

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 22.11.2019
PRONOUNCED ON : 03.01.2020

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

A.S.No.218 of 2013

1.M.Shanthi
2.S.Selvi

...Appellants/Plaintiffs

Vs.

1.Rajkumar
2.Rakee @ Kutti
3.Manivasagam
4.Murugesan
5.Govindan

...Respondents/Defendants

Prayer: Appeal Suit filed under Section 96 of Civil Procedure Code as against the judgment and decree dated 28.07.2011 of the Additional District Judge - Fast track Court No.II, Salem made in O.S. No.103 of 2009.

For Appellants : Mr.V.R.Rajasekaran

For R1 : No appearance/set exparte
vide order of the Court dated
22.11.2019

For R2 : Mr.T.M.Hariharan

For R3 & R4 : Mr.S.Mukund
for M/s.Sarvabhauman associates

For R5 : Mr.A.Thiyagarajan

JUDGMENT

Aggrieved over the judgment and decree dated 28.07.2011, passed in O.S. No.103 of 2009, on the file of the Additional District Judge - Fast track Court No.II, 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.

4.Briefly stated, according to the plaintiffs' case, they and the first defendant are the daughters and son of the deceased Rajamanickam and the deceased Sellammal. Rajamanickam died intestate on 02.07.1991 and Sellammal died on 26.10.2006. The plaintiffs and the first defendant constituted the members of the undivided hindu joint family and under the partition deed dated 03.04.1996, the suit properties fell to the share of the plaintiffs and the first defendant's family and accordingly, the plaintiffs are entitled to 2/3rd share in the suit properties and in fact, the plaintiffs, the first defendant and Sellammal prior to her death had also jointly sold a portion of the suit properties by way of the sale deed dated 24.02.2000 to third parties. Whiles, the first defendant and the plaintiffs' mother Sellammal, with a view to defraud the plaintiffs' share in the suit properties, created nominal and unenforceable sale deeds relating to the portion of the suit properties in favour of the defendants 2 and 3 on 25.06.2003 and 12.03.2004 and the abovesaid sale deeds are not valid and binding upon the plaintiffs and there existed no legal necessity to sell the same by the first defendant and Sellammal. The plaintiffs questioned the abovesaid alienations and demanded partition, however, the first defendant and the mother were not forth coming to effect partition. The mother had died on 26.10.2006. The plaintiffs sent a legal notice on 25.02.2009 seeking partition. The defendants 3 and 4 have chosen to send a reply on 01.04.2009 containing false allegations. The defendants 3 and 4 are not bonafide purchasers and the defendants 3 and 4 in connivance with the fifth defendant are in the process of creating sale deeds in the name of the fifth defendant and hence, according to the plaintiffs, the need for the suit for appropriate reliefs.

5.The second defendant resisted the plaintiffs' suit contending that the partition deed dated 03.04.1996 is true. However, denied that the plaintiffs are entitled to 2/3rd share in the suit properties and also denied the case of the plaintiffs that the sale deeds effected in the name of the defendants 2 and 3 on 25.06.2003 and 12.03.2004 are nominal and unenforceable and effected without any legal necessity. The claim of partition put forth by the plaintiffs is false. After the notice, the plaintiffs had assured that they would not claim anything from the second defendant. The plaintiffs' mother and the first defendant executed a sale deed on 03.11.1998 for valid consideration and handed over the possession and the second defendant mortgaged the said property to Suramangalam Housing Society and obtained loan to construct a house and put up a building thereon and the second defendant had also executed a power of attorney on 09.01.2009 in favour of one Govindan and

obtained a portion of the money and the said Govindan is a necessary party to the suit. The suit properties had not been properly valued and proper Court fee has not been paid and the suit is liable to be dismissed.

