit for partition. Further, the plaintiffs have not added their mother Aruna as a party. It is not correct to say that the defendants committed fraud in purchasing the properties and the plaintiffs came to know about the sale only on 13.10.2007. The plaintiffs are residing adjacent to the suit property and they are aware of the nature of enjoyment by the defendants. It is not correct to say that the suit property is kept vacant. The

defendants have put up a barbed wire fence and gate at their cost and kept under lock and key. It is not correct to say that the plaintiffs are using the suit property as parking land for automobile work shop. The defendants are in exclusive possession and enjoyment of the suit property and the plaintiffs are never in possession. The defendants had filed a suit in O.S.No.678 of 2007 against the plaintiffs and others for the relief of permanent injunction and the same is pending. Therefore, the defendants prayed to dismiss the suit.

6. The averments made in the plaint filed in O.S.No.678 of 2007:

a) The plaintiffs are the absolute owners of the suit property by virtue of the sale deed dated 15.04.1988 executed by one Nataraja Gounder son of Arumuga Gounder. From the date of purchase, the plaintiffs are in exclusive possession and enjoyment of the suit property as absolute owners. Patta has also been changed in their names and therefore, they are paying kists to the Government. Originally, the suit property along with other properties belonged to one Arumuga Gounder. After his death, his three sons viz., Marudhachala Gounder, Chinnasamy Gounder and Nataraja Gounder had divided their family properties under a registered partition deed dated 29.01.1980 and in the said partition, the suit property and other properties were allotted to the said Nataraja Gounder. On 15.04.1988, the said Nataraja Gounder had sold an extent of one acre in the front portion out of 1.48 acre in favour of the plaintiffs and put them in possession and enjoyment of the same. There is a common passage proceeding from Sakthi road towards east and proceeding towards north as an access to all the three schedule properties. As per the terms of the sale deed dated 15.04.1988, the said Nataraja Gounder has to form a 30 feet East West road on the south in between the plaintiffs properties and Sangoor Pallam to be used as a common passage. The said Nataraja Gounder died on 08.12.1995 leaving behind his wife and daughters who are the defendants in the above suit. The fifth defendant is the son-in-law of the said Nataraja Gounder. The defendants are not having any right over the suit property.

b) After purchasing the property in the year 1988, the sons of Marudhachala Gounder viz., Krishnakumar and Venkatasamy @ Venkatasam tried to disturb the possession and enjoyment of the suit property and hence the plaintiffs filed a suit for permanent injunction in O.S.No.1071 of 1989 which is pending on the file of the First Additional Sub-Judge, Coimbatore and obtained an order of interim injunction in I.A.No.1207 of 1989 and the same was made absolute on 01.9.1992. The said suit has been transferred to the Principal District Munsif, Coimbatore and re-numbered as O.S.No.3175 of 1996 and the same is pending. In the suit in O.S.No.1071 of 1989, the said Krishnakumar and his brother filed an application in I.A.No.238 of 1990 to

implead the said Natarajan as a party. The said Natarajan entered into appearance through his counsel and filed a counter stating that he sold one acre of land to the plaintiffs and he has nothing to do so with the sold away property. Subsequently, the said Natarajan sold 20 cents of land under sale deed dated 23.12.1991 in favour of one Uthrakumari on the eastern side of the suit property by mentioning and confirming the sale in favour of the plaintiffs. Therefore, the defendants are not having any right over the suit property. But they attempted to create the troubles on 12.10.2007 and hence the plaintiffs lodged a police complaint on 15.10.2007 and even thereafter, the defendants are giving troubles and hence, the plaintiffs are constrained to file the above suit for the relief of permanent injunction.

7. The averments made in the written statement filed by the fourth defendant and adopted by the other defendants are, in brief, as follows:

