



S.A. No. 800 of 2018

WEB COPY IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.09.2022

CORAM:

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

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1. K. Sakthivel,
S/o. Krishnasamy
2. K.P.Ramasamy,
S/o. Pongiyanna Gounder
3. A.Murugan,
S/o. Aiyyam Perumal
4. P.Ramamoorthy,
S/o. K.K.Palaniappan

... Appellants

Vs.

1. Shanmugapriya,
W/o.K.S.Seenivasan
2. Minor Mathin,
rep. by his paternal grandmother Revathy
S/o. Late T.Periyasamy
3. T.Revathy,
W/o. Late S.K.Thangavel

... Respondents



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PRAYER: Second Appeal filed under Section 100 of Code of Civil Procedure, to set aside the judgment and decree dated 13.04.2017 made in A.S.No.10 of 2016 on the file of III Addl. District and Sessions Court, Gobichettipalayam confirming the judgment and decree dated 12.02.2016 made in O.S.No.187 of 2010 on the file of Sub-Court, Sathyamangalam.

For Appellants : Mr.D.R.Arun Kumar

For Respondents : Mr.S.Subbiah, Senior Advocate
for Mr.D.Gopal

JUDGMENT

The appellants herein are the defendants 3 to 6 in the suit in O.S.No. 187 of 2010 filed by the 1st respondent/plaintiff for the relief of partition of her share in the suit property against her father and brother/ 1st and 2nd defendants and the purchasers of the property/defendants 3 to 6 stating that the suit properties as described in the plaint schedule is the joint family property belongs to her father, her brother and herself equally having 1/3rd share, but ignoring her right over the properties, her father and her brother/1st and 2nd defendants sold a portion of the property



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in favour of defendants 3 to 5 through sale deed dated 15.07.2010.

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Hence, she filed a suit for partition.

2. For the sake of convenience, the parties are referred as per the ranking in the suit.

3. The 1st defendant/father contested the suit stating that in order to construct a house, he borrowed a loan from the bank/third party. To discharge the loan, he was in need of money, and the defendants 3 to 5 have agreed to discharge the bank loan. Hence, as a security for the loan, the sale deed was executed in their name, but the loan was not discharged as they promised, besides, they created a document in favour of 6th defendant, thereby denied the purchase made by defendants 3 to 5. He also stated that there was no cordial relationship between himself and his daughter/plaintiff and he has executed a settlement deed in favour of his son/2nd defendant and also submitted that the plaintiff is not in possession of the suit property. The purchasers/defendants 3 to 5 submitted that they are the bonafide purchasers of the suit properties with an extent of 2.05



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acres out of total extent of 5.5 acres for a valid consideration and the plaintiff was having the knowledge about the sale transaction, but not raised any objection. Now, colluding with her father, she filed this vexatious suit and also submitted that the property was sold to 6th defendant during the pendency of the proceedings.

4. The trial court framed six issues and on considering the evidence as well as documents on either side, finally held that the properties are joint family properties and the defendants 1 and 2 have no right to execute the sale deed with boundaries, even otherwise the purchasers/defendants 3 to 5 not discharged the bank loan as they agreed and also as per the recitals of the sale deed (Ex.B1), the sale is not supported with consideration. Hence, the sale deed is not legally valid and unenforceable one, consequently, the sale deed stands in the name of 6th defendant also sham and nominal. Accordingly, the suit was decreed by granting 1/3rd share in favour of plaintiff. Aggrieved over that, the purchasers/defendants 3 to 6 preferred an appeal in A.S.No. 10 of 2016 before the III Addl. District and Sessions Judge, Gobichettipalayam,



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wherein the lower appellate judge independently analysed the evidence and facts, concludes that the plaintiff is entitled to claim partition in the joint family property and the purchase made by defendants 3 to 5 from defendants 1 and 2 was not supported with any consideration and the same would not binds the plaintiff even though the plaintiff residing at her grandmother's house, she being one of the co-sharer legally deemed to be in joint possession of the property. Accordingly, the plaintiff is entitled for 1/3rd share, thereby confirming the findings rendered by the trial court and also held that the settlement deed executed by her father in favour of his son/2nd defendant would also not binds the share of plaintiff and accordingly, the appeal was also dismissed confirming the trial court findings.

