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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 17.12.2021

PRONOUNCED ON : 05.01.2022

CORAM :

THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

S.A.No.306 of 2010
and M.P.No.1 of 2010

A.Sheik Dawood
Deaf and dumb rep. by his
Next Friend Wife S.Aysha Bi. ... Appellant/Plaintiff

Vs.

1. Subriyuth Begum
2. A.M.T.Basur Ali
3. M.Abdul Rahman Sahib (Died) ... Respondents/Defendants

[R3 died - recorded as per memo [CSR No.5005] dated 12.02.2021
vide Court order dated 31.03.2021 made in SA No.306 of 2010]

[R1 and R2 - LRs of the deceased R3 viz., M.Abdul Rahman Sahib as
per memo dated 19.11.2021 (presented at Court) vide Court order
dated 19.11.2021 made in SA No.306 of 2010 and in M.P.No.1 of
2010]

Prayer:- This Memorandum of Second Appeal is filed under Section
100 of Code of Civil Procedure, against the Judgment and decree
dated 09.02.2009 made in A.S.No.57 of 2008 on the file of the
Additional District Judge, FTC-I, Erode, reversing the judgment
and decree dated 31.03.2008 made in O.S.No.710 of 2003 on the
file of the I Additional Subordinate Judge, Erode.

For Appellant : Mr.D.Balachandran

For Respondents : Mr.N.Manokaran [for R1 & R2]
R3-Died



J U D G M E N T

The plaintiff in O.S.No.710 of 2003, on the file of the learned I Additional Subordinate Judge, Erode, has preferred this Second Appeal.

2. Before the trial Court, the present appellant filed a suit seeking the relief of partition to divide the suit property into four equal shares by metes and bounds with reference to good and bad soil and allot one such equal share to the plaintiff. The learned 1st Additional Subordinate Judge, Erode, by judgment and decree dated 31.03.2008, allowed the suit and granted the decree, as prayed for.

3. Challenging the same, the respondents/defendants preferred an appeal in A.S.No.57 of 2008 on the file of the learned Additional District Judge (FTC-1), Erode and by judgment and decree dated 09.02.2009, the learned Additional District Judge (FTC-1), Erode, allowed the appeal and reversed the findings arrived at by the trial Court. Being dissatisfied with the said findings, the plaintiff in the above referred suit is before this Court.

4. For the sake of convenience, hereinafter the parties are referred to, as per their litigative status before the trial Court.

5. The laconic averments made in the plaint, are as follows:

(i) The plaintiff is deaf and dumb and represented by his wife as a next friend of him. The 2nd defendant in the suit is the brother of the plaintiff. Both the plaintiff and the 2nd defendant are the sons of the 1st defendant. The plaintiff's father name is M.Abdul Rahman Sahib. They had ancestral properties at Lakkapuram Village, Erode Taluk. Out of the income realised from the ancestral properties and joint exertion of the plaintiff's family, the suit properties were purchased in the name of the 1st defendant by virtue of the sale deed dated 21.10.1960 with very old tiled house.

(ii) Subsequently, the plaintiff's family sold the ancestral properties as well as borrowed the amount jointly by mortgaging the properties with Erode Co-operative Housing Society and put up the terraced building in the suit properties. Subsequent to that, the plaintiff's grand father Mohideen Shabib died, leaving behind the plaintiff and the defendants as his only legal heirs to succeed his assets. As such the plaintiff and the



defendants are entitled to common 1/3rd share in the suit properties. In the suit property, except the house portion, wherein the defendants are residing, other portions are leased out to third parties and the rental amounts realised from the tenants are utilized for discharging the mortgaged debt, which was availed from the Erode Cooperative Society.

(iii) After the grandfather's demise, the defendants taking advantage of the position of the plaintiff, given all sorts of troubles in enjoying the suit property in common. Hence, to avoid further complication with the defendants, the plaintiff is now residing in the plaint mentioned address. Since the activities of the defendants are inimical towards the plaintiff and further taking advantage of the plaintiff's said position as deaf and dumb, both defendants are completely acting against the interest of the plaintiff and now making hectic attempts to encumber the properties as per their whims and fancies, ignoring the rights of the plaintiff.