The suit is an abuse of process of law. The defendants are not concerned with O.S.No.1071 of 1989. The police complaint is nothing but a threat to grab the possession of the suit property from the defendants 2 to 4. The suit for bare injunction is not maintainable. The suit property was a joint family property of late Natarajan and the same was allotted to his joint family under a partition deed dated 29.01.1980. The defendants 2 to 4 are daughters of the said Natarajan and they are also members of the joint family. The said Natarajan died on 08.12.1995. After his death, the defendants 2 to 4 are in possession and enjoyment of the entire joint family property including the suit property. On 13.10.2007, the plaintiffs made an attempt to dispossess the defendants 2 to 4 from the suit property with the help of police and hence thereafter the defendants 2 to 4 came to know about the sale deed dated 15.04.1988. The said Natarajan had no right to deal with the joint family property as a separate property. On reading the contents of the sale deed, the defendants came to know that the entire sale consideration was not paid. The plaintiffs have committed fraud. The said fraud was known to the defendants only on 13.10.2007. The suit property is in possession of the defendants 2 to 4 and the same is a vacant land. They have fenced it and rented it to a tenant and they are using it as a parking land for the automobile workshop. The defendants 2 to 4 have already filed a suit in O.S.No.648 of 2007 for the relief of declaration that the said sale deed dated 15.04.1988 as fraud and not binding upon them and also for partition to divide the suit property into four equal shares and allot three such shares to them. The plaintiffs are fully aware of the said suit. As a counter blast, the plaintiffs have filed the present suit. When the defendants 2 to 4 are in possession of the suit property, the plaintiffs cannot maintain the suit for bare injunction.

Therefore, the defendants prayed to dismiss the suit.

8. Based on the aforesaid pleadings, the learned Principal Sub-Judge, Coimbatore, had framed necessary issues and tried both the suits jointly. During trial, the third plaintiff in O.S.No.648 of 2007 viz., K.Gayathri was examined as PW1 and two more witnesses were examined as PW2 and PW3. Exs.A1 to A13 were marked as exhibits on the side of the plaintiffs. On the side of the defendants, the first defendant in O.S.No.648 of 2007 viz., R. Balamurugan was examined as DW1 and one more witness was examined as DW2. Exs.B1 to B18 were marked on the side of the defendants.

9. The learned Principal Sub-Judge, Coimbatore, after considering the materials placed before him, found that the sale deed dated 15.04.1988 executed by late. Nataraja Gounder in favour of the plaintiffs in O.S.No.648 of 2007 is a valid document and the same is not suffered from any fraud and it will bind upon the plaintiffs in O.S.No.648 of 2007. Accordingly, he dismissed the suit in O.S.No.648 of 2007 with costs and decreed the suit in O.S.No.678 of 2007 with costs. Aggrieved by the same, the defendants in O.S.No.648 of 2007 had filed an appeal in A.S.No.20 of 2012 and the plaintiffs in O.S.No.648 of 2007 had filed an appeal in A.S.No.22 of 2012 on the file of the First Additional District Judge, Coimbatore. The learned First Additional District Judge, Coimbatore by the common judgment dated 19.10.2012 had dismissed both appeals and thereby confirmed the judgment and decree passed by the trial court. Feeling aggrieved, the defendants in O.S.No.678 of 2007 have filed the second appeal in S.A.No.233 of 2013 and the plaintiffs in O.S.No.648 of 2007 have filed the second appeal in S.A.No.234 of 2013.

10. This court at the time of admitting the present second appeal, has formulated the following substantial questions of law:

i) Whether courts below are right in decreeing the suit for permanent injunction when the appellants had established continued possession over the property?

ii) When the respondents have admittedly not paid the sale consideration and deposited the amount only during the course of the proceedings, are the courts below justified in recognizing such deposit as a legal tender?

Iii) When the amounts have not been paid as undertaken and the reading of the sale deed suggest

unrealistic nature of the transaction, even in the absence of plea of fraud, are the courts below not competent to invalidate the sale?

iv) In law and in equity, are the courts below not competent to declare sale deed as bad or incomplete or restricted to a proportion, when the purchaser had failed to pay substantial portion of the sale consideration?"

11. Heard Mr.V. Raghavachari, learned counsel for the appellants and Mr.A.Thiyagarajan and Mr.K. Srinivasan, learned senior counsel for Mr.S.Ramesh Kumar, appearing for the respondents.

