



S.A.No.848 of 2017

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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03.11.2022

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No.848 of 2017

&

C.M.P.No.21248 of 2017

S.P.Nagarajan

...Appellant

Vs

G.D.Perumalraj (Died)

1.G.P.Rajaram

2.Rekha

3.M.Sheik Dastagir

4.The Indian Oil Corporation,
Represented by its Regional Manager
No.150, Mount Road,
Chennai.

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5.Pachiammal

6.Dhanalakshmi

7.G.P.Jeyalakshmi

... Respondents

Prayer: The appeal is filed under Section 100 of the Code of Civil Procedure against the Judgement and Decree dated 11.07.2017 Sathyamangalam, reversing the Judgement and Decree dated 28.06.2012 made in O.S.No.149 of 2004 on the file of the District Munsif Court, Sathyamangalam.

For Appellant : Mrs.Chitra Sampath,
Senior Counsel
for Roshan Atiq

For Respondents : Mr.A.K.Kumarasamy
1, 2, 5 to 7 Senior Counsel
Mr.S.Kaithamalai Kumaran

For Respondent 3: No Appearance

For Respondent 4: Mr.Gautham Venkatesh



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JUDGEMENT

The above Second Appeal arises against the Judgement and Decree in A.S.No.25 of 2012 on the file of the Sub Court, Sathyamangalam, in and by which the learned Judge has reversed the Judgement and Decree passed by the learned District Munsif, Sathyamangalam in O.S.No.149 of 2004. The plaintiff in the said suit is the appellant herein. The brief facts that has preceeded the filing of the above Second Appeal is herein below set out with the parties being referred to in the same ranking as before the Trial Court.

Plaintiff's Case:

2. The plaintiff has filed the suit for a declaration that the preliminary decree dated 18.09.1997 in O.S.No.349 of 1995 on the



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file of the Sub Court, Gobichettipalayam, in so far as it relates to Item I is null and void, to direct the 2nd defendant to deliver possession of the Item II of the suit property (site measuring 24*82) to the plaintiff, to direct the 5th defendant to remove its machinery in Item II of the suit property.

3. The 1st defendant is the father of the 2nd defendant and the 3rd defendant is the daughter of the 2nd defendant. The 4th defendant is the auction purchaser and the 5th defendant is the Indian Oil Corporation.

4. It is the case of the plaintiff that the suit Item I of the suit schedule property is the separate property of the 2nd defendant, he having purchased it from out of his own funds. The 2nd defendant had obtained dealership agency from the 5th defendant and was operating a Petrol Bunk in the premises. The superstructure and other

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equipments have been installed in the premises by the 5th defendant.

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5. The 2nd defendant had borrowed a loan from one Moideen Batcha for his business. Since the loan was not repaid, the said Moideen Batcha had instituted a suit in O.S.No.61 of 1984 for recovery of loan amount. The suit was decreed as prayed for. Therefore, the decree holder brought the property described in Item I for sale in execution of the decree in E.P.R.No.49 of 1992. In the sale that was held, the 4th defendant became the successful bidder.

6. The auction purchaser thereafter filed E.A.No.98 of 1995 for delivery of possession of the property and the same was ordered on 09.08.1995. Thereafter, the 4th defendant / auction purchaser sold the property to the plaintiff's vendor one Kamalam on 28.08.1995 and put her in possession. The said Kamalam was in possession of the

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property and with the help of her husband, she was running the Petrol Bunk under an arrangement with the 2nd defendant.

7. After the auction sale had been confirmed and the possession handed over to the 4th defendant, the 2nd defendant had instigated his father the 1st defendant to file a collusive suit in O.S.No.349 of 1995 for a partition and separate possession of the property alleging that the suit property is a joint family property.

8. The 1st defendant had filed the suit against the 2nd defendant, the 2nd defendant's daughter and one Pachayal (co-owner in respect of the other properties), the 4th defendant as well as the 5th defendant. The plaintiff's vendor Kamalam was not impleaded as a party though on the date of this suit she had purchased the said property.

9. The 4th defendant had filed a written statement inter alia



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bringing to the notice of the Court that he had sold the property to Kamalam. However, neither the said Kamalam was impleaded as a party to the suit nor the 4th defendant who had filed a written statement contest the suit colluding with the 1st defendant.

