



S.A.No.518 of 2003

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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Dated : 17.04.2023

CORAM

THE HON'BLE MR.JUSTICE P.VELMURUGAN

S.A.No.518 of 2003

1.P.Murugan
2.P.Bhagavathy
3.P.Gomathi Ammal

... Appellants

-VS-

1.N.Ramalakshmi Ammal
2.P.Subramanian
3.P.Valliammal
(1st respondent in A.S.No.59/97 was set
exparte in the first appeal and hence,
he is not arrayed as respondent in this
second appeal)

(4th respondent in A.S.No.59/97 died
pending appeal and the respondents 2 & 3
are his legal heirs)

..Respondents

PRAYER: Second Appeal filed under Section 100 Code of Civil Procedure, against the Judgment and Decree made in A.S.No.59 of 1997 on the file of the I Additional Sub-Judge, Tirunelveli dated 19.04.2002 confirming the Judgment and Decree in O.S.No.958 of 1989 on the file of the Additional District Munsif, Tirunelveli dated 21.01.1994.



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For Appellants

... Mr.S.Kumar for
M/s Uma Ramanathan

For Respondents

... Mr.P.Thiagarajan for
M/s T.R.Rajaraman (for R1)

No appearance for R2 and R3

JUDGMENT

The appellants are the plaintiffs in O.S.No.958 of 1989 on the file of the Additional District Munsif, Tirunelveli. The appellants, as the plaintiffs, filed the above suit against the respondents for declaration declaring that they are indigent persons and for cancellation of the Decree and Judgment in O.S.No.219 of 1981 on the file of the District Munsif Court, Tirunelveli and for declaration declaring that the first appellant is entitled to 1/4th share in the schedule of properties and the second appellant is entitled to get marriage expenses and the maintenance of Rs.150/- each totally Rs.450/- to the appellants 1 to 3 from the first respondent, till the first appellant attained majority, the second appellant getting marriage and till the life time of the third appellant. The trial Court, after completion of pleadings and trial, dismissed the suit. Challenging the said Judgment and Decree, the appellants/plaintiffs filed the first appeal before the Principal Sub-Judge,



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Tirunelveli in A.S.No.59 of 1997 and the same was made over to the I Additional Sub-Judge, Tirunelveli for disposal. The I Additional Sub-Judge, after hearing the arguments and considering the materials, dismissed the appeal and confirmed the Judgement and Decree passed by the trial Court. As against the said Judgment and Decree, the appellants/plaintiffs have filed the present second appeal before this Court.

2. The parties are referred to as mentioned in the original suit.

3. The case of the appellants/plaintiffs is that the first plaintiff is the son of the first defendant and the second plaintiff is the daughter of the first defendant and the third plaintiff is the second wife of the first defendant. The suit property is the ancestral property. The suit property originally belonged to the first defendant. The first defendant is the Kartha of the family and he sold the property to the second defendant. The third and fourth defendants filed a suit for partition in O.S.No.219 of 1981 and the sale deed, dated 27.01.1981 made by the first defendant in favour of the second defendant is not binding on the plaintiffs in the suit in O.S.No.219 of 1981 and the defendants 3 and 4 in the present suit in



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O.S.No.958 of 1989. The suit in O.S.No.219 of 1981 was decreed in favour of the 3rd and 4th defendants that the sale deed executed by the first defendant in favour of the second defendant could not bind the 3rd and 4th defendants. Therefore, the 3rd and 4th defendants are entitled to 1/2 share in the suit property. The said suit in O.S.No.219 of 1981 was also filed against the first defendant. Since the first plaintiff was minor, aged about three years, he was represented through the first defendant. The second and third plaintiffs were not parties to that suit. All the plaintiffs are residing separately from the first defendant and hence, they are not aware of the earlier suit in O.S.No.219 of 1981. The first defendant has not properly represented for and on behalf of the first plaintiff and he failed to safeguard the interest of the first plaintiff. Therefore, when the earlier suit was decreed in favour of the 3rd and 4th defendants, the sale made by the first defendant in favour of the 2nd defendant would not bind the 3rd and 4th defendants and the same way should have done that the sale would not bind the first plaintiff herein also. Since the first defendant did not properly handle the case and also not safeguard the interest of the first plaintiff, the earlier Judgment and Decree passed in O.S.No.219 of 1981 would not bind the plaintiffs. The second and third plaintiffs were not parties to the said suit, since they were already separated from the



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first defendant and they were living separately and hence, the sale made by the first defendant is not binding them. The Judgment and Decree passed in the earlier suit in O.S.No.219 of 1981 would not bind them. The Judgment and Decree passed in O.S.No.219 of 1981 has to be set aside and the first defendant has to maintain the appellants and the charge decree should be created for maintenance and also marriage expenses of the second plaintiff. Hence, the present suit.

