



S.A No.479 of 2013

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.10.2022

CORAM:

THE HON'BLE MRS.JUSTICE T.V.THAMILSELVI

S.A No.479 of 2013

1.K.C.Vijaya

2.K.C. Loganayaki

...Appellants

Vs.

1.Sideeswari

2.K.N. Chenniappan

...Respondents

PRAYER: This Second appeal filed under Section 100 of the Code of Civil Procedure against the Judgement and Decree dated 24.07.2012 made in A.S No.2 of 2011 on the file of the First Additional District Court, Erode reversal of the Judgment and decree dated 13.10.2008 made made in O.S No.89 of 2005 on the file of the Principal Sub Court, Erode.

For Appellants	: Mr.N.Manokaran
For R1	:Mr.K.S. Elangovan
For R2	: Not appeared



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JUDGMENT

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The appellants herein are the plaintiffs in suit O.S No. 89 of 2005, filed against the their father/first defendant and second defendant for the relief of partition and other consequential relief. Both the defendants filed their objections, on hearing both sides the Trial Court granted 2/3 shares to the plaintiffs in both item 1 and 2 of suit properties by way of passing preliminary degree.

2. Aggrieved over the findings of the Trial Court second defendant preferred an appeal in A.S No.2 of 2011 before the Ist Additional District Judge, Erode, by contending that second item of the property is self acquired property of the first defendant and not an ancestral property, but, the Trial Court erroneously granted 2/3 share in that property in favour of the plaintiffs. Accordingly, he prayed to set aside findings of the Trial Court, the learned lower appellate Judge considering the submissions on either side and allowed the appeal in favour of the second defendant. Accordingly, with regard to item No.2 of the suit property the findings of the trial Court was set aside. Challenging the findings of the Lower appellate Court the



plaintiffs preferred this second appeal.

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3.The brief facts of the case are as follows:

The plaintiff are the daughters of the first defendant in Hindu joint family and the suit property described in the schedule item No.1 of the suit property is ancestral property of their family and out of the income derived from the ancestral property the second item of the suit property was purchased by their father through sale deed dated 14.12.1989. From the year 1989 their father was drunkard and gambler and as their have developed close intimacy with second defendant taking advantage of that, the husband of the second defendant made some concrete attempt to grab the property, having come to know the fact that the plaintiffs who were minors at that time, through their mother issued notice on 24.08.1994 to the husband of the second defendant and her not to create any false documents. Subsequently, they found that their father executed power of attorney in favour of the second defendant's husband, in turn, he executed sale deed dated 20.07.1998 in respect of item No.II in suit property in favour of the second defendant. Item No.2 of the suit property is being the ancestral property the first defendant have no right to to sell the joint family property. The alleged transaction would not bind the plaintiffs. Hence, they filed suit



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for partition.

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4.As per the written objection made by the first defendant is that he denied the allegation that he spending amount for illegal purpose. Further, he totally denied the execution of power deed. He had no objection to divide and allot 1/3 share to the plaintiff in entire suit property and he has no objection to divide the properties and the second defendant also not raised any objection with regard to division of the property of item No.1 of the suit property, he raised objection with regard to the second item of the suit property by stating that this property was purchased by the first defendant through the sale deed dated 14.12.1989 out of the first defendant's self earnings and It was not purchased from the joint family fund. In order to discharge family debts he executed power deed in favour of her husband V.P. Viswanathan and he sold the property to her on 20.07.1998 for valid consideration. She is a bonafide purchaser of the property, ever since then she possessed and enjoyed the property she prayed to dismiss the suit with regard to second item.

5. The trial Court considering the oral and documentary evidence framed two issues and concluded that first item of the property is joint family property, out of income derived from the said property the



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second item of the suit property was purchased by the father of the plaintiffs/first defendant and thereby plaintiffs are entitled to 2/3 share in entire property and also concluded that sale deeds stands in the name of the second defendant would not bind the plaintiffs for the reason that it is sham and nominal documents. Besides, it was purchased out of joint family funds. Accordingly, at the time of the alienation by the father the plaintiffs were minors as well as there is no necessity to cancel the documents but the second defendants is entitled for 1/3 share in second item of the suit property which were sold by the first defendant. Accordingly, preliminary decree was passed but the purchaser/second defendant preferred an appeal by contending that second item of the property is self acquired property of the first defendant and he executed power deed in favour of her husband, in turn, he sold the same for valid consideration through sale deed dated 20.07.1998 in which, the plaintiffs have no right and considering their submission lower appellate Court allowed the appeal and concluded that second item of the suit property exclusively belongs to second defendants and plaintiffs have no share in the property. Challenging the same the plaintiffs filed this second appeal. Which is admitted on following substantial questions of law.



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- i. Whether the first appellate Court has committed an error in dismissing the suit in respect of the 2nd item holding that the sale deed executed by the 1st defendant through his power of attorney holder in the name of the 2nd defendant was valid even though neither the power of attorney deed nor the sale deed have been proved in the manner known to law?
- ii. Whether the Firsts Appellate Court is erred in law in treating the 2nd item of the suit property as the separate property of the 1st defendant especially when the presumption in respect of the ancestral in nature is so strong when the property was purchased in the name of the Kartha of the family?
- iii. Whether the findings of the First Appellate Court is perverse with regard to the applicability of the effect of the Hindu Succession (Amendment) Act, 2005, so far as this case is concerned in view of the decision reported in 2011(9) SCC 788?
- iv. Whether Ex.A1 = Ex.B1 is vitiated in view of the fraud and misrepresentation as stated by the plaintiff and whether the First Appellate Court correctly applied the legal principles in holding that the sale deed Ex.A1 = Ex.B1 was valid?