10. Thereafter, the 1st defendant had obtained an ex parte preliminary decree on 18.09.1997 behind the back of the said Kamalam. Infact, the sale in favour of Kamalam had taken place two years prior to the preliminary decree. Therefore, the plaintiff's vendor was not aware about this collusive preliminary decree. After obtaining the preliminary decree, the defendants had not taken any action to file a final decree proceedings. In the suit for partition, the 2nd defendant deliberately remained ex parte.

11. The Petrol Bunk business was running smoothly and on 17.03.1999 the said Kamalam had sold the property to the plaintiff



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and put him in possession. Thereafter, the 2nd defendant approached the plaintiff with a request to permit him to run the Petrol Bunk business. The plaintiff had permitted him to do so in the portion of the property marked as Item II in the plaint plan. The 2nd defendant had agreed to pay a monthly income of a sum of Rs.2,500/- as rent for two years and thereafter had undertaken to shift his business with the consent of the 5th defendant. However, the 2nd defendant did not take steps to shift the Petrol Bunk .

12.On 05.02.2001, the 2nd defendant had requested for an extension of the lease on the same terms for the further period of two years. However, the plaintiff did not agree to the same. The 2nd defendant with a view to coerce the plaintiff to submit to his terms had instigated the 1st defendant to file a final decree proceedings in O.S.No.349 of 1995. The plaintiff came to know about the preliminary decree only in the first week of May 2001.



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13.It is the case of the plaintiff that the 2nd defendant had paid the rent every month. After January 2001 the 2nd defendant failed to pay the same. The plaintiff reserves his right to take separate proceedings for recovery of the rent. The 5th defendant who has granted dealership agency to the 2nd defendant is liable to remove all the machineries. Therefore, left with no other alternative, the plaintiff has filed the present suit for the relief stated supra.

Written Statement of the 1st defendant:

14.The 1st defendant who is the decree holder in O.S.No.349 of 1995 had filed a written statement inter alia denying the allegations contained in the plaint and stated that the Court auction under which the 4th defendant had purchased the suit property was not binding on them and also the further alienation in favour of the said Kamalam.

The 1st defendant would contend that the sale deed in favour of



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Kamalam is invalid under law and not binding on him. That apart, the 4th defendant was already a party to the proceedings in O.S.No.349 of 1995 and Kamalam being his successor is bound by the said decree, as the sale is hit by lis pendens.

15.The 1st defendant denied the contention that the suit O.S.No.349 of 1995 was a collusive suit. The 1st defendant would further submit that the said Kamalam had filed a suit in O.S.No.141 of 1997 for the similar relief. The 1st defendant was not added as a party in the said suit. However, on coming to know about the said suit, the 1st defendant has impleaded himself in the same. The said Kamalam had allowed the suit to be dismissed for default. Therefore, the present suit filed by the plaintiff is hit by principles of res judicata. The 1st defendant had denied that Kamalam was in possession of the property and thereafter the plaintiff on his purchase.



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Written Statement of the 2nd defendant:

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16.The 2nd defendant had filed a written statement inter alia denying the allegations that the Court auction purchaser had taken possession of the property through orders in E.A.No.98 of 1995. The 2nd defendant would contend that the said Kamalam and her husband Velusamy were entrusted to look after the Petrol Bunk on behalf of the 2nd defendant as he is unwell and at Coimbatore for a long period.

17.It is the case of the 2nd defendant that the said Kamalam and her husband had played fraud on him and cheated him. The 2nd defendant would submit that when the 4th defendant himself did not have any right, title or interest to the property the further alienation made by him to Kamalam and thereafter Kamalam to the plaintiff were sham and nominal transactions.

18.The 2nd defendant would further submit that in the suit filed



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by Kamalam in O.S.No.141 of 1997, the 1st defendant had filed an application to implead himself and had filed a written statement after which the said Kamalam had allowed the suit to be dismissed for default. Therefore, the present suit is hit by principles of res judicata.

