



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 02.03.2021

Pronounced on : 11.03.2021

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CORAM :

THE HONOURABLE DR. JUSTICE G.JAYACHANDRAN

A.S.No.649 of 2018
& C.M.P.Nos.17569 of 2018 & 804 of 2021

1.Parimala,
2.Elyanandhini,
3.Sathiya,

...Appellants / Defendants

/versus/

Sulochana
W/o.K.P.Ramasamy,
D.No.6, No.5, Building Society Road,
V.O.C.Nagar,
Rasipuram Town and Taluk,
Namakkal District.

Rep. by her Power Agent Nagarajan

...Respondent / Plaintiff

Prayer : First Appeal is filed under Section 96 of C.P.C., against the judgment and decree dated 28.11.2017 made in O.S.No.173 of 2010 on the file of the Learned Principal District Court, Namakkal.

For Appellants : Mr.N.Manokaran

For Respondent : Ms. Shabnam Banu,
for Mr.S.Manuraj

J U D G M E N T

The Appeal against the judgment and decree passed by the Trial Court in the suit for partition and separate possession. The aggrieved defendant is the appellant before this Court.

2. Suit for partition filed by the purchaser of the undivided $\frac{1}{2}$ share of the suit property. Same was defendant by the co-sharer on the ground of pre-existing right to purchase. The Trial Court rejected the said defence.

3. The Trial Court judgment and decree is assailed on the ground that the Court below erred in relying upon a void settlement deed dated 02.02.2010 marked as Ex.A.3 and the



subsequent sale deed dated 30.09.2010 marked as Ex.A.4, which is per se not maintainable in the eye of law. The contention of the appellant is that a coparcener cannot donate or settle her undivided share in the suit property without the consent of the other coparceners. Therefore, the settlement deed through which the property has been alienated in favour of the plaintiff is non est in the eye of law because the gift or devise by a coparcener in Mitakshara family of her undivided interest is wholly invalid.

4. In this case, the plaintiff had purchased the suit property from one Haripriya vide Ex.A.4. The plaintiff's vendor Haripriya got the property by way of a settlement deed Ex.A.3 executed by her mother Vasanthamani.

5. The contention of the Learned Counsel for the appellant is that Vasanthamani have no power to settle her undivided share in the coparcener property to her daughter Haripriya. Therefore, the said settlement deed as well as the consequence sale deed will not bind the other coparcener namely the appellant. Further, the case of the appellant is that Ex.A.3 settlement deed and Ex.A.4 sale deed had been fraudulently created at the instigation of one K.P.Ramasamy, then M.L.A of Rasipuram Constituency. At his instance Ex.A.3 settlement deed was fabricated and thereafter, a bogus sale deed created in the name of his wife Sulochana, who is the plaintiff. By force, she took possession of the property and same established by the defendants through Ex.B.6 to Ex.B.12.

6. It is further contended that, proper issues were not framed and the Trial Court had discussed irrelevant issues, which are not germane for deciding the suit. The validity of settlement deed (Ex.A.3) dated 02.02.2010 not been properly considered by the Trial Court. The suit should have been valued as per Section 37(1) of Tamil Nadu Court Fees Act, 1955, had being erroneously valued under Section 37(2) of the Act, which was not considered by the Trial Court.

7. The Learned Counsel for the appellant relying upon the judgment of the Hon'ble Supreme Court in Thamma Venkata Subbamma -vs- Thamma Rattamma and others reported in (1987) 3 SCC 294 and Karsanbhai Dahyabhai Parmar -vs- Dahiben D/o Dahyabhai Dabhaibhai and others reported in AIR 2017 SC 3857 submitted that, gift deed in respect of undivided share without the consent of the other coparceners is invalid. However, the trial Court has totally failed to take note of the dictum laid down by the Hon'ble Supreme Court and erroneously decreed the suit.

8. Per contra, the Learned Counsel appearing for the respondent herein defending the judgment and decree of the trial Court submitted that, on 11.02.1966, the suit property was given



to the share of Vasanthamani when the partition was effected among the legal heirs of Patcha Konar. In the said partition, the suit property was allotted to Papayeeammal and her three children. Viz two sons namely Balasubramanian and Jeganathan and one daughter Vasanthamani. Papayeeammal died interstate on 14.11.2005 and her son Balasubramanian died on 07.06.2009 leaving behind his wife Parimala and daughter Elyanandhini and Satya. Papayeeammal another son Jeganathan died as bachelor on 17.11.2009. The suit property, thus devolved upon Balasubramanian and her sister Vasanthamani. Vasanthamani settled her undivided common $\frac{1}{2}$ share to her daughter Haripriya and the settlement deed dated 02.02.2010 is marked as Ex.A.3. There upon, Haripriya sold it to Sulochana, the plaintiff by virtue of sale deed dated 30.09.2010 marked as Ex.A.4. Prior to the said sale transaction on 25.10.2009, there was an agreement Ex.B.5 between Vasanthamani and Parimala, wherein, the suit schedule property was agreed to be sold to Parimala therefore, it is incorrect to content at this stage by the 1st defendant that Vasanthamani have no right to settle undivided share in favour of her daughter Haripriya. The very same western portion of the suit property was agreed to be sold under Ex.B.5. Being a party to the said sale agreement, the 1st defendant, who is the 1st appellant herein is estopped from pleading the settlement deed Ex.A.3 is a invalid settlement. Prior to alienating her share in the suit property, Haripriya was enjoying the western portion of the property. The property which was in her possession and enjoying was sold to the plaintiff under sale deed Ex.A.4 dated 30.09.2010. Hence, till the partition by metes and bounds is effected, the approximate extent of land on the western portion enjoyed by her vendor being transferred to the plaintiff for enjoyment and hence, there is no error legally in seeking the western portion of the suit land.