6.The third and fourth defendant resisted the plaintiffs' suit contending that the partition deed dated 03.04.1996 is true. However would state that the case of the plaintiffs that the first defendant and their mother had created nominal and unenforceable sale deeds in respect of the portion of the suit properties is false. It is put forth that the first plaintiff purchased an extent of 1490 sq ft on 15.06.1998 from her mother Sellammal and the first defendant and therefore, it is evident that the plaintiffs are not in the joint possession and enjoyment of the suit properties. The first defendant and Sellammal had mortgaged the first item of the suit properties in favour of the bank and obtained loan and unable to repay the dues to the bank and apprehending that the bank might take action against the property, approached the defendants to sell the same for good price and based on the same, the defendants cleared the bank dues and on 25.06.2003, the first defendant and Sellammal had executed a sale deed in favour of the third defendant for an extent of 4181 sq.ft. with tiled house and similarly, on 12.03.2004, they had executed a sale deed in favour of the fourth defendant for an extent of 3512-3/4 sq.ft. with tiled house. The plaintiffs are very well aware of the facts. The plaintiffs have no right over the abovesaid properties and the defendants had put up a new building in the property by spending huge amount. Similarly, the fourth defendant had also levelled the ground and renovated the old structure by spending huge amount. The abovesaid sale transactions had been effected only for the benefit of the family and if the loan had not been discharged, the properties would have been brought for sale. The defendants are the bonafide purchasers. The plaintiffs had laid the suit in collusion with the first defendant and therefore, the suit is liable to be dismissed. सत्यमेव जयते

7.The fifth defendant resisted the plaintiffs suit contending that the partition deed dated 03.04.1996 is true and however, disputed the claim of the plaintiffs for share in the suit properties. According to the fifth defendant, the suit has been laid by the plaintiffs very belatedly and put forth that only for discharging the loan of the bank, the suit properties had been alienated and stated that the plaintiffs had never been in the possession and enjoyment of the property purchased by the fifth defendant and the suit properties have not been properly described and the second defendant, after the purchase of the property, has been in the possession of the same by putting up construction and the remaining property are available with the

family and put forth the case that only to extract money, the suit has come to be laid by the plaintiffs and therefore, the suit is liable to be dismissed.

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 plaintiffs are entitled for partition and separate possession of 2/3 shares in the suit property?

2. Whether the partition took place on 03.04.1996 between Periya Sevigounder and his three sons namely Perumal, Kandasamy and Pillaiyar, Sellammal w/o Rajamanickam and 1st defendant?

3. Whether the 1st defendant and plaintiff's mother Sellammal have created a nominal and inenforceable deed in the name of sale deeds relating to a portion of the suit property?

4. Whether the 1st plaintiff purchased an extent of 1490 sq.ft. from her mother Sellammal and her brother 1st defendant under Document No.3942/1998?

5. Whether the 1st defendant and his mother Sellammal had executed a sale deed in favour of the 3rd defendant under Document No.2467/03 for an extent of 4181 sq.ft. with tiled house?

6. Whether the 1st defendant and his mother Sellammal had executed a sale deed in favour of the 4th defendant under Document No.1154/2004 for an extent of 3512-3/4 sq.ft. with tiled house?

7. Whether the 1st defendant and his mother obtained loan from the bank for the benefit of their family the loan was discharged by 3rd defendant?

8. Whether the defendants 3 and 4 are the bonafide purchaser for value?

9. Whether the 2nd and 3rd item of the suit property are in possession and enjoyment of the 1st defendant?

10. To what relief the plaintiffs are entitled?

Additional issues:-

1. Whether the description of suit properties is correct?

2. Whether the plaintiffs are in joint possession of the suit properties?

3. Whether the valuation of the suit and the court fee paid are correct?

9. In support of the plaintiffs' case, PWs 1 and 2 were examined, Exs. A1 to A15 were marked. On the side of the defendants, DWs 1 and 2 were examined, Exs. B1 to B24 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 declare that the plaintiffs are entitled to 2/3 share in the unsold portion of the items 1 and 2 (excluding the portions sold to the defendants 2, 3 and 4 through Exs. B3, B6 and B14) and in the whole of the item No. 3 of the suit properties and accordingly, granted the preliminary decree in favour of the plaintiffs. Impugning the same, the present first appeal has been preferred by the plaintiffs.

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

1. Whether the defendants are bonafide purchasers for value without notice of the lawful share of the plaintiffs, in respect of the suit properties?

2. Whether the plaintiffs are entitled to obtain the partition and separate possession of 2/3 share in the suit properties as put forth by them?