19.The 2nd defendant would submit that the filing of the final decree petition had not taken place only on account of the fact that the plaintiff had obtained a stay in I.A.No.1183 of 2001 staying all further proceedings in O.S.No.349 of 1995. The 2nd defendant would submit that he has been in uninterrupted possession and enjoyment of the suit property by running Petrol Bunk from the year 1980. The said Kamalam was running the Petrol Bunk only on his behalf. Therefore, the allegation that the possession was taken is totally false. The 2nd defendant would submit that the suit is nothing but an attempt to grab the property. Therefore, the same has to be dismissed.



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Written Statement by the 8th defendant:

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20.After the death of the 1st defendant, defendants 6 to 8 were brought on record as his legal heirs and the 8th defendant had filed the written statement, which is adopted by defendants 6 and 7. They had contended that the written statement filed by their father, the 1st defendant should be read as part and parcel of their written statement. They would submit that the alleged delivery of suit property to the auction purchaser after removing the out fits and other accessories owned by the Government is false and has not been effected by the Court Amin.

21.The defendants 6 to 8 would further submit that the suit filed by the vendor of the plaintiff had been dismissed and therefore the decree was binding upon the plaintiff. They would also reiterate the contentions raised by the other defendants that the possession of the property continued to be with the 2nd defendant and therefore sought

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for the dismissal of the suit.

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Trial Court:

22.The Trial Court had framed the following issues on considering the pleadings filed by the parties:

“1.அ.வ.எண்.349/95 வழக்கின் முதல்நிலை தீர்ப்பாணை உடன் கூட்டு சதி செய்து பெறப்பட்டுள்ளதா? சட்டப்படி செல்லத்தக்கதா?

2.வாதிகள் கோரிய விளம்புகை பரிகாரம் வாதிக்கு கிடைக்கத்தக்கதா?

3.வாதிகள் கோரிய 2ம் அயிட்ட சொத்தின் சுவாதீன ஒப்படைப்புக்கான உத்தரவு பரிகாரம் வாதிகளுக்கு கிடைக்கத்தக்கதா?

4.தாவா 2ம் அயிட்ட சொத்தில் உள்ள இயந்திரங்களை அகற்றக்கோரும் உத்தரவு



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பரிகாரம் வாதிகளுக்கு கிடைக்கத்தக்கதா?

5.வேறு என்ன பரிகாரம் வாதிகளுக்கு
கிடைக்கத்தக்கது?

23.The plaintiff had examined himself as P.W.1 and marked Ex.A.1 to Ex.A.7. The defendants on their side had examined the 8th defendant as D.W.1 and marked Ex.B.1 to Ex.B.18. The 2nd defendant did not enter the box to adduce the evidence.

24.The Trial Court on considering the evidence on record held that though it was contended that the purchase of the suit property by the 2nd defendant was from the sale of the other family property, has not been proved by the defendants. They have not produced any evidence to show that ancestral property had been sold which gave nucleus for purchasing the suit schedule property. The three sale



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deeds which are executed by the 1st and 2nd defendants are all subsequent to the purchase of the suit property.

25.The Trial Court has further held that though the defendants have contended that the properties are joint family properties, the document showing separate alienation being made by Perumal Raj and Rajaram would only strengthen the case of the plaintiff that there was no ancestral property and what was being sold was only the independent property of the 1st and 2nd defendants.

26.The Trial Court has also found fault with the defendants for not having initiated final decree proceedings at the earliest. In the suit O.S.No.349 of 1995, allegations had been made that the 2nd defendant had borrowed heavily and left the Petrol Bunk. However, in the present suit the 2nd defendant herein would contend that he was looking after the Petrol Bunk till date without any interruption and

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running it smoothly. The 2nd defendant in his written statement has contended that he was bed ridden as a result of which he had handed over the running of the Petrol Bunk to Kamalam even prior to the purchase by Kamalam on 28.08.1995. Ex.A.7, the delivery certificate would prove the fact that Kamalam was running the Petrol Bunk. Therefore, the Trial Court had returned a finding that the suit O.S.No.349 of 1995 was a collusive suit and not binding on the plaintiff. Since the suit was held to be a collusive one, the Trial Court had decreed the suit as prayed for.