9. The Learned Counsel appearing the respondent would also submit that there is no plea by the appellant that the suit property was held by the parties as Hindu undivided family property. The property devolved upon Balasubramanian and Vasanthamani not by survivorship, but by intestacy.

10. The Learned Counsel appearing for the respondent relying upon the judgment of the Hon'ble Supreme Court in Ramdas -vs- Sitabai and others reported in AIR 2009 SC 2735 contended that, the vendor, who has purchased the undivided interest of a joint family has to work out his right only by a suit for partition and his right to possession will take from the specific allotment was made in his favour. In this case, since, the parties have already mutually enjoying the separate portion of the property though, no formal division was effected and same being reflected in Ex.B.5. The Trial Court has rightly accepted the plea of the plaintiff to allot the western portion.



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11. The Learned Counsel relying upon the judgment of the Hon'ble Supreme Court in Uttam -vs- Saubhag Singh and others reported in AIR 2016 SC 1169 contended that, the right of pre-emptive purchase pleaded by the appellant as a coparcener is not sustainable since, the suit property had lost its coparcener character when the division of the property took place on 11.02.1966 under Ex.A.2.

12. Point for determination in this appeal:-

Whether the suit property is a coparcener property or not, if it is a coparceners property, whether the undivided share in the property disposed by way of a settlement Ex.A.3 is valid?

13. The partition deed (Ex.A.2) dated 11.02.1966 entered between legal heirs of Patcha Konar, in which "A" schedule property was allotted to his wife and children of one Muthusamy Konar. The said property is now the subject matter of this Appeal. In the said partition deed marked as Ex.A.2, it is stated, it is a joint family property.

14. In Thamma Venkata Subbamma -vs- Thamma Rattamma and others reported in 1987 (3) SCC 394, the Hon'ble Supreme Court has held that, gift by a coparcener of his undivided interest in the coparcenary properties as void. However, it is the settled law that the coparcener can make a gift of his undivided interest in the coparcener property to another coparcener or to a stranger with a prior consent of all other coparceners. In the instant case, the mother of the plaintiff's vendor, after entering into an agreement to sell a property to the other coparcener namely Parimala, the 1st defendant on 25.10.2009 executed a settlement deed in favour of her daughter Haripriya on 02.02.2010 and got the deed registered for purpose of selling the property to the respondent and the sale deed Ex.A.4. The settlement deed followed by sale deed are well within the period of one year granted for performing the contract under Ex.B.5.

15. The recital as found in Ex.A.2 does not indicate that it is an ancestral property except reference about enjoyment in common by the family members. The property of Patcha Konar, on his demise, has been divided among his wife and children on 11.02.1966. How Patcha konar got this property not mentioned in this document. In Ex.A.2 is a recital that item No.2 of "A" schedule property stood in the name of Angalammal wife of Patcha Konar. It is also referred that she is the head of the family administering the property and on her supervision the division under Ex.A.2 was effected.

16. The Muthusamy Konar, who is the father of the plaintiff and grandfather of defendants, had three wives. The



"A" schedule property allotted to his 1st wife and her children namely Balasubramaniam, Jeganathan and Vasanthamani. Jeganathan died unmarried interstate. Balasubramaniam died leaving behind his wife Parimala and two daughter Elayanadhini and Sathiya.

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17. Ex.B.5 is an unregistered sale agreement entered between Vasanthamani and Parimala. It is dated 25.10.2009. In Ex.B.5, the suit property was agreed to be sold by Vasanthamani for Rs.10,00,000/- and advance of Rs.1,00,000/- paid to her by Parimala. Time to complete the contract was fixed as 1 year. As per the recital found in Ex.B.5, the 1st respondent ought to have been sought for specific performance of this agreement expressing her ready and willingness within the time prescribed. There is no material to show that the 1st defendant had any intention to enforce the said contract. The plaintiff has filed the suit on 16.11.2016 based on the sale deed executed in her favour by Haripriya the daughter of Vasanthamani. The title of the plaintiff's vendor Haripriya is traced through settlement deed executed by Vasanthamani. These two documents are marked as Ex.A.3 the settlement deed and Ex.A.4 the sale deed. The settlement deed is dated 02.02.2010 and the sale deed is dated 30.09.2010. As noted earlier Ex.B.5 sale agreement with the 1st defendant entered upon 25.10.2009 with one year period to complete the contract ended on 24.10.2010. Much earlier to the expiry of this period, Vasanthamani has settled the property in favour of her daughter and her daughter in turn had sold the property to the plaintiff.

