



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 02.08.2021

CORAM:

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A. (MD)No.774 of 2013

and

M.P. (MD)No.1 of 2013

WEB COPY

Karuthapandian ... Appellant / Appellant / 6th Defendant
-Vs-
1.Venkidammal ... 1st Respondent / 1st Respondent / Plaintiff
2.Ramasami
3.Seenivasan
4.Saravanakumar
5.Mahalakshmi
6.Kavitha
7.Kalimuthu Thevar
8.Supputhaye ... Respondents 2 to 8 / Respondents 2 to 8/
Defendants 1 to 5, 7 & 8
(2, 7 and 8 respondents are exparte
in lower Court. Hence Notice may be
dispensed)

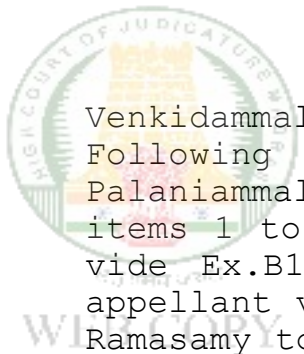
PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree passed in A.S.No.87 of 2010 on the file of the Sub Court, Sankarankovil, dated 21.08.2013 confirming the judgment and decree in O.S.No.4 of 2009 on the file of the Additional District Munsif Court, Sankarankovil, dated 17.08.2010.

For Appellant : Mr.R.J.Arivu Kumar
for Mr.R.Manimaran
For R1 : Mr.V.Meenakshi Sundaram
for Mr.D.Nallathambi
For R2, R7 &
R8 : exparte
For R3 to R6 : Mr.S.Rajesh Kanna

JUDGMENT

The 6th defendant in O.S.No.4 of 2009 on the file of the Additional District Munsif Court, Sankarankovil, is the appellant in this second appeal.

2. The said suit was filed by the first respondent herein namely Venkidammal seeking the relief of partition and separate possession of her 1/6th share in the suit properties. The suit items are four in number. There is no dispute that the suit properties are ancestral properties in the hands of the first defendant/Ramasamy who is the father of Venkidammal. Ramasamy got married to one Saroja and through the said wedlock, the plaintiff



Venkidammal and the second defendant Seenivasan were born. Following the demise of Saroja, Ramasamy/D1 got married to one Palaniammal. Through Palaniammal, D3 to D5 were born. The suit items 1 to 3 were mortgaged by Ramasamy in favour of the appellant vide Ex.B1. Later, items 1 to 3 were sold by Ramasamy to the appellant vide Ex.B2 dated 05.04.2004. The fourth item was sold by Ramasamy to D8 vide sale deed Ex.B5. According to Venkidammal, the alienations were not for any family necessity and that in any event, the offending transactions can be valid only to the extent of her father's 1/6th share in the suit properties. Seeking partition, the aforesaid suit was filed. The appellant filed his written statement controverting the plaint averments. The appellant took the stand that from a mere perusal of Ex.A1-mortgage deed dated 14.07.1997, one can note that the mortgage was for family necessity. Since the mortgage debt could not be cleared, Ramasamy sold the property in favour of the mortgagee vide Ex.B2. The sale was not impeached within three years. Therefore, according to the appellant, the suit was not maintainable as far as the appellant is concerned. Based on the divergent pleadings, the learned trial Judge framed the necessary issue. The plaintiff Venkidammal examined herself as P.W.1 and marked Ex.A1 to Ex.A3. The appellant examined himself as D.W.1 and two other witnesses were examined on the side of the defendants. Ex.B1 to Ex.B5 were marked. After consideration of the evidence on record, the trial Court decreed the suit as prayed for. The preliminary decree for partition and separate possession was passed declaring the plaintiff's 1/6th share in the suit properties. Aggrieved by the same, the appellant alone filed A.S.No.87 of 2010 before the Subordinate Judge, Sankarankoil. By the impugned judgment and decree dated 21.08.2013, the first appeal was dismissed. Challenging the same, this second appeal came to be filed.

3. The second appeal was admitted on the following substantial questions of law:-

1.Whether the Courts below is right in granting the relief of partition when there is no specific pleading regarding absence of legal necessity on the part of the Kartha in alienating 1 to 3 items of the suit properties?

2.Whether the plaintiff has got any right to sue when she got married prior to coming into force of Act 1 of 1989 in the light of non production of any documentary evidence or independent oral corroborative evidence regarding the date of marriage?

