



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 13.04.2022

CORAM

THE HONOURABLE MS. JUSTICE R.N.MANJULA

A.S. (MD) No. 78 of 2019

and

C.M.P. (MD) No. 4296 of 2019

1. M.Lavanya
2. Minor Aswin Krithick
Represented through his mother and guardian M.Lavanya
3. K.M.Bhuvaneswari
4. Minor Nerak
Represented through his mother and guardian K.M.Bhuvaneswari
5. K.M.Manivannan (died)
6. K.M.Karthick
7. Vanitha ... Appellants / Plaintiffs

(R7 brought on record as legal heir of the deceased 5th respondent vide Court order dated 08.01.2020 made in C.M.P. (MD) No. 206 of 2020 in A.S. (MD) No. 78 of 2019 by NSKJ)

Vs.

1. Murugavel
2. Ponuraj
3. Radhakrishnan ... Respondents / Defendants

PRAYER: Appeal Suit filed under Section 96 r/w Order 41 Rule 1 of the Civil Procedure Code, 1908 against the judgment and decree of the learned Additional District Judge (Fast Tract Court), Theni, dated 04.02.2019 in O.S. No. 46 of 2017.

For Appellants : Mr.A.Arumugam
for M/s.Ajmal Associates
For Respondents : Mr.N.Vallinayagan for R3
No appearance for R1 & R2

J U D G M E N T

This Appeal Suit has been preferred challenging the judgment and decree of the learned Additional District Judge (Fast Tract Court), Theni, dated 04.02.2019 made in O.S. No. 46 of 2017.

2. The appellants are the plaintiffs in the suit; the suit has been filed by the plaintiffs for the relief of partition; according to



the case of the plaintiffs, the suit property belonged to the plaintiffs as their ancestral property; it was purchased in the name of one Kalappa Gounder from and out of the joint family income by virtue of three registered sale deeds, dated 28.02.1955, 15.10.1956 and 18.01.1974 respectively; the properties were enjoyed by the joint family members; Kalappa Gounder died on 07.04.2004; during his life time, he mortgaged the suit properties with Bodinaiyakkanur Co-operative Housing Building Society Limited and availed a loan of Rs.3,50,000/- (Rupees Three Lakhs and Fifty Thousand only); Kalappa Gounder had one son and five daughters; after the demise of Kalappa Gounder, his wife and five daughters had jointly executed a registered General Power Deed in respect of his son, i.e., Murugavel, who is the 1st defendant in the suit; on 21.09.2005, Murugavel for himself and as a power agent for his mother and sisters had executed the sale deed in respect of the suit properties in favour of the 2nd defendant; by virtue of the sale deed, the earlier mortgage loan pending with Bodinayakkanur Co-operative Housing Building Society Limited was discharged; a sum of Rs.34,306/- (Rupees Thirty Four Thousand Three Hundred and Six only) which was a debt due by Kalappa Gounder to the 2nd defendant was also discharged; despite the sale deed was executed, it could not be registered because of the non-payment of the correct registration fee by the 2nd defendant; only on 17.05.2017, the deficit fee was paid and the sale deed got registered; the sale deed was executed by Murugavel for himself and as a guardian for his two minor sons, who are the 5th and 6th plaintiffs; no permission was sought from the Court for selling the minor's property; hence, the sale deed is null and void; the 1st and 3rd plaintiffs are the daughters of the 1st defendant and 5th and 6th plaintiffs are the sons of the 1st defendant; the 2nd plaintiff is the minor son of the 1st plaintiff and 4th plaintiff is the minor son of the 3rd plaintiff; they are represented by their mothers and guardian respectively; at the time of executing the sale deed, the 1st plaintiff was a major and she did not sign the sale deed; the 3rd plaintiff was a minor daughter of the 1st defendant and permission was not obtained for selling the suit properties and hence, she has got an interest; since the wife, daughters and sons have equal shares in the suit properties and the wife and daughters had relinquished their rights in the suit property in favour of Murugavel and he has full right over the suit properties; being the children of Murugavel, his two sons and two daughters along with Murugavel would get 1/5th share each in the suit properties; the sale deed executed by Murugavel does not have legal validity as against the plaintiffs; the 2nd defendant had executed a mortgage deed in favour of the 3rd defendant on 01.06.2017 and that will also not bind the plaintiffs in the interest of the suit properties; hence, the plaintiffs have filed a suit for preliminary decree for partition by claiming 1/10th share for the plaintiffs 1 to 4 each and 1/5th share for the 5th and 6th plaintiffs and also to declare the sale deed dated 21.09.2005 and mortgage deed dated 01.06.2017 as null and void and for further relief of