27.Challenging the said Judgement and Decree, the defendants 6 to 8 had filed an appeal in A.S.No.25 of 2012 on the file of the Sub Court, Sathyamangalam. The Lower Appellate Court held that the statement of the plaintiff that he had let the property on lease to the 2nd defendant and that the 2nd defendant was paying rent to him is totally false case.

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28.The Lower Appellate Court further held that the plaintiff had purchased the property during the pendency of the suit O.S.No.141 of 1997. That suit had been dismissed for default. Therefore, the plaintiff who has obtained a sale deed from Kamalam cannot be considered the owner of the suit schedule property. Ultimately, the Lower Appellate Court has allowed the appeal and dismissed the suit.

29.Challenging the same, the appellant / plaintiff is before this Court.

30.The above Second Appeal is admitted on the following Substantial Questions of Law:

“a. When the Sale Deed dated 09.06.1980 exclusively stood in the name of the 1st respondent and the 1st respondent being the absolute owner of the suit



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property suffered a decree of recovery of money pursuant to which his property was brought for auction by the Executing Court and the decree and the auction sale has become final, whether without challenging the said decree and auction sale, suit simpliciter for partition is maintainable?

b. Where a decree has been obtained by collusion between parties by abuse of process of law, whether such a decree can be put against on the ground of lis pendens against bonafide purchaser for value?

c. Where the title to the property is vested by virtue of a Court auction sale which is not challenged, whether a relief for declaration of title to be sought for without there



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being any cloud on the title?

d. Whether the appellate Court was right in answering the earning capacity of the 1st respondent in a collateral proceedings and put the burden of proving the fact on the appellant and on the ground deny the relief claimed by the appellant?”

31. During the arguments, the learned counsel for the respondents had raised an objection regarding the Jurisdiction of the Munsif Court to declare the decree passed by a Sub Court as null and void. Therefore, the following Additional Substantial Question of law is framed:

“Whether the Judgement and Decree passed by the



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*Sub Court can be declared as null and void by the Court
of lower Grade, namely, the District Munsif?"*

Submissions:

32. Mrs.Chitra Sampath, learned Senior Counsel appearing on behalf of the appellant / plaintiff has produced the following dates and events which makes useful reading and simplifies the narration:

<i>S.No</i>	<i>Date</i>	<i>Events</i>
1	09.06.1980	2 nd Defendant purchased the Suit property
2	27.06.1984	Money Suit in OS.No.61 of 1984 filed against the 2nd defendant was decreed
3	08.02.1994	4th Defendant purchased the suit property vide court auction
4	08.04.1994	D2 filed E.A.No.110 of 1994 to set aside the court auction sale
5	07.02.1995	E.A.No.110 of 1994 filed by D2 to set aside the auction sale was dismissed and sale was confirmed
6	31.07.1995	D2 in collusion with his father D1, filed a suit in O.S.No.349 of 1995 for partition of the suit property along with other properties against D2 and other family members



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S.No	Date	Events
7	09.08.1995	Court amin delivered possession of the suit property to D4
8	28.08.1995	Kamalam (Plaintiff's vendor) purchased the suit property from D4 .
9	18.09.1997	O.S.No.349 of 1995 filed by D1 for partition was decreed exparte
10	14.10.1997	Kamalam filed a suit in O.S.No.141 of 1997 against the D1 and D2
11	17.03.1999	Kamalam sold the suit property to the plaintiff and put him in possession
12	2001	Kamalam died
13	28.09.2001	Suit filed by Kamalam in O.S.No.141 of 1997 was dismissed
14	05.12.2001	Suit filed by the plaintiff in O.S.No.149 of 2004.

33.The learned Senior Counsel would submit that in the suit filed by Moideen Batcha, namely, O.S.No.61 of 1984, the said Moideen Batcha had obtained a decree for recovery of money which he sought to execute by bringing the property of the 2nd defendant to sale in E.P.R.No.49 of 1992. The said Execution Petition was ordered and thereafter possession was taken by the 4th defendant through

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proceedings in E.A.No.98 of 1995 on 09.08.1995.