3.Whether the Courts below are correct in decreeing the suit which is barred by limitation since Ex.B2 is dated 05.04.2004 and the first respondent is aged 26 years as on the date of filing of the suit and since the impugned transaction is



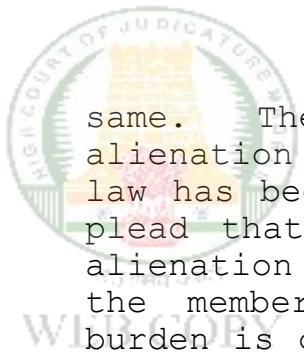
4.The learned counsel appearing for the appellant reiterated all the contentions set out in the memorandum of grounds. He would point out that Ex.B2-sale deed in turn refers to Ex.B1-mortgage deed. From a close reading of the recitals found in both the documents, one can easily come to the conclusion that sale was made for legal necessity. The learned counsel submitted that this aspect of the matter was not at all appreciated by the Courts below. He called upon this Court to answer the substantial questions of law in favour of the appellant and allow this appeal by setting aside the impugned judgment and decree.

5.Per contra, the learned counsel appearing for the respondents submitted that the impugned judgment and decree does not call for any interference.

6.I carefully considered the rival contentions and went through the evidence on record. There is no dispute that the suit properties bear the character of ancestral properties at the hands of the first defendant / Ramasamy. Ramasamy was allotted the suit items as is evident from Ex.A3-partition list dated 28.06.1985. Even when the suit items were allotted in favour of Ramasamy, the plaintiff had already been born. Of-course, as per the law then obtaining, the plaintiff did not become the member of the coparcenary. But on account of the Tamilnadu Act 1 of 1990 the plaintiff very much became the member of the coparcenary. The sale in favour of the 8th defendant took place in the year 1984. But then, the 8th defendant did not file any appeal challenging the decree passed by the Court below in favour of the plaintiff. It is only the appellant who has filed the first appeal and then the second appeal. The appellant is concerned with the sale of items 1 to 3. Items 1 to 3 were mortgaged in the year 1997 and thereafter, sold on 05.04.2004. By the time when the sale took place, not only the appellant but also two other children had already attained majority, they were full-fledged members of the coparcenary and had right in the suit properties. Their consent was not at all obtained.

7. Apart from this fundamental flaw which is vitiating the impugned sale transaction, it is obvious that Ramasamy had only 1/6th share in the suit properties. Of-course, as karta of the family, Ramasamy/D1 could have alienated the property for valid and legal necessity. But then, the burden to show that the alienation was for legal necessity would lie only on the alienee. Of-course the alienee can prove the existence of legal necessity by referring to the relevant recitals in the document itself. If no such recital is available, the alienee can establish the same by adducing extraneous evidence. In the case on hand, in Ex.B1-mortgage deed, recital only reads that mortgage debt was being incurred for agricultural necessities. This recital is wholly insufficient to come to the conclusion that the act of encumbrance was for valid necessity. In

<https://hcservices.ecourts.gov.in/hcservices/> burden lies only on the alienee to establish the



same. The Courts below have concurrently given a finding that alienation was not for legal necessity. The substantial question of law has been framed as if the plaintiff is obliged to specifically plead that there was no legal necessity and that therefore, the alienation was vitiated. The law does not impose any such burden on the member of the coparcenary challenging the alienation. The burden is only on the alienee or the kartha. The first substantial question of law has been incorrectly framed.

8. In any event, when the Courts below have concurrently found that alienation was not for legal necessity, in as much as the said finding has not been shown as perverse, I hold that no substantial question of law arises for consideration.

9. There is no dispute that the plaintiff / R1 herein was an unmarried daughter when Tamilnadu Act 1 of 1990 came into force. Therefore, the second substantial question of law also has been incorrectly framed. It is not in dispute that the plaintiff was not a party to Ex.B2. The sale had taken place in the year 2004 and the suit was filed in the year 2009 itself. The plaintiff was not obliged to impeach Ex.B2 because she was not a party to the same. She can conveniently ignore the same and independently file the suit for partition. The third substantial question of law is also answered against the appellant.

10. There is no merit in the second appeal. The second appeal stands dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-I)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

rmi

To

1.The Sub Court,
Sankarankovil.

2.The Additional District Munsif Court,
Sankarankovil.

<https://hcservices.ecourts.gov.in/hcservices/>



3.The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai. (2 Copies)

+1 CC to M/s.D.NALLATHAMBI, Advocate (SR-25109[F] dated 03/08/2021)

+1 CC to M/s.R.MANIMARAN, Advocate (SR-25111[F] dated 03/08/2021)

Judgment made in
S.A.(MD)No.774 of 2013
02.08.2021

PS (CO)
GC (26.10.2021) 5P 7C