18. Assuming that the property is an ancestral property and the defendant had right of pre-emptive purchase beside being the agreement holder, the right to exercise the pre-emptive right or the contractual right vested on her the 1st defendant/1st appellant herein ought to have expressed her ready and willingness to purchase the property. The right of pre-emptive purchase or the sale agreement cannot prevent the title holder from contracting with any other prospective buyer, if the previous agreement holder is not interested in exercising the option of pre-emptive purchase or the right to enforcing the contract.

19. In the written statement the defendants have stated that, "they are ready and willing to perform their part of contract as per Ex.B.5 and when they came to know that the vendor Vasanthamani had executed a settlement deed in favour of her daughter, notice was issued to Vasanthamani and her daughter Haripriya on 01.11.2010 calling upon them to execute the sale deed expressing their ready and willing to pay the balance sale consideration. The said notice was received by the defendants, but they did not reply. Therefore, the 1st defendant is contemplating to file a suit for specific performance based on the agreement with Vasanthamani on 25.10.2009." Though, such a



plea is taken in the written statement filed on 05.01.2011, the 1st defendant has not filed any suit for specific performance. Further, Vasanthamani had deposed before the Court that the sale agreement (Ex.B.5) in favour of 1st defendant was not executed by her. No steps were taken by the defendant to establish the genuineness of the said sale agreement Ex.B.5.

20. The prime contention of the appellant is that, the suit property being a coparcener property, the undivided share cannot be gifted away. From the recital of deed Ex.A.2, this Court could not find any indication to show it is a coparcener property. The next contention of the appellant is that, there is an agreement between Vasanthamani the as one of co-sharer and the other co-sharer the 1st defendant. To defeat this interest, Vasanthamani has executed the settlement deed in favour of her daughter and her daughter in turn sold it to plaintiff. The plaintiff has not come forward before the Court to depose about the genuineness of the contract. Only her power agent, who had no personal knowledge about the transaction had deposed on behalf of the plaintiff. This contention of the appellant also not sustainable. It is to be noted that Vasanthamani, who has settled the property in favour of her daughter Haripriya had mounted the witness box and had spoken about the genuineness of the settlement deed and also disowned Ex.B.5 agreement of sale. Therefore, the plea of the appellant that power agent had no personal knowledge about the transaction, pales to insignificance.

21. The other limb of the argument placed by the Learned Counsel for the appellant is that, by force, the western portion of the property was taken by the plaintiff and to prove the same Ex.B.6 to Ex.B.13 were marked. To contradict the said contention, the respondent had relied upon Ex.A.6 series, 20 in numbers, which indicate that, the defendants/appellants have sold their portion of property to 20 different persons, pending suit.

22. The Learned Counsel appearing for the appellants submitted that, they were forced to sell the property, pending suit, to met out the family expenses and the said transactions were done pursuant to the permission granted by this Court in C.M.P.No.98 of 2011. There is no doubt, the said transactions were subsequent to the suit and pursuant to the permission granted by this Court. In any event, the right of the plaintiff to question the purchaser of undivided $\frac{1}{2}$ share is very limited. The appellants has failed to prove that the property sold was the interest in the undivided coparcener property. Further, the plaintiff has also failed to prove that after entering into an agreement for sale, when they had right to purchase the property their ready and willing to purchase the property at any time. Therefore, this Court is of the view that, though dispossession



of the defendants from the suit portion appears to be by force, as far as the settlement deed (Ex.A.3) by Vasanthamani in favour of her daughter Haripriya and the subsequent sale by Haripriya to Sulochana under Ex.A.4 are valid document.

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23. In such circumstances, the suit for ½ share on the western side of the suit property is maintainable. The facts and circumstances of this case had prompted the plaintiff to seek for the western portion and it is now proved through other evidence and also admitted by the defendants that they have sold the portion of the eastern portion, which were in their possession and enjoyment. In such circumstances, any interference in the judgment of the trial Court will lead to inconvenience to the third parties as well. Therefore, this Court holds the trial Court judgment and decree based on evidence and proven facts which needs no interference. Accordingly, the Appeal Suit is dismissed. No costs. Consequently, connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar (CS-II)

// True Copy //

Sub Assistant Registrar

bsm

To,

1.The Principal District Judge,
Namakkal.

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

+1cc to Mr.N.Manokaran, Advocate SR.No.15978

+1cc to Mr.S.Manuraj, Advocate SR.No.15794

A.S.No.649 of 2018
& C.M.P.Nos.17569 of 2018 & 804 of 2021

KK(CO)
RVM(20/09/2021)