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34.The application taken out by the 2nd defendant to set aside the auction sale in E.A.No.110 of 1994 was dismissed on 07.02.1995 and the sale was thereafter confirmed. This has not been challenged by the defendants. It is after the dismissal of E.A.No.110 of 1994 that the 1st defendant had filed a suit in O.S.No.349 of 1995 for partition. The auction purchaser has been arrayed as the 4th defendant. The learned Senior Counsel would submit that after the said Kamalam had purchased the property from the 4th defendant, the suit in question came to be filed. The taking of possession or handing over of the possession was not challenged by the defendants.

35.The learned senior counsel would submit that all along the defendants had been aware of the purchase of the suit property by the Kamalam and in fact the 4th defendant had filed a written statement

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stating that he had sold the property to Kamalam and despite which no steps have been taken to implead the said Kamalam. The learned senior counsel would submit that after passing of the preliminary decree of which the said Kamalam was totally unaware, the said Kamalam had filed the suit O.S.No.141 of 1997 against the 2nd defendant for a declaration and recovery of the possession. The 1st defendant had filed an application for impleading himself in this proceedings and consequently had also so impleaded.

36.The learned senior counsel would submit that the suit was dismissed for default on 28.09.2001 and immediately, the present suit by the appellant has been filed in O.S.No.149 of 2004. The learned senior counsel would take the Court through the evidence of D.W.1 and D.W.2, which would clearly show the collusion between the 1st defendant and the 2nd defendant. The learned Senior Counsel would submit that the collusion is writ large in as much as the 2nd defendant

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has not participated in the proceedings and that apart the final decree proceedings has not been filed in the above suit. That apart, the decree in O.S.No.61 of 1984, from out of which the Execution Proceedings had emanated has not been challenged, more particularly when possession has been taken under the said proceedings.

37.As regards the plea that the suit property was joint family property, the learned senior counsel would submit that there is not an iota of proof to show any contribution from an ancestral nucleus for the purchase of the same. The learned senior counsel would submit that the Trial Court has taken note of the date of the sale in favour of the 2nd defendant in Ex.A.4 and the prior sales which the 2nd defendant would submit are sale of the ancestral properties.

38.The Trial Court has held that since the other sales were subsequent to the purchase by the 2nd defendant by no stretch of

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imagination can it be stated that the 2nd defendant had purchased the property from out of the joint family funds. The sale in favour of the 2nd defendant took place as early as in the year 1980. The suit for partition has been filed 15 years thereafter. The learned senior counsel would submit that in the written statement of the 2nd defendant, he has admitted that the possession of the property is with Kamalam.

39.The learned senior counsel would submit that the property had been handed over to Sheik Dastagir under Ex.A.7, delivery certificate. Thereafter, Sheik Dastagir has sold the property to Kamalam on 28.08.1995. The sale in favour of the plaintiff has taken place as per Ex.A.1 dated 17.03.1999.

40.The contention of the learned senior counsel is that the suit for partition in O.S.No.349 of 1995 was a collusive one and further

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the 2nd defendant had not deemed it fit to question the delivery effected in the execution proceedings in the earlier suit. That apart, the plaintiff has been put in possession of the property by his vendor who inturn had obtained possession from her vendor, Sheik Dastagir. Further, there was not a shred of evidence to show that the 2nd defendant is in possession of the suit property.

41.Per contra, Mr.A.K.Kumarasamy, learned senior counsel appearing on behalf of the defendants 2, 3, 6 to 8 would submit that the suit property is the ancestral property of the 1st defendant. The suit O.S.No.349 of 1995 had been decreed on 18.09.1997 and the predecessor in title of the plaintiff was a party to the said suit and no application has been taken out to set aside the decree. Further, Kamalam who had filed a suit in O.S.No.141 of 1997 for the very same relief immediately after the decree of the suit for partition has allowed her suit to be dismissed for non-prosecution. That apart, the

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learned senior counsel would submit that a mere perusal of the cross examination of the plaintiff would demonstrate that the sale is a sham and nominal one in as much as the plaintiff is unable to give any details about the property that he had purchased or the proceedings surrounding the same. Therefore, the learned senior counsel would submit that the appeal may be dismissed and the Judgement and Decree of the Lower Appellate Court be upheld.