4. The case of the respondents is that the property is the ancestral property of the first defendant and he obtained loan from the Co-operative Urban Bank Limited, in order to discharge the family expenses and also medical expenses. After the death of his wife, in order to discharge the society loan, he sold the property to the second defendant. Hence, the sale would bind them. However, the 3rd and 4th defendants filed the suit before the Principal District Munsif Court, Tirunelveli in O.S.No.219 of 1988 for partition and also the sale made by the first defendant in favour of the second defendant would not bind them. In that suit, the Court decreed the suit and the sale made by the first defendant in favour of the second defendant would not bind. However, the sale made over the above debt discharged to the Co-operative Bank and the fourth



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respondent was minor and therefore, in the earlier suit, the Court held that the sale made by the first defendant in favour of the second defendant would not bind the 3rd and 4th defendants' interest that half share in the suit property. Therefore, even the portion of 1/2 share in respect of the suit property and the rest of the 1/2 share, in view of the sale made by the first defendant in favour of the second defendant, the second defendant is entitled to 1/2 share in the suit property. Subsequently, they filed an application in I.A.No.1730 of 1983 in O.S.No.219 of 1988 for passing of final decree. The final decree was also passed on 24.03.1994 and also the 2nd defendant had taken 1/2 share and the 3rd defendant had taken 1/2 share and they are enjoying the same since the sale made by the first defendant in favour of the second defendant in respect of 1/2 share. In that suit, the first defendant effectively represented for the first plaintiff. Further, the plaintiffs are residing with the first defendant and they have not separated and there is no evidence. The first plaintiff was effectively represented by the first defendant. Therefore, the plaintiffs were aware of the earlier suit and the final decree. Even at the time of evidence, P.W.1, 3rd plaintiff admitted that she knew the earlier suit. They ought to have impleaded themselves in the suit or in the final decree, but they have not challenged the same.



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The present suit is filed, after a lapse of 6 years. Now, the suit properties are not of the first defendant and the total possession vested with the defendants 2 to 4 and the first defendant has no right in the suit property. Hence, the charge decree cannot be passed either for maintenance or for marriage expenses of the second plaintiff. The trial Court appreciated the evidence and the pleadings and has not satisfied for the reason that the plaintiffs have not participated in the earlier suit in O.S.No.219 of 1988 and they have not satisfactorily explained that they separated from the first defendant. Hence, the Judgment and Decree granted in the earlier suit would not bind them. Therefore, the trial Court rightly dismissed the suit. Challenging the same, the plaintiffs filed the appeal before the first appellate Court. The first appellate Court also, considering the materials, dismissed the appeal and there is no question of law to be decided in this appeal and hence, the second appeal is liable to be dismissed.

5. At the time of admission, this Court, considering the facts and circumstances of the case, formulated the following substantial questions of law:-



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“1. Whether the Court below is right in holding that the decree in O.S.No.219/81 cannot be set aside against the 1st appellant inasmuch as in O.S.No. 219/1981, it has been specifically held that the alienation by the father in favour of the 1st respondent will not bind the sons, namely, the first respondent herein as his deceased brother Palanivel who were the plaintiffs 1 and 2 in O.S.No.210/81 and on the same ground, the sale is also not valid as against the 1st appellant?

2. Whether the Courts below are right in holding that charge for puberty and marriage expenses of the 2nd appellant cannot be created when in the earlier suit O.S.No.219/81 marriage expenses for the 3rd respondent was provided for and a charge was created?

3. Whether the Courts below are right in rejecting the maintenance claim of the 3rd appellant?”

6. The learned counsel for the appellants would submit that admittedly, the suit property is the ancestral property of the first defendant. The first plaintiff is the son of the first defendant through the second wife, namely, the third plaintiff and the second plaintiff is the daughter of the first defendant through the second plaintiff. The 4th and 5th defendants are sons of the first defendant through his first wife and the 5th defendant is the daughter through the first wife of the first



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defendant. The first defendant sold the property to the second defendant in the year 1981. At that time, the first and second plaintiffs were minors. Immediately, 3rd and 4th defendants filed the suit for partition and also sale made by the first defendant in favour of the second defendant would not bind them. In that suit, the trial Court accepted the contention of the plaintiffs therein/ 3rd and 4th defendants herein and passed the preliminary decree for the 1/2 share in the suit property. However, the other 1/2 share was given to the second defendant, since the sale made by the first defendant in favour of the second defendant in respect of 1/2 share of the property only would not bind them and granted partition for the third and fourth defendants herein. In that suit, the first defendant, the father of the plaintiffs has not effectively represented and safeguarded the interest of the minor. When the sale made by the first defendant would not bind the other sons born through the first wife, the same way the sale would not bind against the plaintiffs also. At the best, they could have confirmed the share of the first defendant i.e., 1/4th share. Since it is an ancestral property, the first defendant has got 1/4, the first plaintiff has got 1/4, and the defendants 3 and 4 have got each 1/4th share. When the sale deed executed by the first defendant in favour of the second defendant would not bind the 3rd and



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4th defendants, in that suit, the trial Court would have held that 1/4th share of the first plaintiff herein would not bind their sons since he was minor and he was represented by the first defendant. The first defendant would not conduct the case effectively and safeguard the interest of the first plaintiff. He would have got 1/4th share, whereas the first defendant would not effectively deal with the case also and failed to safeguard the interest of the minor son.