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

4. To what relief, the defendants are entitled to?

Point Nos. 1 & 2:-

12.The plaintiffs are the sisters of the first defendant. Rajamanickam is the father and Sellammal is the mother of the plaintiffs and the first defendant. It is not in dispute that the suit properties had been allotted to the family of the plaintiffs and the first defendant by way of the partition deed dated 03.04.1996 marked as Ex.A11. The parties are not in dispute that the suit properties had been allotted to the plaintiffs family under the abovesaid partition. Thus, it is found that the suit properties are the ancestral properties of the family consisting of the plaintiffs, the first defendant and their mother Sellammal and Sellammal had died only subsequent to the abovesaid partition deed. From the marriage invitation cards marked as Exs.A13 and A14, it is found that the trial Court had correctly determined the factum of the plaintiffs' marriage and therefore, the trial Court has held that the plaintiffs are entitled to equal right and share in the ancestral properties as per law. Accordingly, when it is found that the parties are not in dispute that the suit properties had been allotted to the family of the plaintiffs and the first defendant, resultantly, it is seen that both the plaintiffs and the first defendant would be entitled to equal share in the suit properties. However, it is found that the first defendant along with the mother had effected alienations of the portion of the suit properties in favour of the defendants 2, 3 and 4 by way of the sale deeds dated 03.11.1998 and 25.06.2003 and 12.03.2004. Admittedly, the plaintiffs are not parties to the abovesaid sale transactions. Therefore, according to the plaintiffs, the purchase of the portion of the suit properties by the defendants 2 to 4 only from the first defendant and the mother Sellammal is not valid as far as the plaintiffs share is concerned and therefore, contended that the abovesaid sale deeds would not bind the plaintiffs' share with reference to the same and accordingly, contended that the plaintiffs are entitled to the suit properties allotted under Ex.A11 partition deed and the plaintiffs have 2/3rd share in the suit properties and as their request for allotting the share had been not acceded to, according to the plaintiffs, they had been necessitated to lay the suit for appropriate reliefs.

13.The defendants would put forth the case that the sale transaction effected in their favour in respect of the portion of the suit properties under Exs.B3, B6 and B14 are all made only for the legal necessities and the plaintiffs are aware of the same and therefore, the plaintiffs are not entitled to challenge the same. Further, according to the defendants, they have spent huge amount in levelling the property and putting up the construction etc., and therefore, at the belated stage, the plaintiffs cannot put forth the right over the properties sold to them and hence, according to them, the plaintiffs are not entitled to claim any share in the properties which had been sold to them by way of the abovesaid sale deeds.

14. When as above noted, the plaintiffs are entitled to equal share in the suit properties on the strength of Ex.A11 partition deed, in such view of the matter, it has to be seen primarily whether the defendants 2 to 4 had purchased the suit properties despite having knowledge about the rights of the plaintiffs over the same. In this connection, as put forth by the respective parties in the pleadings, the defendants have not disputed the allotment of the suit properties to the plaintiffs family under the partition deed. Despite the same, it is evident that the defendants had endeavoured to purchase the portion of the suit properties only from the first defendant and Sellammal. On a perusal of the partition deed Ex.A11, they would have been put on notice about the entitlement of the plaintiffs in the properties purchased by them. In this connection, Raji, examined as DW1, during the course of cross examination, has admitted that he knew the plaintiffs even from their birth and further admitted that the suit properties are the ancestral family properties of Rajamanickam. The plaintiffs, the first defendant and Sellammal are the legal heirs of Rajamanickam and the same is not in dispute. Therefore, it is found that when DW1, the second defendant is very well aware of the status of the plaintiffs as the daughters of Rajamanickam and also the nature of the suit properties allotted to the family of Rajamanickam in the partition deed marked as Ex.A11, evidently, it is seen that DW1, the second defendant is fully aware of the rights of the plaintiffs over the suit properties. In fact, the same has been admitted by DW1 in the course of cross examination and he has deposed that it is correct to state that the plaintiffs have share in the suit properties, the ancestral properties allotted to the share of Rajamanickam. Therefore, when the second defendant, as deposed by him, is fully aware of the plaintiffs right in the suit properties, it does not stand to reason as to why he had endeavoured to purchase the suit properties only from the first defendant and Sellammal and not from the plaintiffs. With reference to the same, no proper explanation and reason has been adduced by the second defendant.