(iv) The 1st defendant is the housewife and not at all had any individual income even to purchase the property and put up the construction in the same. It appears that the defendants colluded and joined together and created a gift settlement deed dated 22.04.1999 in between them, only with a view to defraud the interest of the plaintiff. The alleged release deed dated 22.04.1999 created by the defendants, is not at all binding upon the plaintiff's right.

(v) Since the father of the plaintiff is the competent person, who knows every transaction, he was impleaded as a third defendant. Before the suit, the plaintiff demanded the defendants for partition in person as well as through the well wishers of the family by suggesting several modes for amicable partition. But all the efforts taken by the plaintiff ended in vain. Hence, the plaintiff issued the legal notice dated 08.07.2003 for an amicable partition, out of Court. After receipt of the said notice, they failed to issue a reply notice and also failed to comply with the demands of the plaintiff. Hence, the suit.

6. The case of the defendants, as averred in the written statement, is as follows:

(i) The plaint is verified by the next friend on behalf of the plaintiff and the procedure adopted by the plaintiff in filing the suit is not maintainable. The next friend should seek permission from the Court to represent on behalf of the plaintiff. The relationship stated in the plaint is correct.



The plaintiff's family is not having any ancestral property at Lakkapuram Village. The suit property has not been purchased from the income realised from the ancestral property. The terrace building found in the suit property is not constructed from the sale proceedings of the ancestral property as alleged by the plaintiff. The suit properties are not in the common enjoyment of the plaintiff and the defendants. It is true the 1st defendant had executed a settlement deed in favour of the 2nd defendant. But the same is not under collusion. The release deed created by the defendant is binding upon the plaintiff.

(ii) The family property situated at Lakkapuram was sold on 14.09.1994 and the sale consideration was divided among the plaintiff and the 2nd defendant and the father of the plaintiff viz., Abdul Rahman on that day itself. The suit property was purchased by the 1st defendant on 21.10.1960 by using the sale proceeds of the jewels owned by her. The suit property was purchased in the year of 1960 i.e., 44 years ago. At that time, the age of the plaintiff was only 4. So the plaintiff is not competent to say anything about the sale consideration derived from the property, which stands in the name of the 1st defendant. Therefore, the source for purchasing the suit property alleged by the plaintiff is false and devoid of merits. Except the 1st defendant no one else got any semblance/right/title over the suit property as an absolute owner. Nobody enjoyed the property as if it is a joint family one. Being the reason that the plaintiff is a disabled person, the next friend of the plaintiff viz., his wife falsely alleged in the plaint what she like.

(iii) After the marriage of the plaintiff with his next friend, she broke away from the joint family and utilised all the benefits without sharing with the family. As far as the suit property is concerned the plaintiff has no locus standi to claim any single inch, as the property absolutely belongs to the 1st defendant. On 24.02.1999, the 1st defendant settled the property in favour of the 2nd plaintiff, who alone is maintaining her and also showed love and affection by providing food and shelter. After the settlement, the 1st defendant has no right or title or possession over the property from that date onwards. Thus, the 2nd defendant is the absolute owner of the property and therefore, the claim for partition is unsustainable. Hence, the suit is not having any merits and the same is liable for dismissal.

7. Based the above averments, the learned I Additional Subordinate Judge, Erode, framed necessary issues and tried the suit. On the side of the plaintiff, two witnesses viz., PW1 and PW2 were examined and five exhibits were marked as Ex.A1 to



Ex.A5. Similarly, on the side of the defendants, three witnesses were examined as DW1 to DW3 and five documents were marked as Ex.B1 to Ex.B5.

8. Having considered the materials placed before him, the learned I Additional Subordinate Judge, Erode, by judgment and decree dated 31.03.2008, came to the conclusion that the plaintiff is entitled to the relief of partition, as prayed for. In the appeal, the learned Additional District Judge (FTC-1), Erode, reversed the findings arrived at by the trial Court and dismissed the suit.