12. Substantial Questions of law 1 to 4:

The learned counsel for the appellants has submitted that the courts below failed to see that the appellants are in possession and enjoyment of the suit property. He further submitted that the courts below failed to see that since the late Natarajan got the suit property in the partition which took place between himself and his brother, the suit property does not lose the character of ancestral property. He further submitted that in view of the Hindu Succession (Amendment) Act, 2005, the daughters of the said Nataraja Gounder are co-parceners and hence they are entitled to get 3/4th share in the suit property. He further submitted that the courts below failed to see that in the sale deed dated 15.04.1988 itself, it is clearly stated that already the road is in existence and in such a case, there was no necessity to lay one more road by the said Natarajan. He further submitted that since there was no necessity to lay one more road, the respondents are not entitled to retain the sale consideration of Rs.50,000/-. He further submitted that since the entire sale consideration not passed, the sale deed dated 15.04.1988 is not valid atleast to the proportionate extent of the land. He further submitted that after 19 years, the respondents have deposited the said amount of Rs.50000/- before the court and that itself also would show that there was no necessity to lay any more road by the late Natarajan and therefore, the said document is vitiated by the act of fraud. He further submitted that DW1 has clearly admitted in her cross-examination that they made a complaint to the police stating that one Kumar and others have occupied the suit property by parking cars and made a request to the police to remove the said cars and handover the possession to them and the said statement would show that on the date of filing of the suit, the respondents are not in possession and enjoyment of the suit property. He further submitted that Ex.A3 series would show that the appellants are in possession and enjoyment of the

suit property. He further submitted that the Ex.A3 series cannot be created by over night. He further submitted that Ex.A4 would show that the appellants leased out the suit property to one M/s.Indusind Bank Ltd., He further submitted that Exs.A5 to A13 also would show that the appellants are in possession of the suit property by leasing out the same to various parties for parking the vehicles and the said facts would show that the sale deed dated 15.04.1988 was not acted upon. He further submitted that the courts below without taking into consideration of the evidence in a proper perspective had rejected the claim of the appellants and accepted the claim of the respondents and therefore, he prayed to allow the second appeals and set aside the judgments and decrees passed by the courts below and decree the suit in O.S.No.648 of 2007 as prayed for and to dismiss the suit in O.S.No.678 of 2007.

13. In support of the aforesaid contentions, he relied upon the following decisions:-

- 1) A.Mahimaidas Vs.P.Parameswari and Others MANU/TN/7457/2018= 2019-1-LW927.
- 2) Muthia Pillai and another Vs.P. Radhakrishna Pillai (died) and Seven others 1997-3-LW-717.
- 3) Balkrishna Dattatraya Galande Vs. Balkrishna Rambharose Gupta and another (C.A.No.1509 of 2019) arising out of SLP (C) No.29417 of 2016 on the file of the Hon'ble Supreme Court dated 06.02.2019.

14. Per contra, learned senior counsel for the respondents has submitted the since the late Nataraja Gounder got the suit property in the partition which took place between himself and brothers, the suit property is the separate property of late Nataraja Gounder and hence he got every right to dispose of the same. He further submitted that even assuming that the suit property is the ancestral property, the daughters of the said Nataraja Gounder got married even before the commencement of Hindu Succession Tamil Nadu Amendment Act (Tamilnadu Amendment Act 1 of 1990), they cannot claim that they are co-parceners. He further submitted that the said daughters cannot claim co-parcenership under the Hindu Succession (Amendment Act, 2005) also, because under the said Amendment Act, it is clearly stated that the properties which were partitioned or alienated before 20th December, 2004 will remain unaffected. He further submitted that the documentary evidence produced by the respondents would clearly show that they are only in possession of the suit property. He further submitted that the appellants are residing adjacent to the suit property and they cannot take a plea that they came to know about the sale deed dated 15.04.1988 only on 13.10.2007. He further submitted that after executing the sale deed dated 15.04.1988, the said Natarajan was alive for nearly 7 years but he did not take any steps to

set aside the said sale deed and that being so, the appellants are not entitled to question the said documents as it is vitiated by fraud. He further submitted that the said sale deed was executed on 15.04.1988 and the respondents have filed the suit in O.S.No.648 of 2009 after 19 years and hence the suit is clearly barred by limitation. He further submitted that the said Natarajan had agreed to lay a road in the suit property for convenient enjoyment, but he has not laid a road and hence the sum of Rs.50000/- being the part of sale consideration has been retained by the respondents. He further submitted that even assuming that the respondents are bound to pay the said amount merely because the said amount was retained by them, it is always open to the vendor to file a suit for recovery of the balance sale consideration, but neither the original vendor Natarajan nor his legal heirs (appellants) filed any suit for recovery of the said amount. But the respondents voluntarily deposited the said amount before the court. He further submitted that taking into consideration of the aforesaid facts, the courts below concurrently found that the said sale deed is a valid document and the same is not vitiated by fraud and the same will bind upon the appellants and that respondents are in possession of the suit property and in the said concurrent factual findings, this court cannot interfere. Therefore, he prayed to dismiss the second appeals.