5. Challenging the concurrent findings of both the courts below, the purchasers/defendants 3 to 6 have preferred this Second Appeal submitting that both the courts below failed to consider that neither the 1st defendant nor the legal heirs of 2nd defendant filed a suit for cancellation of sale deed, Ex.B1, but the trial court went beyond the



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scope of the suit wrongly framed additional issue No.2 for an unpleaded relief and given a finding that the sale deed dated 15.07.2010 is not legally valid and the same is unenforceable one. Further, there is no prayer in the plaint for cancellation of sale deed by the plaintiff and no court fee so paid to that effect. In spite of that, both the courts below erroneously gave the findings with regard to validity of sale deed and the suit properties were not joint family property and it ceases to be a joint family properties after a partition held in the family, but the courts below erroneously held that it is a joint family property. Hence, they prayed to set aside the findings as unjust one. Accordingly, this Second Appeal is admitted on the following question of law :-

“(a) Whether the courts below committed an error in and ignored the provisions of the conjoint reading Sections 4, 8 and 19 of the Hindu Succession Act, 1956 and the status of the joint family property ceases to be joint family property in the hands of the various persons who have succeeded to it as they hold the property as tenants in common or joint tenants?



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(b) Whether the courts below erred in traversing the issue beyond the scope of the suit to hold that the sale deeds dated 15.07.2010 and 03.01.2012 are invalid, in the absence of any prayer to nullify the sale deeds dated 15.07.2010 and 03.01.2012?

6. Brief facts of the case is as follows :-

The 1st and 2nd defendants are father and brother of plaintiff. The defendants 3 to 5 are said to be purchasers of the portion of suit property from defendants 1 and 2. During the pendency of the suit, defendants 3 to 5 said to have sold the property to 6th defendant. The plaintiff's case is that the suit properties are ancestral property of plaintiff's father and the same was allotted to his share by way of partition held in the family between her father and his brothers, in which 'A' and 'C' schedule of properties were allotted to plaintiff's father's share and the said document was marked as Ex.A1 dated 15.09.1993. Thereafter, along with her father and brother, she enjoyed the properties, but due to some family misunderstanding, she was residing at her grandmother's house and completed her studies, however, without her knowledge, a portion of the



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property was sold by defendants 1 and 2 in favour of defendants 3 to 5 and the said sale would not binds her, besides her father constructed a house in the property by utilising the joint family fund, in which she is also entitled to 1/3rd share. Hence, the suit for partition was filed.

7. The 1st defendant/father of plaintiff submitted his objections stating that the house in the property was constructed by his own separate earnings and by borrowing housing loan from the State Bank of India mortgaging the entire suit property and also contended that the plaintiff enjoyed the property in joint possession. He would also submit that the plaintiff was under the care of maternal grandmother eversince from her birth and to discharge the loan, he was in need of money. Hence, he approached the defendants 3 to 5 to secure the loan amount and they have also agreed to repay the loan. Thus, as a security, document like sale deed was executed by defendants 1 and 2 in favour of defendants 3 to 5, but they have not repaid the loan amount, however, they planned to file a suit to cancel the sale deed, because it is a sham and nominal document, since they are in possession of entire property, thereby he denied the sale deed executed in favour of defendants 3 to 5.



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8. The defendants 3 to 5 claimed themselves as bonafide purchasers and submitted that out of settlement, they have paid a sum of Rs.4,72,000/- to the defendants 1 and 2 in order to discharge the loan and they have sold the property due to necessity. Hence, the sale deed is valid one and same is also binds the plaintiff and prayed to allot the property purchased by them under equity.