permanent injunction restraining the 2nd and 3rd defendants from alienating or making any encumbrance in the suit property till the disposal of the appeal.

3. The 1st defendant remained exparte; the 2nd and 3rd defendants resisted the suit by stating that Kalappa Gounder had purchased the suit property from and out of his own funds; he was working as a Manager at Bodi Zamin and he had the funds to purchase the property; the suit property was kept under the absolute and exclusive enjoyment of Kalappa Gounder till his life time; after his death, his wife and daughters are entitled to inherit the suit property; as the rightful owners of the suit property, the wife and daughters of Kalappa Gounder had been in possession and enjoyment of the same; the power of attorney deed, dated 06.05.2005 and sale deed, dated 21.09.2005 are admitted; the plaintiffs have no legal right over the suit property; at the time of sale of the suit property, the 1st defendant had 1/7th share in the suit property and that was his exclusive right; since he sold his share and other shares of his mother and sisters in favour of the 2nd defendant, the 2nd defendant has become the lawful owner of the suit property; the execution of the sale deed dated 21.09.2005 on behalf of the plaintiffs 5 and 6 could not be any significance; even assuming that the plaintiffs 5 and 6 have right in undivided share, no Court permission is necessary for the sale as per law; even assuming that the plaintiffs 5 and 6 have got any right over the suit properties, they ought to have filed the suit to set aside the sale within three years after attaining majority; hence, the suit itself is barred by limitation; the plaintiffs 5 and 6 being eo-nominee to the sale deed, dated 21.09.2005, they cannot proceed with the suit to seek any relief without setting the sale deed by paying the correct Court fee.

4. The plaintiffs did not get any share or right in the suit properties; as per the request made by the 1st defendant to the 2nd defendant to stay in the suit property for five years, the 2nd defendant permitted to stay; so, his possession over the suit property subsequent to the sale deed is null and void; as on the date of licence, the plaintiffs in collusion with the 1st defendant filed the suit in order to defeat the interest of the 2nd defendant; however, the 2nd defendant sold the same in favour of the 3rd defendant and hence the suit has to be dismissed.

5. On the basis of the above pleadings, the learned trial Judge framed the following issues:

- (i) *Whether the plaintiffs are entitled to 4/5 share in the suit properties?*
- (ii) *Whether the sale deed dated 21.09.2005 executed by the 1st defendant to the 2nd defendant is liable to be declared as null and void?*
- (iii) *Whether the mortgage deed dated 01.06.2017*



executed by the 2nd defendant to 3rd defendant is liable to be declared as null and void?

(iv) Whether the Court fees paid by the plaintiffs under Section 37(2) of TNCF Act is correct?

(v) Whether the suit is barred by limitation?

(vi) Whether the plaintiffs are entitled to preliminary decree for partition as prayed for?

(vii) Whether the plaintiffs are entitled to the reliefs of declaration in respect of sale deeds dated 21.09.2005 and 01.06.2017?

(viii) Whether the plaintiffs are entitled to permanent injunction as prayed for?

(ix) To what cost and other reliefs, the plaintiffs are entitled to?

6. During the course of trial, on the side of the plaintiffs, two witnesses were examined as PW1 and PW2 and Exs.A1 and A15 were marked. On the side of the defendants, one witness was examined as DW1 and no document was marked. At the conclusion of the trial, the learned Judge, considered the evidence available on record and dismissed the suit. Aggrieved over that, the plaintiffs have preferred this Appeal.