9. Feeling aggrieved over the findings arrived at by the lower appellate Court, the plaintiff is before this Court with the present Second Appeal. When the second appeal is taken up for admission, this Court formulated the following substantial questions of law.

"1. Whether the First Appellate Court is right in discharging that the wife cannot act as a next friend for her husband who is deaf and dumb without obtaining prior permission?

2. Whether the First Appellate Court is correct in discharging that it cannot be presumed that the suit property is joint family property?"

10. Heard Mr.D.Balachandran, the learned counsel appearing on behalf of the appellant/plaintiff and Mr.N.Manokaran, the learned counsel appearing on behalf of the respondents/defendants and perused the materials available on record.

11. Admittedly the plaintiff Shaiek Dawood and the 2nd defendant A.M.T.Basur Ali, are the brothers and the 1st defendant is their mother. It is the stand taken by the plaintiff that the suit schedule property has been purchased vide sale deed dated 21.10.1960 in the name of the 1st defendant, from the income realised from their ancestral proceeds. On the other hand, it is the case of the 1st defendant that the suit property has been purchased from the sale proceeds of the jewels which is having by the 1st defendant.

12. In this occasion, it is for the plaintiff to prove his case, as the suit schedule property has been purchased in the name of the 1st defendant from the income realised from the ancestral property having by the plaintiff's family. In this regard, in order to prove the same, except the oral evidence,



nothing was produced on the side of the plaintiff, showing that the suit schedule property was purchased only from the income derived from the ancestral property.

13. Before the trial Court, the sale deed in respect to the suit property dated 21.10.1960 stands in the name of the 1st defendant was marked as Ex.A1. The averments found in the said document does not reflect the sale of Lakkapuram property. Secondly, the sale deed dated 14.09.1994 pertains to the sale effected by the plaintiff was marked as Ex.A2, which reveals the fact that the suit property was sold on 14.09.1994 by the plaintiff and defendants 2 and 3.

14. Now on culling out the dates found in the above said documents, it would reveal the fact the funds derived in the year of 1994, cannot be used for the purchase of the property in the year 1960. On that score alone, the plaintiff failed in his attempt to prove the fact that the suit schedule property was purchased in the name of the 1st defendant by using the funds realised from the ancestral property.

15. Apart from that, being the reason that the plaintiff and the defendants are Muslims, the concept of joint family property cannot be taken into account, for deciding the Substantial Questions of Law raised in this appeal under Section 138 of the Mohammedan Law. For a valid gift deed alleged to be given by the 1st defendant in favour of the 2nd defendant, it would be necessary to see whether both the settler and settlee are in a sound state of mind and also it would be necessary to find out whether the said law is having the intention to settle the property.

16. The lower appellate Court has also by relying on the judgment in Noorbibi Vs. Ayeshabibi, reported in AIR 1999 (Guj) 27, came to the correct conclusion that the settlement deed alleged to be executed by the 1st defendant in the name of the 2nd defendant is a valid one and the same was not at all to be questioned by the plaintiff.

17. The another substantial question of law raised in this appeal, is whether the suit filed by the plaintiff is maintainable under law. It is the case of the plaintiff-Shaik Dawood that he is a deaf and dumb person. So the present suit has been filed by his wife S.Aysha Bi, in the capacity of next friend. While at the time she was examined as PW1, she had admitted in her evidence that the plaintiff - Sheik Dawood is deaf and dumb. Though she has stated as above, in her cross



examination, she has stated that the plaintiff was working in a Press and received a salary of Rs.4,000/-. Further, though, it was alleged as the plaintiff was a capable man to understand the things as above, in order to prove the same, she has not produced any relevant documents. If the evidence given by PW1 is found correct, it is not necessary for the plaintiff to file the present suit after appointing the next friend for the plaintiff. In this regard, it would be necessary to see whether any permission is needed for filing this suit under Order 32 Rule 15 of Code of Civil Procedure. Idiocy or unsoundness of mind indicates an abnormal state of mind, whereas mental infirmity only indicates weakness of mental strength.