9. Both the courts below on considering the evidence and documents adduced on either side, held that the defendants 3 to 5 not discharged the bank loan as they agreed in the sale deed, thereby the sale deed was not supported by their consideration nor it binds the plaintiff. The learned counsel for appellants submitted that when there is no specific plea either by plaintiff or on the side of defendants 1 and 2 to declare the sale deed as sham and nominal, both the courts, on its own gave a finding that the sale deed is not supported by consideration and without any pleadings to that effect in the plaint. As such, it is perverse findings and beyond the scope of the suit.



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10. Per contra, the learned counsel for plaintiff submitted in her pleading that she claimed 1/3rd share in the entire property including the alleged sale deed stands in the name of defendants 3 to 5. To decide the said issue, the trial court framed additional issues as to whether the sale deed Ex.B1 binds the plaintiff. Accordingly, to answer the said issue, the trial judge on considering the evidence as well as submissions made on the side of 1st defendant as well as purchasers/defendants 3 to 5, and on considering the evidence of D.W.2 and also on considering the recitals of sale deed, held that a portion of the suit property was agreed to sell to defendants 3 to 5 by 1st and 2nd defendants for a sale consideration of Rs.4,70,000/- and the purchasers/defendants 3 to 5 agreed to pay the said amount to discharge the loan amount, but they have not discharged the loan. Hence, the trial court held that it is an unenforceable one and it would not binds the plaintiff. Those findings rendered by the trial judge is incidentally arrived while deciding the plaintiff's right of 1/3rd share in the suit property.

11. It is pertinent to note that as the plaintiff approached the court for the relief of partition, the initial burden is casted upon her to prove



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that the properties are joint family properties, for which, she produced Ex.B1, Partition deed, it reveals that ancestral property of plaintiff's father was divided among his brother, in which 1/3rd share allotted to him and the same is the suit property herein. So, the family owns ancestral property and subsequently, it became as joint family property of 1st defendant, his son/2nd defendant and the plaintiff herein. Thus, the suit property assumes the character of joint family property. Accordingly, the question of law (a) is answered.

12. It is an admitted fact that the plaintiff was married in the year of 2006 after the amendment of 2005, but the contention of her father/1st defendant is that she was brought up by her grandmother ever since from her birth, thereby denied the joint possession of property. Even assuming that she was residing in her grandmother's house, and she being one of co-sharer, she is also deemed to be joint possession of the property. Hence, the objections to that effect is unsustainable one and both the courts below rightly appreciated this fact. Thus, she is entitled to 1/3rd share in the entire suit property. But, the appellants/defendants 3 to 5



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contended that they purchased the property from defendants 1 and 2 claimed that they are bonafide purchasers as per the sale deed Ex.B1, dated 15.07.2010. However, the plaintiff submitted that her father and his brother have no right to sell the property with specific boundaries. But, strangely, in this case, the father of plaintiff/1st defendant submitted that he borrowed loan from the bank and other third parties and to discharge the said loan, he approached the defendants 3 to 5 and they agreed to discharge the loan directly to the bank. Hence, at their instance, as a security, a sale deed was executed in their name, but the loan was not discharged by them subsequently. Admittedly, he has not filed any suit to cancel the sale deed. As per the sale deed, in Ex.B1, the sale consideration was fixed at Rs.4,70,000/- for 2.05 acre and the recitals of the document reads as follows :-

“இதனடியிற்கண்ட சொத்தை இன்று நாங்கள் உங்களுக்கு ரூ.4,72,000/- (ரூபாய் நான்கு லட்சத்து எழுபத்தி இரண்டாயிரம்)-க்கு கிரையம் செய்வதாய்..... கிரையம் செய்து கொடுத்து கிரையத் தொகை எங்களுக்கு செல்லானதற்கு விபரம் :-

இதனடியிற்கண்ட சொத்தின் பேரிலும் அதன் மற்ற பாகத்தின் பேரிலும் கெம்பநாயக்கன்பாளையம் ஸ்டேட் பேங்க் ஆப் இந்தியா வங்கியில் பெற்றுள்ள கடன்



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நிலுவை தொகையை நீங்கலே செலுத்தி ஆதரவு பெற்றுக் கொள்வதாக
ஒப்புக்கொண்ட வகையில் ரூபாய் நான்கு லட்சத்து எழுத்தி இரண்டாயிரம் எங்களுக்கு
செல்லாகி விட்டது.”