7. The learned counsel for the appellants submitted that the defendants did not prove that the property is a self-acquired property of Kalappa Gounder; despite it was claimed by the appellants that it was the ancestral property of Kalappa Gounder, the sale deed in favour of 2nd defendant will not bind the interest of the plaintiffs; it is not proved that the sale was made for the benefit of the family or for the welfare of the minors; the suit is not barred by limitation in view of Article 109 of the Limitation Act, 1963; the possession is still with the plaintiffs and the 2nd defendant did not take any possession; no proof is shown before the Court that Kalappa Gounder was employed as a Manager of Bodi Zamin and he had sufficient income to purchase the property; Karta being the eldest member of the family, there should be a presumption that the property in the name of Kalappa Gounder is in his capacity for the Karta for joint family and not in his personal capacity; the mortgage executed by the Kalappa Gounder in favour of the Society would show that the 1st defendant also joined in the execution; this was only because, the property was treated as a joint family property; since the respondents did not prove that Kalappa Gounder had personal income to purchase the suit property in his personal capacity, the sale deed in favour of 2nd and 3rd defendants will not bind the interest of the plaintiffs; since the learned trial Judge has not appreciated the evidence in proper perspective and dismissed, the appeal should be allowed.

8. The learned counsel for the respondents submitted that the
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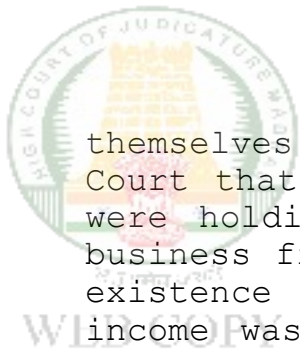
property is admitted as a self-acquired property of Kalappa Gounder; after his death, as per Section 8 of the Hindu Succession Act, 1956, his wife, son and daughters would get equal share; the plaintiffs, who are the sons and daughters of the 1st defendant have filed the suit in collusion with the 1st defendant; they have created false right over the suit property; the 5th and 6th plaintiffs are eo-nominees to the sale deed, dated 21.09.2005; even it is assumed for the sake of arguments that the plaintiffs had any right in the suit property, the suit to declare the sale deed null and void ought to have been filed within a period of three years; the learned trial Judge has rightly appreciated the evidence and dismissed the suit; hence, it does not require any interference.

9. Points for consideration:-

"Whether the judgment and decree of the trial Court in dismissing the suit is fair and proper?"

10. The fact that the original owner of the suit property was Kalappa Gounder is not disputed. Kalappa Gounder has one son and five daughters. Even according to the case of the plaintiffs, the suit property was purchased in the name of Kalappa Gounder by virtue of three registered sale deeds dated 28.02.1955, 15.10.1956 and 18.01.1974 respectively. The sale deeds are marked as Exs.A1 to A3. The suit of the appellants is filed on the sole ground that despite the suit properties were purchased in the name of Kalappa Gounder, it was the joint family property only. In other words, it is claimed by the appellants that the properties were purchased by Kalappa Gounder with the income derived from the joint family properties. The sale deeds would show that Kalappa Gounder is the purchaser of the suit properties. The sale deeds did not mention that Kalappa Gounder had purchased the suit properties in his capacity as a Karta for the joint family. Before claiming the character of the property as joint family property, the appellants have got duty to prove that they were joint family properties which were managed by Kalappa Gounder as a Manager.

11. The specific case of the respondents 2 and 3 is that Kalappa Gounder was working as a Manager with Bodi Zamin and he had his financial wherewithal to purchase the properties in his name. When the written registered documents like sale deeds would show that the properties were purchased in the name of a person in his personal capacity, the burden to prove otherwise would be on the shoulders of those who plead that the properties were purchased on behalf of the joint family in the name of its title holder. By virtue of Section 91 of the Indian Evidence Act, 1872, the burden of title holder of the property and any of his subsequent purchasers to prove that the properties were the self-acquired properties of the title holders would get discharged by the production of very title deeds. Curiously, the title deeds have been produced by the appellants



themselves as Exs.A1 to A3. It was not established before the trial Court that Kalappa Gounder and the 1st defendant or their ancestors were holding joint family properties or running any joint family business from which, they were deriving income. Without proving the existence of any joint family income, it cannot be claimed that income was derived from the said income. So it is right for the learned trial Judge to presume that the properties stood in the name of Kalappa Gounder were the properties purchased by him from and out of his own income.