15. The learned senior counsel for the respondents in support of the aforesaid contentions, relied upon the following decisions:-

- 1) M. Yogendra and Others Vs. N.Leelamma and Others 2009 (5) CTC 170
- 2) M. Palaniappan and another Vs. Nachimuthu 2017-2-L.W. 343
- 3) S.M.Sivaswami Vs. Nagammal and 5 others 2011(1) CTC 337
- 4) Kaliaperumal Vs. Rajagopal and another (2009) 4 SCC 193.
- 5) Prakash and others Vs. Phulavati and others 2016-2-LW-865.

16. The suit property is admeasuring one acre situated in S.No.186/3 of Ganapathy village, Coimbatore. It is seen from Ex.B1 that the defendants in O.S.No.648 of 2007 and the plaintiffs in O.S.No.678 of 2007 had purchased the suit property from one Natarajan S/o.Arumuga Gounder for Rs.1,95,000/-. In the said document itself, the said Natarajan had stated that the said property is an ancestral property and he got the same under a registered partition deed vide document No.1025/1980 of Sub-Registrar Office, Gandhipuram. A registration copy of the said partition deed dated 29.01.1980 has been produced by the plaintiffs in O.S.No.648 of 2007 and marked as Ex.A2. A perusal

of Ex.A2 would show that the suit property is the ancestral property. Further, the trial court as well as the first appellate court have concurrently held that the suit property is the ancestral property to the said Natarajan. As against the said findings, the respondents have not filed any cross objection and therefore, it is not open to them to contend that the suit property is the separate property of the said Natarajan.

17. In M. Yogendra and Others Vs. N.Leelamma and Others (cited supra), the Hon'ble Supreme court has held that the property in hands of sole co-parcener allotted to him in partition shall be his separate property and the same shall revive as coparcenary property only when a son is born to him.

18. In this case, the plaintiffs in O.S.No.648 of 2007 are claiming that they are coparceners based on the Hindu Succession (Tamilnadu Amendment Act 1 of 1990) and also Hindu Succession (Amendment Act, 2005). Therefore, whether the suit property is a co-parcenary property or not depends upon the answer to the question whether the aforesaid amendment Acts will apply to the present case.

19. In M. Palaniappan and another Vs. Nachimuthu (cited supra), this court has held that the properties derived by the first defendant from his father could only be treated as a separate property and not as joint family property. In this case, the plaintiffs in O.S.No.648 of 2007 have not claimed any right through their father. On the contrary, they are claiming right by birth as coparceners and therefore, the aforesaid decision will not apply to the facts and circumstances of the case.

20. In S.M.Sivaswami Vs. Nagammal and 5 others (cited supra), a Division Bench of this court has held that if the property was not available with the family when Tamil Nadu Amendment Act 1 of 1990 came into force, it cannot be partitioned by plaintiffs for obtaining their shares.

21. In this case, admittedly the suit property was sold by the said Natarajan under Ex.B1 to the defendants in O.S.No.648 of 2007 on 15.04.1988 much before the Tamil Nadu Amendment Act 1 of 1990 came into force. Therefore, in view of the aforesaid decision, the plaintiffs in O.S.No.648 of 2000 cannot avail benefits of the Tamil Nadu Amendment Act 1 of 1990.

22. In Prakash and others Vs. Phulavati and others (cited supra), the Hon'ble Supreme Court in paragraph Nos.22 and 23 has observed as follows:

"22. In this background, we find that the proviso to Section 6(1) and sub-section (5) of Section 6 clearly intend to exclude the transactions referred to therein which may have taken place prior to 20th December, 2004 on which date the Bill was introduced. Explanation cannot permit reopening of partitions which were valid when effected. Object of giving finality to transactions prior to 20 th December, 2004 is not to make the main provision retrospective in any manner. The object is that by fake transactions available property at the introduction of the Bill is not taken away and remains available as and when right conferred by the statute becomes available and is to be enforced. Main provision of the Amendment in Section 6(1) and (3) is not in any manner intended to be affected but strengthened in this way. Settled principles governing such transactions relied upon by the appellants are not intended to be done away with for period prior to 20 th December, 2004. In no case statutory notional partition even after 20th December, 2004 could be covered by the Explanation or the proviso in question.