7. The learned counsel for the appellants/plaintiff would further submit that in the year 1980 itself, at the time of sale made by the first defendant in favour of the second defendants, all the plaintiffs were separated from the first defendant and they are living separately. Therefore, they were not aware either the sale made by the first defendant in favour of the second defendant dated 27.01.1981 or the suit in O.S.No. 219 of 1981 filed by the defendants 3 and 4. Therefore, the decree passed in that suit would not bind. Since it is an ancestral property, the first plaintiff has got 1/4th share in the suit property, the sale made by the first defendant in favour of the second defendant would bind the interest of 1/4th share of the first plaintiff and also the decree passed in the earlier suit in O.S.No.219 of 1981 would not bind the first plaintiff in respect of



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his 1/5th share. Therefore, the trial Court should have held that the decree and judgment passed in O.S.No.219 of 1981 is not valid and would not bind the plaintiffs and therefore, the decree should have been set aside and the case should have been decreed in favour of the first plaintiff.

8. The learned counsel for the appellants/plaintiffs would further submit that since the plaintiffs 1 and 2 are minors, they have got maintenance right and also the second plaintiff has got marriage expenses while getting marriage, the trial Court would have considered these things and set aside the Judgment and Decree passed in O.S.No.219 of 1988. Unfortunately, the trial Court failed to consider the fact that in the earlier suit, the trial Court held that sons of the first wife of the first defendant are entitled to the property, the same way could have granted to the first plaintiff also. In that suit, he was represented by his father and he failed to do so. Therefore, the Judgment and Decree passed by the trial Court in that suit was not valid and liable to be set aside and at the best, the decree would not bind the first plaintiff herein and the same way, the trial Court would have held that the Judgment and Decree in O.S.No.219 of 1988 in respect of 1/4th share. Unfortunately, the suit was dismissed and the appeal was filed before the lower appellate Court. The



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lower appellate Court failed to consider the settled proposition of law and in the ancestral property, when the other co-parceners were having shares, in the same way, the first plaintiff also is entitled to 1/4th share and this fact has not been considered and the first appellate Court dismissed the appeal. Therefore, both the Judgments of the trial Court and the first appellate Court are against the principles of law. Hence, the learned counsel prays that the second appeal has to be allowed and the Judgment and Decree passed by both the Courts below will have to be set aside and the suit in O.S.No.958/1989 will have to be decreed.

9. The learned counsel for the respondents/defendants would submit that the plaintiffs were fully aware of the preliminary and final decree in O.S.No.219 of 1981. The plaintiffs are not entitled for cancellation of the decree in O.S.No.219 of 1981. The second plaintiff is the daughter of the first defendant and she is not entitled to maintenance or marriage expenses. The 'Oththi' in favour of the second defendant was true and valid one. The sale of 1/2 share of the first defendant in favour of the second defendant is true and valid. The first defendant was only coolie and he was taking treatment for his first wife and he incurred debts. Since he did not have over financial position, he could not



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maintain the family with his meagre income. Earlier, the first defendant mortgaged the suit property in Nellai Cooperative Urban Limited on 26.06.1971 and got loan of Rs.1000/- for meeting medical expenses of his wife and also family expenses. The first defendant could not repay such interest with the bank for the mortgaged amount as he had to. The bank threatened to take coercive steps for collection of the mortgaged amount due with interest accrued thereon. The first defendant was forcing to raise the amount by causing debts in respect of the property in favour of the second defendant. The first defendant incurred the debts to the death ceremony of his first wife and therefore, he got loan of Rs. 1500/- from the second defendant for discharging of loan and also for family expenses on 10.11.1983. The amount was utilized for making the improvement of the building and also for discharge of debts incurred on the first defendant for the treatment of his first wife and other incidental expenses. Subsequently, the first defendant sold 1/2 share in the property in favour of the second defendant for valuable consideration of Rs.5,000/- as Kartha of the family himself, legal necessity for him and guardian of the minor 4th defendant and the first plaintiff, it would also meet all the family expenses prior to the debts. The first defendant sold the property to the second defendant. Hence, there is no merit in the



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appeal. The dispute is that the plaintiffs knew about the said final decree proceedings and they were fully aware of the fact that the first defendant, as Kartha of the family and in order to discharge the debts and meet out the family expense, sold the property. Therefore, there is no ground to set aside the decree in O.S.No.219 of 1981, since during the pendency of the suit, no steps have been taken by the plaintiffs either to claim partition or to set aside the sale in favour of the second defendant. Therefore, no ground has been satisfied by oral and documentary evidence that the sale made in favour of the second defendant would not bind the plaintiffs and there is no reason to set aside the Judgment and Decree in O.S.No.219 of 1981. Since there is no merit in the appeal, it has to be set aside.