15. DW1, during the course of cross examination has stated that inasmuch as certain properties had been already allotted to the plaintiffs, the plaintiffs cannot lay the claim over the properties alienated to the defendants. In this connection, the sale deed Ex.B1 dated 15.06.1998 has been pressed into service. The abovesaid sale deed is found to be executed in favour of the first plaintiff by Sellammal and Rajkumar and there is no clear material as to in what circumstances, the abovesaid sale deed had been effected in favour of the first plaintiff. According to the plaintiffs, the same had been nominally effected and she had not enjoyed the property and further put forth that the same had been subsequently alienated on 24.02.2000, marked as Ex.A12.

By way of the abovesaid sale deed marked as Ex.B1, the defendants had endeavoured to put forth the case that the plaintiffs had been allotted with distinct shares in the family properties by the first defendant and Sellammal. However, when there is no clear material as to whether really Ex.B1 sale deed had been effected and enforced and when the properties comprised under Ex.B1 sale deed had been alienated on 24.02.2000 under Ex.A12 sale deed and when there is no material to hold that the second plaintiff had been settled or sold any property and when the defendants have not taken any plea that there had been subsequent partition amongst the plaintiffs, the first defendant and Sellammal in respect of the family properties allotted to their share under Ex.A11 partition deed, in such view of the matter, Ex.B1 would not in any manner support the defence version to hold that the plaintiffs had been already given due share in the family properties.

16. Considering the fact that the sale deed marked as Ex.A12 is reflected in the Encumbrance Certificate marked as Ex.A5 and when it is seen that Ex.A12 sale deed had been executed by all the legal heirs of Rajamanickam, in such view of the matter, when the properties said to have been conveyed under Ex.B1 had been subsequently sold by all under Ex.A12, resultantly, it is seen that the claim of the defendants that the plaintiffs had already been settled and allotted their shares in the family properties by way of Ex.B1 sale deed cannot at all be believed and accepted and the abovesaid factor had been omitted to be considered by the trial Court properly. As abovenoted, DW1, the second defendant, has admitted that the plaintiffs had right over the suit properties and despite knowledge of the same, when he has not endeavoured to acquire the sale deed from the plaintiffs also, in such view of the matter, it is seen that the sale deed obtained by the second defendant would not in any manner bind the plaintiffs and therefore, as rightly contended by the plaintiffs' counsel, the second defendant is found to be not a bonafide purchaser for value without notice of the plaintiffs' rights over the suit properties.

17. The third defendant examined, as DW2, would claim that he and the fourth defendant had purchased the properties from the first defendant and Sellammal and it is stated that only with a view to discharge the bank loan, they had alienated the properties to them and thereby contended that the alienations effected in their favour are made for legal necessity and thus binding on the plaintiffs. When DW2 has admitted that he is aware of the fact that the plaintiffs are the daughters of Rajamanickam and in such view of the matter, before endeavouring to purchase the properties from the first defendant and Sellammal, as contended by the plaintiffs' counsel, the defendants 3 and 4 should have endeavoured to know from the

plaintiffs as to whether they had been already allotted and settled with the other properties belonging to the family. In such view of the matter, to say that they have been informed about the settlement of other properties in favour of the plaintiffs and on that premise, they had purchased the properties only from the first defendant and the Sellammal, as such, cannot be believed and accepted.