Discussion:

42. The above suit is filed to declare the Judgement in an earlier suit O.S.No.349 of 1995 as null and void and for recovery of possession against the 2nd defendant and mandatory injunction against the 5th defendant to remove the machineries put up in the Item II of the suit property, directing the 2nd defendant to deliver possession of the

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Item II of the property. The suit which is now sought to be declared as null and void was a suit filed by the deceased 1st defendant against his son the 2nd defendant, the 2nd defendant's daughter, the paternal aunt of the 1st defendant, the auction purchaser as the 4th defendant and the Indian Oil Corporation as the 5th defendant.

43. In the said suit, the 4th defendant had filed a written statement contending that the property had been sold to one Kamalam. However, the 1st defendant had not deemed it necessary to implead the said Kamalam though the 4th defendant has put him on notice about the purchase of the suit property to the said Kamalam. An ex parte decree has been obtained by the 1st defendant. The plaintiff's case is that this decree is collusive decree as the defendants have chosen to remain ex parte.

44. The 4th defendant, auction purchaser who had initially



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participated in the said suit had thereafter remained ex parte since he had already alienated the property. Further, the 2nd defendant has chosen to remain ex parte and has not brought to the notice to the Court that in an earlier proceedings the property had been brought to auction and the same was purchased by the 4th defendant who was the auction purchaser.

45.The earlier suit O.S.No.61 of 1984 has been filed by one Mohideen Batcha against the 2nd defendant for recovery of money and he had obtained a decree against the 2nd defendant. The suit Item I of the property was purchased by the 2nd defendant on 09.06.1980 and the sale deed stands in his name. Therefore, the decree holder had filed E.P.R.No.49 of 1992 for attaching and selling the said property and on 08.02.1994 the property was brought to sale. The 4th defendant in the partition suit O.S.No.349 of 1995 was the successful bidder.



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46. After obtaining the sale certificate, the 4th defendant has filed E.A.No.98 of 1995 for delivery of possession including the portion in the occupation of the Petrol Bunk. The Court Amin has gone to the premises and recorded delivery on 09.08.1995. The 2nd defendant had filed an application in E.A.No.110 of 1994 to set aside the sale. Ultimately, on 07.02.1995, this petition came to be dismissed and full satisfaction was recorded and the sale certificate issued, pursuant to which possession was handed over by the bailiff on 09.08.1995. In the interregnum, the 1st defendant has come forward with the suit for partition in O.S.No.349 of 1995, impleading only the auction purchaser as the 4th defendant.

47. Meanwhile, on 28.08.1995, Sheik Dastagir has sold the property to Kamalam from whom the plaintiff has purchased the property on 17.03.1999. The suit for partition was decreed ex parte on 18.09.1997 after the purchase of the suit property by the said

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Kamalam. As already stated Kamalam was not brought on record despite the sale in her favour being brought to the notice of the 1st defendant, who is the plaintiff in the suit for partition.

48.It has to be first analysed as to whether the suit property was the exclusive property of the 2nd defendant or whether as stated by the 1st defendant in his suit for partition that the suit property is the ancestral property.

49. Ex.B.19, is the sale deed under which the 2nd defendant had purchased the suit schedule property from one Rajgopal, son of Veerasamy. The recitals of the sale deed would read that the property has been sold for sale consideration of a sum of Rs.15,900/-, which was paid by cash on the date of the sale deed. The property has been sold only in the name of the 2nd defendant. When the property was

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brought to sale in O.S.No.61 of 1984 the property has been described as a vacant site and it is seen that after the purchase the Petrol Bunk has been put up.

50.Admittedly, the Petrol Bunk belongs to the 2nd defendant, who was in exclusive possession of the same. The 2nd defendant has been running the Petrol Bunk from the year 1980 as per his statement in paragraph no.8 of his written statement. Neither the 1st defendant nor the other defendants have had anything to do with the running of the Petrol Bunk and that apart from the year 1980 they have not taken any steps to alter the management or the running of the Petrol Bunk and neither have they claimed any right to the property.

51.In the suit for partition, it is stated that the sale proceeds from out of the sale of the ancestral property on 09.06.1980 forms source of income for purchasing the suit property in the name of the

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2nd defendant on 14.07.1980. However, no documents have been filed on the side of the defendants to show the above sale.

