



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 05.06.2020

Judgment Pronounced on : 30.11.2020

CORAM: THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

S.A.No.751 of 2006

1. Lakshmanan (Died) ..... 3<sup>rd</sup> defendant / Appellant / Appellant
2. Sulochana
3. Elumalai
4. Santhosh
5. Suguna
6. Sudha
7. Periyathai ..... Appellants

(Appellants 2 to 6 are brought on record as legal representatives of the deceased sole appellant viz., Lakshmanan Vide Order of Court dated 01.07.2019 made in CMP.No.677, 680 and 682/2019 in S.A.No.751/2006 and 7<sup>th</sup> Appellant brought on record as LR of the deceased 1<sup>st</sup> appellant viz., Lakshmanan vide order of Court dated 15.07.2019 made in CMP No.14762, 14767 and 14768 in SA No.751 of 2006.)

Vs

- 1.Subburayan
- 2.Senguttuvan
- 3.Periyathai
- 4.Lakshmi

... Respondents/Respondents/ Plaintiff, Defendants 1,2 & 4

Prayer :- Second Appeal filed under Section 100 of CPC, against the judgment and decree passed by the Additional Subordinate Court, Tiruvannamalai in A.S.No.35 of 2005 dated 31.01.2006, confirming the judgment and decree passed by the District Munsif, Tiruvannamalai in O.S.No.165 of 2004 dated 04.5.2005

For Appellants : Mr.P.G.Thiyagu

For Respondents : Mr.R.Neelakandan

#### JUDGMENT

The third defendant in a suit for specific performance challenges the successive decree passed in favour of the plaintiff by the trial court as well as by the first appellate court, in this second appeal. Parties would be referred to by their rank before the trial Court. Pending appeal, the third defendant died and hence, his legal heirs are brought on record as appellants 2 to 6.



WEB COPY

2.1 The case of the plaintiff is as below :

- A block of land measuring 1.21 acres in S.No.78/1 was purchased in the name of the second defendant under Ext.A7 sale deed dated 11.01.1962. According to the plaintiff, this property was purchased by Paramagounder, who is the husband of the second defendant, out of the income from the joint family, and that this property partakes the character of a joint family property. The couple (Paramagounder and Periyathai) had 2 sons and a daughter, of who, the first defendant is one of their sons, and the fourth defendant is their daughter. Their other son was one Ponnusamy, and he is not a party to the suit. After the demise of Paramagounder, the entire properties including the property covered under Ext.A7, which the family possessed devolved on his heirs.
- The fourth defendant, the daughter of the second defendant was given in marriage long prior to the suit and only the two brothers, namely the first defendant and Ponnusamy came to enjoy the properties. While so, the first defendant and Ponnusamy orally divided the properties, which is needless to mention included the property that stood in the name of the second defendant.
- So far as the property comprised in S.No.78/1 goes, it was divided into two halves, of which, the northern half was allotted to the share of the first defendant and the southern half was allotted to Ponnusamy. The second defendant, in whose name the property was purchased under Ext.A7, consented to this division. The property came to be allotted to the first defendant is described as Item No.1 & 2 in the plaint.
- Be that as it may, Ponnusamy, the allottee of the southern half, had sold his share to the third defendant/appellant herein Vide Ext.A8 sale deed dated 08.12.1989. The second defendant is one of the attesting witness to this document.
- After the partition, the first defendant had purchased Item No.3. While so, on 03.9.1996, the first defendant and the plaintiff had joined to execute a registered sale agreement (marked Ext.A1 = Ext.A9).
- However, within about a couple of weeks since the execution of Ext.A1 sale agreement, on 19.9.96 to be precise, both the first and second defendants jointly executed a sale deed (Ext.B2 = Ext.A2) in favour of the third defendant.
- Thereafter, the plaintiff issued Ext.A3 suit notice dated 04.11.96, which was replied to by the first defendant Vide Ex.A5 and by the second defendant Vide Ext.A6, both of which are dated 15.11.1996. The third defendant on his part has



WEB COPY

replied through Ext.A4 dated 11.11.1996. All of them unilaterally denied that the suit property was not a joint family property, and that there has never been an oral partition between the first defendant and Ponnusamy, and that Ext.A.1 = Ext.A9 sale agreement is incompetent.

2.2 A written statement was filed consistent with the stands taken in the reply notices referred to above.

3.1 The suit went to trial, and the plaintiff has examined himself as P.W.1. He also examined three other witnesses on his side. Defendants 1 & 2, the son and the mother chose to remain exparte; and for the third defendant, his wife deposed on his behalf as DW1. (DW1 and the second defendant share the same name) and one Govindasamy Pillai was examined as DW2. DW1 in her testimony had said that her husband, the third defendant, has some difficulties in speaking and hence she was deposing on his behalf.