18. In this context, it was held by the Andhra Pradesh High Court in Ganga Bhavanamma v. Somaraju, reported in AIR 1957 Andhra Pradesh 938, that the provisions of Lunacy Act applies only to idiots or persons of unsound mind, whereas Order 32 Rule 15 applies to dull-witted persons or persons with lesser degree of intellectual competence.

19. A similar question came up for consideration in the decision in Rami Reddi Vs. Papi Reddy, reported in AIR 1963 Andhra Pradesh 160, wherein the Andhra Pradesh High Court, has held that Order 32 Rule 15 applies not only to a person adjudged to be of unsound mind, but also to a person of weak mind.

20. Therefore, whether a deaf and dumb person can be said to be a person suffering from mental infirmity and as one entitled to protection of Order 32 Rule 15, is the question to be considered. Mental infirmity is not mental disorder. It is not mental illness or unsoundness of mind or insanity. It only indicates the weakness of intellect, and in the particular context of Order 32 Rule 15, weakness of intellect to the extent of making a person incapable of protecting his interests in the litigation. Thus a person who is not of unsound mind may, yet be a person who is mentally infirm, thus entitling him to the protection under Order 32 Rule 15.

21. In the similar situation, in the decision referred by the learned counsel appearing for the respondents/defendants, reported in CDJ 2008 Ker Hc 080 [Raveendran vs. Sobhana & Another], the Kerala High Court, has observed as follows:

"11. Thus the legal position is that mental infirmity in the context of Order 32 Rule 15 is not mental disorder, insanity or mental illness. Weakness of mind due to any reason, making a person incapable of protecting his interests, is sufficient to unfold the



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protective umbrella under Order 32 Rule 15. Such infirmity can also be caused by physical defects like deafness or dumbness, whereby a person is made incapable of communicating his wishes, views or thoughts to others who are not acquainted with him. If such a person is before the court in a suit or proceedings either as plaintiff or defendant, the court has a jurisdictional obligation to conduct an enquiry as to whether the person is capable of protecting his own interests. If in the judicial enquiry, if necessary and if required, conducted with the assistance of an expert, it is found that such person is incapable of protecting his interests in the suit or proceedings before the court, the court has an obligation to appoint a next friend for such person, and if the court on the other hand finds that the person is otherwise capable of protecting his interests without a next friend, the court shall remove the next friend if already available and permit the person, who is alleged to be of unsound mind or suffering from mental infirmity, to conduct the litigation himself. As held by the Supreme Court in Ram Chandra Vs. Man Singh (AIR 1968 SC 954), a decree passed against a minor without appointment of guardian is a nullity. The same principle would apply as far as a person suffering from unsoundness of mind or mental infirmity as referred to in Order 32 Rule 15 is concerned."

22. Accordingly, the principles set out in the above referred paragraph, is also applicable to the present case. Herein, it is a case, at the time of filing the suit, the plaintiff has not filed any application under Order 32 Rule 15 of Code of Civil Procedure. The said lapse committed by the next friend is against the law set out as referred above. Therefore, on that score, the present appeal is dismissed. The judgment and decree dated 09.02.2009, made in A.S.No.57 of 2008 on the file of the learned Additional District Judge (FTC-1), Erode, is confirmed. No Costs. Consequently, the connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(CCC)

// True Copy //

Sub Assistant Registrar



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To

1.The Additional District Judge, FTC-I, Erode.

2.The I Additional Subordinate Judge, Erode.

Copy to: The Section Officer,
V.R.Section,
High Court, Madras.

+lcc to Mr.D.Balachandran, Advocate SR.No.1285
+lcc to Mr.N.Manokaran, Advocate SR.No.769

S.A.No.306 of 2010

VG II(CO)
CB(14/03/2022)