52. The partition suit came to be filed only after the Court auction sale. An application in E.A.No.110 of 1994 has been filed to set aside the Court auction sale and there is nothing to show that in this application, viz., E.A.No.110 of 1994, the 2nd defendant has stated that the suit property is a joint family property.

53. Further, the 2nd defendant has allowed this application to be dismissed for default on 07.02.1995, following which the sale has been confirmed in favour of the said Sheik Dastagir. It is only after this confirmation that the 1st defendant has filed the suit for partition. In the suit for partition the pleadings in respect of this suit property makes an interesting reading. The 1st defendant as plaintiff would

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state that the purchase of the suit property in the name of the 2nd defendant herein had taken place on 14.07.1980 by using the money received from the sale of joint family property on 09.06.1980. The pleadings would further state that on 09.06.1980, the 1st defendant and 2nd defendant had sold the joint family property for a sum of Rs.12,000/-. The suit property was thereafter purchased for a sum of Rs.15,900/-. However, the sale deed dated 09.06.1980 is one executed by Rajagopal in favour of the 2nd defendant and this document has been marked as Ex.A.1 in the suit O.S.No.349 of 1997. Ex.A.2, therein is the sale of the property by the 1st and 2nd defendants in favour of one Rangammal. Ex.A.3 is the mortgage deed dated 28.09.1991 executed by the 1st defendant in favour of one Chinnamal, wife of Sivaraman. Ex.A.4 is the sale deed executed in favour of minor Marusamy by the 1st and 2nd defendants herein.

54. While discussing the 3rd issue framed in the suit O.S.No.349



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of 1995, as to whether the suit A Schedule belonged to the 2nd defendant herein, the learned Judge has not given any finding but has simply observed that the A Schedule property therein is the joint family property of the defendants 1 to 3. In fact there is no discussion about the defense made by Sheik Dastagir that the property is an exclusive property of the 2nd defendant.

55. In these circumstances, the filing of the suit for partition in O.S.No.349 of 1995 without challenging the auction sale is not maintainable. In the instant case, a challenge has been taken but has not proceeded with and the same is dismissed for default and no application have been taken to restore the same. The auction sale has become finality. The pleadings and the manner in which the suit O.S.No.349 of 1995 has come to be filed clearly shows that it is a collusion between the 1st and 2nd defendants. That apart, the sale in favour of the 4th defendant through the Court auction has attained

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finality and the sale in favour of Kamalam and thereafter in favour of the plaintiff is not hit by lis pendens since the suit O.S.No.349 of 1995 is a collusive and fraudulent suit.

56. Therefore, considering the fact that the sale has not been questioned and the challenge to the sale having been dismissed for default the sale in favour of the auction purchaser has attained finality and title has come to be vested in him. The auction purchaser has thereafter sold the property to Kamalam who inturn sold the property to the plaintiff. Since the auction sale itself has been questioned and the subsequent suit for partition filed, a cloud has been cast title of the plaintiff and therefore the suit for declaration of title is definitely maintainable. Therefore, the Substantial Question of Law Nos.a to c are answered in favour of the plaintiff.

57. The Lower Appellate Court was clearly in error in directing



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the appellant to prove the earning capacity and the finding against the appellant in this regard has to necessarily be set aside and consequently Substantial Question No.d is also answered in favour of the plaintiff.

58. The additional Substantial Question of Law that has been raised has to be answered against the respondents / defendants since the suit has been instituted originally before the Sub Court, Gobichettypalayam, from where it has been transferred to the District Munsif, Gobichettypalayam on an administrative orders. Therefore, this Additional Substantial Question of Law is answered against the defendants.

59. In the result, the Second Appeal is allowed, the Judgement and Decree of the Sub Court, Sathyamangalam, is set aside confirming the Judgement and decree of the District Munsif, Sathyamangalam.



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Consequently, connected Civil Miscellaneous Petition is closed. No costs.

03.11.2022

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Index : Yes/No

Speaking order/non-speaking order

To,

1.The Sub Court,
Sathyamangalam.

2.The District Munsif,
Sathyamangalam.

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