6. Relationship between the plaintiff and the first defendant are admitted herein. The plaintiffs are daughters of the first defendant. It is also admitted fact that first item of the suit property is ancestral joint family property allotted to the plaintiffs father through partition held between their ancestors on 20.03.1980 as B schedule was allotted to their father and the same is proved through Ex.B3 partition deed. The trial Court allotted 2/3



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share to the said property in favour of the plaintiff.

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7. The point to be decided is whether second item of the property also joint family property wherein the plaintiffs are entitled to 2/3 share and or absolutely belongs to first defendant who purchased by way of sale deed dated 14.12.1989 and as per the sale deed executed by father of plaintiffs the second defendant became the absolute owner of that property.

8. Whether the second item of the property also joint family property purchased out of income derived from item No.1 of joint family property or self acquired property of the first defendant. As per the contention of the plaintiffs out of income derived from the first item of the property as agriculturist their father purchased second item of the property in his name on 14.12.1989. On perusal of the first item of the property all are agriculture land in which their father is doing agriculture. The first defendant/father of the plaintiffs not denied this facts in his written statement but he remains exparte during trial proceedings, the plaintiffs able to establish that their ancestral joint family property except agriculture their family has no other source of income. On seeing the nature of the property it is agricultural lands through which families having considerable income. Hence, they are able to established that out of income derived from the first



item of suit property, second item was purchased by his father in his name in the year 1989 at that time plaintiffs were minors.

9. The plaintiffs discharge their initial burden, now it shift on the persons who claim property as self acquired property is upon defendants who is bound to prove that it was purchased by the separate funds of the first defendant. The first defendant remains exparte and he is not produced any evidence to show that property was purchased by self acquisition. The second defendant who is the purchaser of the property contend that said item was purchased by the first defendant out of his self earned income but there is no proof to that effect. The defendants failed to establish that second item of the suit property was purchased out of self income earned by the first defendant. But the lower appellate judge ignoring this legal aspects, only considering the conduct of the father of the plaintiffs who remains exparte observed that it is collusive suit towards father and daughters in order to evade sale deed executed in favour of the second defendant. With regard to alleged purchase made by the second defendant the plaintiffs contend that the husband of the second defendant is closely associated with their father and developed illegal intimacy with the second defendant, using this opportunity he with a intention to grab the property some how he got



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executed sale power deed in his name on 25.05.1998 and within the month he executed sale deed in favour of his wife/Second defendant. As pointed rightly pointed out by the appellate counsel when the property was purchased in the year 1989 the sale consideration was fixed as 52,000/- near about after ten years later the same property was sold to the second defendant for same sale consideration itself proves that no consideration was paid hence the alleged sale deed was sham and nominal one. Recitals of the document Ex.B1 sale deed stands in the name of the second defendant proves that only sale consideration 52,000/- property was sold but there is a proof that consideration was paid to the defendant. From the evidence of the second defendant (D.W.1) there was loan transaction between the first defendant and her husband when the 1st defendant attempted to alienate the property at the instance of husband of the second defendant in the year 1994 on behalf of the minor daughters their mother issued notice to the first defendant not to alienate the properties and the copy of the notice also marked as Ex.A2, which proved that already there was misunderstanding between the plaintiffs and the first defendant with regard to alienation of the properties. Even four years prior to the filing of the suit the said notice Ex.A2 was issued by the plaintiffs raising objection



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with regard to causing interference over both the item No.1 and 2 properties. Hence, the trial Court observing all these aspects and rightly granted relief 2/3 share in the entire suit property. But the first appellate Judge without considering the fact plaintiff discharged their burden of proof by establish that family owned sufficient nucleus to purchase second item of the suit property and also proved the malafide attitude of the second defendant and her husband with first defendnat. Hence the findings rendered by the lower appellate Court is perverse in nature. Accordingly it is liable to be set aside. First question of law is answered accordingly.

10. As discussed above, the second item of suit property is purchased by the first defendant out of income derived from the ancestral property ignoring this facts the first appellate Court treated the said item as separate property which is un-sustainable one and liable to be set aside. Accordingly, second question of law is answered.

11. As discussed above, the conduct of the second defendant with regard to execution of the Ex.B1 sale deed is failed to taken note of by the lower appellate judge, fact reveals that the husband of the second



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defendant got power of attorney within the month he executed sale deed in favour of the second defendant but there is no proof with regard to sale deed in favour of the first defendant. Besides, the plaintiffs already issued notice four years ago to the defendants to not create any encumbrance over the property in respect of suit property but the father of the plaintiffs/first defendant executed power deed in favour of husband of the second defendant, in turn, he executed sham and nominal deed in favour of his wife/second defendant. It will not bind the plaintiffs accordingly questions of law D and E is answered. Hence, the second item of the suit property is considered as joint family property, in which, the plaintiffs having 2/3 share. Accordingly the plaintiffs are entitled to 2/3 share in the second item of the suit property remaining 1/3 share goes to the first defendant from whom the third defendant has to work out his remedy if any. Accordingly the appeal is allowed the findings of the lower appellate Court is set aside. The suit is decreed as prayed for. No costs.

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T.V.THAMILSELVI,J.

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To

1. The First Additional District Court, Erode.
2. The Principal Sub Court, Erode.
3. The Section Officer,
V.R Section.

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