23. Accordingly, we hold that the rights under the amendment are applicable to living daughters of living coparceners as on 9th September, 2005 irrespective of when such daughters are born. Disposition or alienation including partitions which may have taken place before 20th December, 2004 as per law applicable prior to the said date will remain unaffected. Any transaction of partition effected thereafter will be governed by the Explanation. "

23. From the aforesaid decision, it is clear that the rights under the Hindu Succession (Amendment Act, 2005) are applicable to living daughters of living coparceners as on 9th September, 2005 irrespective of when such daughters are born. It is also clear that disposition or alienation including partitions which may have taken place before 20th December, 2004 as per law applicable prior to the said date will remain unaffected. In this case, the defendants in O.S.648 of 2007, had purchased the suit property under Ex.B1 on 15.04.1988 and hence in view of the aforesaid decision of the Hon'ble Supreme Court, the plaintiffs in O.S.No.648 of 2007 cannot claim coparcenership under Hindu Succession (Amendment Act, 2005) also.

24. Though the said Natarajan got the suit property in a partition which took place between himself and his brother under Ex.A2 dated 29.01.1980, in view of the decision in S.M.Sivaswami Vs. Nagammal and 5 others (cited supra) and Prakash and others Vs. Phulavati and others (cited supra), the plaintiffs in O.S.No.648 of 2007 cannot claim any right either under Tamilnadu Amendment Act 1 of 1990 or under the Hindu Succession Act (Amendment Act 2005). Therefore, they cannot claim partition in the suit property.

25. In Ex.B1, the said Natarajan gave an undertaking that he will lay an East-West road with a width of 30 feet in the southern side of S.No.186/3. Further, he has shown the said road as one of the boundaries for the property sold under the said document. In the plan attached to the said document also, he has shown the said road in yellow colour. Further, he gave consent to retain Rs.50,000/- out of total sale consideration of Rs.1,95,000/- until he lays the aforesaid road. So, it is clear that in the plan attached to Ex.B1 sale deed, the 30 feet road which has been shown in yellow colour is only a proposed road because while describing the boundaries, the said Natarajan had clearly stated as follows:-

“ சங்கனூர் பள்ளத்துக்கும், வடபுரம் கிரய சொத்தின் தென்புறம், கீழ்மேலாக நான் அமைத்துக் கொடுக்கும் 30 அடி அகல தடத்துக்கும்...வடக்கு.”

26. So, it is clear that the said Natarajan had shown the proposed road itself as one of the boundaries and that it does not mean that already a road is in existence on the southern side of the property sold under the said document. The plaintiffs in O.S.No.648 of 2007 also have not stated in their plaint that the said road was already in existence or it has been laid subsequently by the said Natarajan.

27. It is also to be pointed out that admittedly the said Natarajan died only on 08.12.1995. So, it is clear that he was alive for nearly 7 years after the execution of B1 sale deed. But he has not filed any suit to declare that the said sale deed is vitiated by fraud and that being so, it is not open to the plaintiffs to question the same.

28. In A.Mahimaidas Vs. P.Parameswari and Others (cited supra), a suit was filed to declare that the sale deed dated 27.01.2006 is null and void and nonest in the eyes of law. In the said suit, it was contended that the respondents were in need of money and in that endeavour, when they had approached their advocate, he had introduced the appellant as his friend and apprised that the appellant would offer them money on the mortgage of the suit property and later, the respondents came to

know that the appellant, in collusion with the respondents' advocate by committing fraud and deceit, had obtained a sale deed from them on 27.01.2006 under the guise of a mortgage deed without even paying any money. This court taking into consideration of the fact that if really there had been any payment of the balance sale consideration, at the time of registration of the sale deed, the Registrar concerned would have made necessary endorsement with reference to the same but no such endorsement has been made by the Registrar and the said circumstances also, would show that the said sale deed was not a valid document, but in this case in Ex.B1, it is clearly stated that the vendor undertook to lay a road on the southern side of the property which was sold under the said document and until the said road is laid by him, he gave a consent to retain the amount of Rs.50000/- out of the total sale consideration Rs.1,95,000/-. Therefore, the aforesaid decision will not apply to the facts of this case.