12. For the nature of the claim made by the appellants, the character of the suit properties plays a pivotal role. If the appellants could prove that the properties were the ancestral properties of Kalappa Gounder and that there was no partition taken place during the life time of Kalappa Gounder then, in pursuance of the later amendments to the Hindu Succession Act, both the son and daughters of Kalappa Gounder would become co-parceners and the plaintiffs might also get some interest over the same. If the property is proved to be only self-acquired property of Kalappa Gounder, at the death of Kalappa Gounder, succession opens as per Section 8 of the Hindu Succession Act. The wife, son and daughters being the Clause-I legal heirs of late Kalappa Gounder, they would exclude the other heirs and inherit the properties equally among themselves. So, there is no question of ancestral interest in the suit property as against the plaintiffs.

13. The learned counsel appearing for the appellants further submitted that even though the property might be the self-acquired property of Kalappa Gounder as against the children of the son of Kalappa Gounder (1st defendant), the property should be construed as ancestral property. But the position of law is settled in this aspect as early as in the year 1987.

14. The learned counsel for the respondents invited the attention of the Court to the judgment of the Hon'ble Division Bench of the Supreme Court held in ***Yudhishter vs. Ashok Kumar*** reported in (1987) **AIR (SC) 558** to support his contention that, if a Hindu male inherits the property in accordance with Section 8 of the Act, the property so inherited by him would be his self-acquired property and it cannot be considered as ancestral property. In the said judgment, it is held as under:

"11. This question has been considered by this Court in Commissioner of Wealth Tax, Kanpur and Others Vs. Chander Sen and Others, where one of us (Sabyasachi Mukharji, J) observed that under the Hindu Law, the moment a son is born, he gets a share in father's property and become part of the coparcenery. His right accrues to him not on the death of the father or inheritance from the father but with the very fact of



his birth. Normally, therefore whenever the father gets a property from whatever source, from the grandfather or from any other source, be it separated property or not, his son should have a share in that and it will become part of the joint Hindu family of his son and grandson and other members who form joint Hindu family with him. This Court observed that this position has been affected by Section 8 of the Hindu Succession Act, 1956 and, therefore, after the Act, when the son inherited the property in the situation contemplated by Section 8, he does not take it as Kar of his own undivided family but takes it in his individual capacity. At pages 577 to 578 of the report, this Court dealt with the effect of Section 6 of the Hindu Succession Act, 1956 and the commentary made by Mulla, 15th Edn. Pages 924-926 as well as Mayne's on Hindu Law 12th Edition pages 918-919. Shri Banerji relied on the said observations of Mayne on 'Hindu Law', 12th Edn. At pages 918-919. This Court observed in the aforesaid decision that the views expressed by the Allahabad High Court, the Madras High Court, the Madhya Pradesh High Court and the Andhra Pradesh High Court appeared to be correct and was unable to accept the views of the Gujarat High Court. To the similar effect is the observation of learned author of Mayne's Hindu Law, 12th Edn. Page 919. In that view of the matter, it would be difficult to hold that property which developed on a Hindu u/s 8 of the Hindu Succession Act, 1956 would be HUF in his hand vis-a-vis his own sons. If that be the position then the property which developed upon the father of the respondent in the instant case on the demise of his grandfather could not be said to be HUF property. If that is so, then the appellants authority was right in holding that the respondent was a licensee of his father in respect of the ancestral house."

15. In the case in hand also, the wife, son and daughters of Kalappa Gounder had inherited the suit property in their capacity as Clause-I legal heirs in accordance with Section 8 of the Hindi Succession Act. The position of law has been settled even to the extent that, even in the ancestral properties, if partition had taken place and the member of the joint family had acquired its share, then the share so acquired would lose the character of the ancestral nature and that should be treated as his self-acquired property only. So, it is made clear that if anyone claims any share in the property by claiming that it is ancestral in nature, it should be established that there was an ancestral property and it remained so without any partition until the death of the respective coparcener.