3.2 The trial Court held that the property which stood in the name of the second defendant in terms of Ext.A7 sale deed was indeed allowed to be treated as a joint family property between her sons, namely the first defendant and Ponnusamy, and its line of reasoning are:

- (a) Under Ext.A8 sale deed, which Ponnusamy had executed in favour of the third defendant/appellant herein, he has sold 1.39 acres in S.No.78/1 and in this sale deed the northern boundary is shown to be the property of the first defendant. This supported the theory of oral partition as alleged by the plaintiff. And, the second defendant who now asserts her independent title in her Ext.A6 reply notice, was an attesting witness to this sale deed.
- (b) That even the first defendant has created a mortgage vis-a-vis in Item Nos.1 & 2, in terms under Ext.A10 dated 02.8.1993 asserting his independent title to the property.
- (c) The first and second defendants who are the competent persons to speak about the first defendant's title, chose to remain exparte.
- (d) Inasmuch as Ext.A1 is a registered sale agreement, the third defendant cannot claim himself to be a bonafide purchaser of the suit property for value, since DW1 in her evidence has stated that she did not even know about Ext.A1 sale agreement. Secondly, while in his written statement, the third defendant has contended that he had paid the sale consideration on the date of Ext.B2, the recital in the document shows that the sale consideration has been adjusted against the earlier payment made by the third defendant to the first defendant which implies that Ext.B2 sale deed was supported only by past consideration.



3.3 Ultimately, the trial Court decreed the suit. This was challenged by the third defendant before the first appellate Court, which concurred with the reasoning of the trial Court and confirmed its decree. Aggrieved which, the third defendant has preferred the second appeal.

4. This appeal was admitted on the following substantial questions of law :

(1) In the absence of any evidence in proof of existence of joint family or alleged oral partition, still is the learned Subordinate Judge right in upholding the title of plaintiff, especially when the sale deed stood in the name of the mother of the defendant?

(2) When it is settled in law that there is no presumption that property standing in the name of female is not a joint family property, still in the absence of any proof that the property is the joint family property, is the learned Subordinate Judge right in holding that the plaintiff has title?

5. The learned counsel for the third defendant/appellant argued:

- That there is no evidence on record to indicate that the sale consideration for the purchase of property covered under Ext.A7 was provided out of the income from the ancestral properties of her husband Paramagounder. Nor is there any material available on record to indicate that there were ancestral properties generating income to purchase the property under Ext.A7. Therefore, when the property stands in the name of the second defendant, the very Ext.A1 sale agreement executed by the first defendant without his mother, the second defendant joining the former as a co-executant, the said sale deed is incompetent. The entire cause of action of the plaintiff is pivoted on his assertion that the property covered under Ext.A7 is a joint family property. When this assertion is not established, necessarily the case he has built on this foundation should collapse.
- The second leg of plaintiff's assertion is that there was an oral partition, to prove which, he relied on Ext.A8 sale deed, which the first defendant's brother Ponnusamy had executed in favour of the third defendant. The fact that the northern boundary was described as first defendant's property is of no consequence to prove an oral partition between the brothers. In law, while a property purchased in the name of a coparcener can be presumed to be a part of the coparcenary property, that there is no such presumption when the property is purchased in the name of a female member.



WEB COPY

6. Heard the learned the counsel for the respondents (plaintiff, defendants 1,2 & 4). His line of argument was the literal reproduction of the reasoning of the Courts below, and hence they are not reproduced.

7.1 On carefully weighing the rival submissions, this Court finds that the counsel for the third defendant/appellant has entertained considerable fallacy to weave a case for him. It is fundamental to any suit for specific performance involving the sale of an immovable property, the title is not liable to be investigated. This is because a mere sale agreement does not create any interest in the land to be transacted, and the suit for specific performance itself is laid only for enforcing a contractual right created in personam. Secondly, if at all someone could challenge the title of the first defendant to execute Ext.A1 = Ext.A9 sale agreement, only the second defendant has the competency to do. She, though issued Ext.A6 reply notice promptly, did not choose to contest the suit when an opportunity was beckoning her.

7.2 Even if this aspect is slightly kept aside, the third defendant has not adequately explained how he purchased the southern portion of the property under Ext.A8 from Ponnusamy, since the same logic and the principle of law that he now canvasses should necessarily affect Ext.A8 sale deed as well. This would imply that the third defendant takes a divergent stand when it comes to assertion of his title differently as between Ext.A8 sale deed and the one under Ext.A2 sale deed.

7.3 In a suit for specific performance, the fundamental defence open to a third party purchaser of the property is that he is a bonafide purchaser of value without notice. This is critical to his defense, and it is here, in proving it, he fails absolutely. It is indisputable that Ext.A1 is a registered sale agreement, but DW1 says that she was not aware about the sale. The minimum, the Court expects of a subsequent purchaser is to prove his bonafide. When there exists a registered sale agreement executed earlier to Ext.B-2 sale deed, is not appropriate that the third defendant/appellant made necessary enquiries about it and to verify if there were any encumbrance over the property?

8. This Court finds that the Courts below have entered a finding on facts correctly, which does not calls for interference. So far as the substantial questions raised on concern, this Court has already found that they are not very germane to decide in a suit for specific performance. Consequently, the substantial questions of law raised fails.

9. In conclusion, the appeal is dismissed and the judgment and decree passed by the Additional Subordinate Court, Tiruvannamalai in A.S.No.35 of 2005 dated 31.01.2006, confirming the judgment and decree passed by the District Munsif, Tiruvannamalai in



O.S.No.165 of 2004 dated 04.5.2005, is hereby confirmed. No costs.

WEB COPY

Sd/-  
Assistant Registrar (CS-I)

//True copy//

Sub Assistant Registrar

ds

To:

- 1.The Additional Sub Judge  
Tiruvannamalai.
- 2.The District Munsif  
Tiruvannamalai.
- 3.The Section Officer  
VR Section  
High Court, Madras.

S.A.No.751 of 2006

SS (CO)  
GMY (27/08/2021)