18. At one stage, DW2 would claim that without any verification of the family properties of Sellammal, they had endeavoured to purchase the properties. The abovesaid fact would only go to expose that no proper enquiry had been made before purchasing the suit properties. However, when it is seen that the defendants had purchased the suit properties only after verifying the encumbrance certificate and Ex.A12 sale transaction had been reflected in the encumbrance certificate, on that basis, as contended by the plaintiffs' counsel, the defendants would have been put on notice about the family properties of Rajamanickam and thereby, the entitlement of the plaintiffs to the allotment of their share in the properties of Rajamanickam. Resultantly, when the defendants 3 and 4 had purchased the properties from the first defendant and Sellammal only based upon the partition deed, they would have been aware of the rights and entitlement of the plaintiffs to the suit properties and in such view of the matter, their claim that they were not put on notice about the entitlement of the plaintiffs to the suit properties, as such, cannot be believed and accepted. Merely because the suit properties had been subjected to loan obtained by the first defendant and Sellammal, it cannot be construed that the plaintiffs had lost their rights over the suit properties and it cannot also be construed that as the defendants 3 and 4 had discharged the said loan, their purchase is valid and binding on the plaintiffs. When the fact remains that the plaintiffs have equal share in the suit properties as that of the first defendant after the demise of Sellammal and during the life time of Sellammal, the plaintiffs have equal share in the suit properties along with the first defendant and Sellammal, hence the sale transactions effected by the defendants 3 and 4 ignoring the plaintiffs rights cannot be valid sale transactions as far as the plaintiffs are concerned and in such view of the matter, the claim of the defendants 3 and 4 that they are bonafide purchasers without notice of the plaintiffs' right to the suit properties, as such, cannot be countenanced.

19. The case has been projected by the defendants that subsequent to their purchase, they had improved the properties and put up construction and renovated the existing structure by spending huge amount and therefore, at this belated stage, the plaintiffs cannot be allowed to claim share in the suit

properties. However, when the defendants had endeavoured to purchase the suit properties only from the first defendant and Sellammal though knowing the fact that the plaintiffs have also have equal right in the suit properties, in such view of the matter, the subsequent improvements alleged to have been made by the defendants would not in any manner bind the plaintiffs as such. On that score, the defendants cannot be allowed to deprive the lawful share of the plaintiffs in respect of the suit properties.

20. The trial Court has proceeded to decline the reliefs in favour of the plaintiffs in respect of the properties purchased by the defendants 2 to 4 and granted the reliefs in favour of the plaintiffs with reference to the remaining properties. As abovenoted, when the trial Court had determined that the plaintiffs have equal share in the suit properties as the legal heirs of Rajamanickam and Sellammal and when the trial Court has come to the conclusion that the sale deeds had been obtained by the defendants 2 to 4 only from the first defendant and Sellammal and not from the plaintiffs and when there is no convincing and reliable material placed on the part of the defendants that the plaintiffs had been allotted or settled other family properties in lieu of their shares and when it is noted that the defendants are fully aware of the plaintiffs right over the suit properties prior to the sale transactions and when the defendants have not properly explained as to why they had ignored the plaintiffs and obtained the sale deed only from the first defendant and Sellammal, in such view of the matter, as contended by the plaintiffs' counsel, in no way the defendants can be held to be bonafide purchasers for value without notice of the plaintiffs right and resultantly, the determination of the trial Court that the plaintiffs are entitled to claim share in the properties belonging to the family and not in respect of the properties alienated to the defendants 2 to 4, as such cannot be sustained in the eyes of law.

21. For the reasons aforestated, I hold that the defendants are not bonafide purchasers of the suit properties without notice of the plaintiffs right over the suit properties. I therefore hold that the plaintiffs are entitled to obtain the partition and separate possession of 2/3 share in all the suit properties as put forth by them. Accordingly, the point Nos.1 and 2 are answered.

Point Nos.3 & 4:

22. In the light of the abovesaid discussions, the judgment and decree dated 28.07.2011, passed in O.S. No.103 of 2009, on the file of the Additional District Judge - Fast track Court No.II, Salem holding that the plaintiffs are not entitled to

claim partition and separate possession of 2/3 share in the portions sold to the defendants 2, 3 and 4 through Exs.B3, B6 and B14 are set aside and resultantly, the plaintiffs wholly are entitled to obtain partition and separate possession of 2/3 share in respect of the portions sold to the defendants 2 to 4 through sale deeds Exs.B3, B6 and B14 and in other aspects, the judgment and decree of the trial Court are confirmed. Accordingly, the first appeal is allowed with costs. Consequently, connected miscellaneous petition, if any, is closed.

-s/d-

Assistant Registrar

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The Additional District Judge,
Fast track Court No.II, Salem.

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