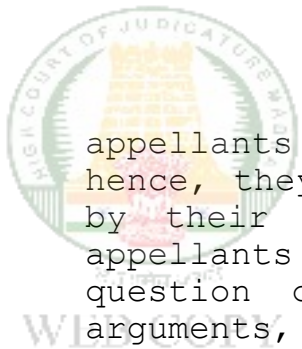


16. The fact that the mother and sisters of the 1st defendant had executed the power deed in his favour and in pursuance of the said power, he transferred the said property in favour of the 2nd defendant by virtue of a sale deed, dated 21.09.2005, was not denied. Excepting Ex.A14 which is a mortgage deed executed by Kalappa Gounder in favour of the Co-operative Housing Building Society dated 22.07.1999, the appellants did not produce any other evidence in support of their claim that the property was treated as joint family property.

17. On perusal of Ex.A14 mortgage deed, it is seen that Kalappa Gounder and the 1st defendant had executed the mortgage deed in favour of the Society. On the strength of a mortgage deed, it cannot be claimed that there was a joint family existence and that the suit property along with other properties were in joint possession and in enjoyment of Kalappa Gounder and the 1st defendant. In fact, the 1st defendant, who is the father of the plaintiffs 1, 3, 5 and 6 himself did not claim that there was a joint family, in which, he was a member and his father was a Manager. It was not claimed by the 1st defendant that he had been included in executing Ex.A14 document in his capacity as a joint family member. Just because the 1st defendant was also added while executing Ex.A14, that will not confirm him any status of the member of the joint family.

18. It is claimed by the appellants that in Ex.A7 sale deed itself, the 1st defendant had executed it for himself and on behalf of minor son and that would also show that the character of the suit property was ancestral in nature. The 1st defendant had other children apart from plaintiffs 5 and 6 for whom he has stated to be the guardian in Ex.A7. Sometimes, at the instance of purchasers by abundant caution, the name of the person who had no interest in the property would also be included just for the reason that they are member of the family. Moreover, the plaintiffs 5 and 6 did not challenge the above said sale deed within three years of their attaining majority.

19. The learned counsel for the respondents submitted that the suit itself is barred by limitation because the prayer as to declare the sale deed as null and void has been made in a suit which was filed beyond three years. But the learned counsel for the appellants submitted that for this case, the limitation contemplated under Article 109 of the Limitation Act is also contemplated and hence, the suit filed within 12 years as prescribed Article 108 of the Act. But in order to invoke Article 109 of the Act, the minor son ought to have got right to get partition in the suit property. But in the case in hand, it is proved that the suit properties were purchased in the name of Kalappa Gounder from and out of the income of his joint family. Under such circumstances, there is no question of getting any time for limitation as prescribed under Article 109 of the Limitation Act. In view of the above facts and circumstances, in view of the risk of repetition, it is reiterated that the minor



appellants 5 and 6 did not have any right in the suit property and hence, they do not have any right to challenge the alienations made by their father along with his sisters and mother. Since the appellants omitted to prove the very cause of action itself, the question of limitation will not arise. Even for the sake of arguments, the plaintiffs had the right to file the suit for declaring the sale deed as null and void and that has to be exercised within a period of three years of attaining their majority. In any context, the appellants did not prove that they got any right or interest in the suit properties and further that, they are eligible to get any share in the suit properties. The learned trial Judge is right in appreciating the evidence and dismissed the suit. In my considered view, the judgment of the trial Court does not require any interference. **Thus, the point is answered.**

In the result, this Appeal Suit is dismissed and the judgment and decree in O.S. No. 46 of 2017 on the file of the Additional District Court (Fast Track Court), Theni, dated 04.02.2019, is hereby confirmed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (CS-III)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

vji

To

1. The learned Additional District Judge (Fast Track Court),
Theni.

2. The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.AJMAL ASSOCIATES, Advocate (SR-18932[F] dated
18/04/2022)

+1 CC to M/s.N. VALLINAYAGAM, Advocate (SR-18933[F] dated
18/04/2022)

A.S. (MD) No. 78 of 2019
and

C.M.P. (MD) No. 4296 of 2019
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SJ(CO)

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