10. Heard the learned counsel appearing on either side and perused the materials available on record.

11. The specific case of the plaintiffs is that the suit property is the ancestral property of the first defendant and he sold the property to the second defendant. The 3rd and 4th defendants challenged the said sale deed and filed a suit for partition in O.S.No.219 of 1981. The said suit



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was decreed and in that suit, the sale made by the first defendant in favour of the second defendant would not bind the share of the 3rd and 4th defendants. The first plaintiff is also to be footing on the same place. Therefore, he is also entitled to 1/4th share and the sale made by the first defendant in favour of the second defendant would not bind the first plaintiff. Hence, they filed the suit for cancellation of the decree in O.S.No.219 of 1981 on the ground that 1/4th share to the first plaintiff and the marriage expenses to the second plaintiff and maintenance of all the plaintiffs. The trial Court failed to appreciate the same and dismissed the present suit. On the date of sale of the property, both the plaintiffs and the first defendant were living together and the first defendant was only taking care of the plaintiffs. The debts incurred by the first defendant from the society were only meagre amounts and the property was sold for more than debts and therefore, the 1st and 2nd defendants did not prove the earlier suit that the entire sale consideration was for family purpose of meeting loan and spending medical expenses to her mother also. Whereas the discharge receipts were marked only to make out entire expenses. The trial Court in O.S.No.219 of 1981 held that the first defendant sold the property over and above the debts. Therefore, 50% of the sale could not bind him and granted decree.



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12. Now, this Court has to see whether the Judgment and Decree passed in O.S.No.219 of 1981 can be cancelled and not binding the plaintiffs.

13. As already stated, the suit property is the ancestral property of the first defendant and the first defendant, as Kartha of the family, sold the property for over and above debts and family expenses. At that time of sale, the defendants 3 to 5 were living separately and the plaintiffs and the first defendant were living separately. Though the first plaintiff has stated that they have separated in 1988 and they were not aware of the suit in O.S.No.219 of 1981, the oral and documentary evidence clearly proved that the plaintiffs have not established that they separated from the family from 1980 and that they were not aware of the suit. Further, P.W1, the first plaintiff admitted that they aware of the earlier suit proceedings. However, they did not take any steps to implead them as parties in the said suit or otherwise, at least during the final decree, they would have approached the Court to implead them as parties.



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14. Further, the plaintiffs have not proved that the first plaintiff left the matrimonial home along with children due to the negligence on the part of the first defendant. Hence, the first plaintiff has not pleaded and proved that the first defendant incurred debts for the immoral purpose or illegal purpose and it is only for the family purpose. However, at the time of sale of the property, the defendants 3 and 4 were not with the first defendant and that the debt for only about Rs.2,500/- was discharged and as far as knowledge is concerned, at that time, the appellants/plaintiffs and the first defendant were in the same family and the first defendant spent the amount only to the plaintiffs. Therefore, in the absence that the first plaintiff sold the property to incur immoral debts, the sale made by the Kartha of the family cannot be challenged. Further, when the plaintiffs knew the earlier proceedings, the first plaintiff did not participate either for her or even for her children for maintenance and got charge decree. The said suit was not challenged by the plaintiffs and after passing the preliminary decree and final decree, the parties were separated and they have not taken possession and the second defendant has taken 1/2 share as per the decree in O.S.No.218 of 1988 and the defendants 3 and 4 had taken 1/2 share in the properties. Pending appeal, the fourth defendant died. Therefore, under these



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circumstances, there is no ground made out to cancel the decree passed in

O.S.No.219 of 1981.

15. Further, the suit property is not in possession of the first defendant and at the time of filing the present suit, the first defendant was not in possession and title over the suit property, therefore, the plaintiffs are not entitled to any charge decree either for maintenance or for the marriage expenses as against the first defendant. This Court does not find any merit in the appeal. Therefore, considering the facts and circumstances of the case, all the substantial questions of law are answered against the appellants/plaintiffs and in favour of the respondents/defendants.

16. In the result, this Second Appeal fails and the same is **dismissed**. No costs.

17.04.2023

NCC : Yes/No
Index : Yes/No
Internet: Yes/No
skn



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To:

- 1.The I Additional Sub-Judge, Tirunelveli.
- 2.The Additional District Munsif, Tirunelveli.
- 3.The Record Keeper,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai.



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