29. In Muthia Pillai and another Vs. P. Radhakrishna Pillai (died) and seven others, (cited supra), a suit was filed for declaration that the sale consideration for sale deed dated 25.05.1980 was really Rs.20000/- and for recovery of the same from the defendants. This court has held that the said case would come within the exception provided in Proviso No.1 to Section 92 of the Evidence Act and hence the plaintiff is entitled to adduce evidence with regard to failure of consideration. But in this case, the question of failure of consideration not at all arise. The vendor gave an undertaking that he will lay a road on the southern side of the property which was sold under Ex.B1 and gave consent to retain Rs.50000/- out of total sale consideration of Rs.1,95,000/- until he lays the said road. Therefore, the aforesaid decision also will not help the appellants.

30. In Kaliaperumal Vs. Rajagopal and another (cited supra), the Hon'ble Supreme Court in paragraph No.17 held as follows:

"It is now well settled that payment of entire price is not a condition precedent for completion of the sale by passing of title, as Section 54 of Transfer of Property Act, 1882 ('Act' for short) defines 'sale' as a transfer of ownership in exchange for a price paid or promised or part paid and part promised. If the intention of parties was that title should pass on execution and registration, title would pass to the purchaser even if the sale price or part thereof is not paid. In the event of non-payment of price (or balance price as the case may be) thereafter, the remedy of the vendor is only to sue for the balance price. He

cannot avoid the sale. He is, however, entitled to a charge upon the property for the unpaid part of the sale price where the ownership of the property has passed to the buyer before payment of the entire price, under [Section 55\(4\)\(b\)](#) of the Act."

31. From the aforesaid decision, it is clear that if the intention of the parties was that title should pass on execution and registration of a sale deed, title would pass to the purchaser even if the sale price or part thereof is not paid. It is also clear that in the event of non-payment of price (or balance price as the case may be) thereafter, the remedy of the vendor is only to sue for the balance price. He cannot avoid the sale.

32. In this case, as already pointed out that even after execution of Ex.B1 sale deed, the original vendor Natarajan was alive for nearly 7 years, but he has not filed any suit for the balance sale price. After his death, his daughters viz., the plaintiffs in O.S.No.648 of 2007 have also not filed any suit for the balance price. But the defendants in O.S.No.648 of 2007 have voluntarily deposited the balance sale consideration of Rs.50,000/- before the court even though neither the vendor nor his legal heirs have laid the road as agreed by the vendor in Ex.B1 sale deed.

33. In *Balkrishna Dattatraya Galande Vs. Balkrishna Rambharose Gupta and another* (cited supra), the Hon'ble Supreme Court has held that in a suit for permanent injunction, the plaintiff has to prove that he was in actual possession of the property on the date of the suit. In Ex.B1 itself, it is stated that on the date of sale deed itself, the possession of the suit property was given to the purchasers. Further, out of total extent of 1.48 acres in S.No.186/3, only one acre was sold under Ex.B1 and the remaining land was retained by the vendor Natarajan. Therefore, Exs.A3 to A13 may relate to the rest of the land belonging to the plaintiffs in O.S.No.648 of 2007 and based on the said documents, it cannot be said that they are in possession of the suit property. Exs.B6 to B16 would show that the defendants in O.S.No.648 of 2007 are in possession of the suit property. Taking into consideration of the aforesaid facts, the courts below had rightly come to the conclusion that Ex.B1 sale deed is a valid document and it will bind upon the plaintiffs in O.S.No.648 of 2007 and as such, they are not entitled to ask for partition in the said property and further they are not in possession of the suit property and on the contrary, the defendants in that suit are in the possession of the suit property and in the said factual concurrent findings, this court cannot interfere. Accordingly, the substantial questions of law are answered against the appellants.

34. In the result, both the second appeals are dismissed. No costs. The judgments and decrees passed by the courts below are confirmed.

Sd/-
Asst.Registrar

/true copy/

Sub Asst. Registrar

gv

To

1. The First Additional District Court,
Coimbatore.

2. The Principal Subordinate Court,
Coimbatore.

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

+1 cc to Mr.V.Raghavachari Advocate sr44325

+2 cc to Mr.S.Ramesh Kumar Advocate sr44165 dt 11/12/2019

S.A.Nos.233 and 234 of 2013

ssv(co)
aa14/11/2019

सत्यमेव जयते

WEB COPY