So, the purchasers are bound to pay sale consideration to discharge the bank loan, but during the evidence, the purchaser D.W.2 admits that they have not discharged the bank loan and also deposed that they are ready to settle the loan amount. So, the admission made on the side of purchasers would clearly reveals that at the time of filing the suit, the bank loan was not discharged by the purchasers as they agreed. Hence, the sale deed is not supported by valid consideration and unenforceable one. It is settled preposition that an oral evidence not permitted to adduce against the recital of the document unless contrary is proved. The case in hand, the evidence of purchasers itself prove that they have not discharged the loan as they agreed, thus, they failed to comply the written recitals found in the sale deed. The 1st defendant contended that in order to discharge the bank loan, the sale deed was executed, but subsequently it was not complied by the purchasers. As per the recitals of sale deed, no sale consideration was paid to the 1st defendant on the date of execution of sale deed, but the same is to be paid to the bank to discharge the loan, but



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the same was not complied by the purchasers. Subsequently, when there is concrete evidence about the conduct of purchasers, the courts below framed issues and held that it would not binds the plaintiff, besides, the sale deed also an unenforceable one. Therefore, the authority relied on by the learned counsel for 1st respondent reported in **2021 (3) MWN (Civil) 825 in the case of Kewal Krishnan vs. Rajesh Kumar and others.** is solely applicable to the facts of the case and the relevant portion of judgment is extracted hereunder :-

“Transfer of Property Act 1882 (4 of 1882), Section 54 – Sale – Price, an essential part of sale of immovable property – Price either ought to have been partly paid or payable in future – Sale of property without any consideration, held, void.

15. Section 54 of the Transfer of Property Act, 1882 (for short 'the TP Act') reads thus :-

“54, “Sale” defined - 'sale' is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

Sale how made .- Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a



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reversion or other intangible thing, can be made only by a registered instrument.

In the case of tangible immovable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

Contract for sale - A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.

It does not, of itself, create any interest in or charge on such property.”

Hence, a sale of an immovable property has to be for a price. The price may be payable in future. It may be partly paid and the remaining part can be made payable in future. The payment of price is an essential part of a sale covered by Section 54 of the TP Act. If a sale deed in respect of an immovable property is executed without payment of price and if it does not provide for the payment of price at a future



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date, it is not a sale at all in the eyes of law. It is of no legal effect. Therefore, such a sale will be void. It will not effect the transfer of the immovable property.”

13. At the time of filing written statement itself, the 1st defendant contended that as the security for the loan, the sale deed was executed, besides, the plaintiff also denied the sale deed. Hence, to decide the issue between the parties, the trial court framed additional issues with regard to Ex.B1 sale deed and incidentally analysed the fact and found that it does not binds the plaintiff, consequently, the sale deed was held as unenforceable one. So, it is not beyond the scope of the suit as submitted by the appellants and the conduct of the purchasers would prove that they are not bonafide purchasers. Hence, the findings rendered by the courts below is within the scope of the suit. Accordingly, the question of law (a) is answered.

14. Furthermore, during the pendency of the suit proceedings, these appellants created a document in favour of 6th defendant, but his purchase is hit by Sec.52 of Transfer of Property Act under the principles



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of lis pendens, which needs no interference. Moreover, the purchasers were not in possession of the property, though they transferred the patta in their name, but patta is not a document of title and it will not confer any title over the property, as they said to be purchased. Accordingly, the question of law (b) is answered.

15. In the result, both the courts below have rightly held that the plaintiff is entitled to 1/3rd share, which needs no interference. Accordingly, this Second Appeal is dismissed as no merits and the suit is decreed as prayed for by-passing the preliminary decree. No costs.

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Index : Yes / No
Internet : Yes / No
Speaking/Non-speaking order
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To

III Addl. District and Sessions Judge,
Gobichettipalayam.



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T.V.THAMILSELVI, J.

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Pre-delivery judgment in
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