



S.A.No.592 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 19.01.2024

Pronounced on: 31.01.2024

CORAM :

THE HONOURABLE MR. JUSTICE P.B.BALAJI

S.A.No.592 of 2018

Tmt.Kokila

...Appellant

Vs.

1.Gunasekaran
2.Murugan
3.Chandran
4.Rajendiran
5.Velu
6.Sharad Jalan

...Respondents

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure, against the Judgment and Decree of the learned Subordinate Judge, Arakkonam dated 19.09.2017 made in A.S. No.17 of 2016 confirming the Judgment and decree of the learned District Munsif, Arakkonam dated 16.02.2016 made in O.S. No.177 of 2007.

For Appellant : Mr.G.Jeremiah



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For Respondents : No Appearance

JUDGMENT

The unsuccessful plaintiff in a suit for partition and separate possession is the appellant before me.

2. The appellant had sought for a preliminary decree of 1/5th share in her favour. The suit was resisted by the 3rd and 6th defendants. The 3rd defendant supported the plaintiff's case and stated that the 3rd defendant never disputed the plaintiff's legitimate share and that he has no objection to divide the suit property into five equal shares. However, the 6th defendant, the purchaser from defendants 4 and 5, who in turn had purchased the property from the 3rd defendant, one of the brothers of the plaintiff stated that the property was sold for family necessity by the Karta and therefore the sale by the 3rd defendant cannot be questioned and consequently the purchase by the 6th defendant was claimed to be bonafide and the suit was sought to be dismissed.

3. The Trial Court dismissed the suit and the appeal preferred by the appellant in A.S.No.17 of 2016 was also dismissed. The Second Appeal was



admitted on 20.11.2018, on the following substantial questions of law:

“(i) Whether the Courts below are correct in law in holding that Ex.B1 having been executed by the Kartha of the Hindu Joint Family, was binding on the minors?

(ii) Was the Lower Appellate Court correct in law in upholding the validity of Ex.B1 sale, after having rendered a finding that the same was not for the benefit of the minor sharers?

(iii) Whether the Lower Appellate Court was correct in law in having dismissed the appeal on the ground that the alienations by the Kartha had not been specifically challenged, when the suit relief was for partition?

(iv) Whether the judgment and decree of the Lower Appellate Court below is legal sustainable, in the light of judgment of the Supreme Court reported in 2010(5) CTC 719(SC) = 2010 (13) SCC 530 (B.V.Nagesh and another Vs. H.V. Sreenivasa Murthy) and

(v) Whether the Lower Appellate court in having failed to comply with the mandate of Order 41 Rule 31 C.P.C., while deciding, is legally sustainable?”

4. Despite notices sent in the Second Appeal, none of the respondents have chosen to appear and contest the appeal. I have heard Mr.G.Jeremiah, learned counsel for the appellant.



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5. Learned counsel for the appellant would state that the plaintiff is the sister of the defendants 1 to 3 and the father of the plaintiff and defendants 1 to 3, along with the 1st defendant who attained majority, alienated the suit property in favour of defendants 4 and 5 vide Ex.B1 dated 28.12.1992. It is from the defendants 4 and 5 that Defendant 6 chose to purchase the suit property vide Ex.B2 on 19.04.2007. The sale in favour of defendants 4 and 5 was on behalf of the plaintiff as well as defendants 2 and 3 who were both minors at that relevant point of time. According to the learned counsel for the appellant the plaintiff has clearly pleaded that there was no family necessity and therefore the alienation on the ground that it was family necessity was not sustainable and the defendants 4 and 5 and from them the purchaser 6th defendant cannot claim to be bonafide purchasers.

6. Learned counsel for the appellant would also state that the Trial Court had dismissed the suit finding that the suit for partition



simpliciter without a prayer for declaring the sale deed was not binding on the plaintiff, was not maintainable and also on the ground of limitation, finding that the suit had not been filed within three years from the date of plaintiff attaining the majority. However, the First Appellate Court has reversed the finding of the Trial Court only on the ground of limitation and confirmed the findings of the Trial Court with regard to the maintainability of the suit.

7. Learned counsel for the appellant would take me through Secs.6, 8 and 12 of the Hindu Minority and Guardianship Act, 1956. He would also place reliance on the decisions of the Hon'ble Supreme Court in *Mrs.Umadevi Nambiar Vs. Thamarasseri Roman Catholic Diocese rep by its Procurator Devssia's Son Rev.Father Jospeh Kappil* reported in *2022 LiveLaw (SC) 338* and judgment of Hon'ble Supreme Court in *Gangadharan Vs. Janardhana Mallan & Ors*, reported in *AIR 1996 SC 2127*. Learned counsel for the appellant would also state that the alleged encumbrance was only a mortgage



which was created just one year prior to sale and further the same was also not produced before the Trial Court by the defendants and therefore, much sanctity cannot be attached to such a mortgage, much less justify the Courts holding that the property was sold for family necessity.

8. In ***Gangadharan***'s case, the Hon'ble Supreme Court, placing reliance on ***Rani and anr Vs. Mrs.Shanti Bala Dev Nath & Ors***, reported in ***1970 (3) SCC 722***, held that the onus of proving legal necessity would be discharged by the alienee by proof of actual necessity or by proof that he made proper and bonafide enquiries about the existence of the necessities. The Hon'ble Supreme Court in ***Rani***'s case further held that mere recitals in a deed of legal necessity would not by itself prove legal necessity. The recitals could be used to corroborate, by leading other evidence in support of existence of legal necessity. Here, admittedly in the facts of the present case, I do not find any evidence forthcoming from the side of the defendants to



establish that the property has been mortgaged for the benefit of the family, especially in the interest of the minors and that the sale was also necessary only in order to clear the mortgage and that it was also for the benefit of the family, besides also being in the interest of the minor and for the necessity of the family.

9. In *UmaDevi Nambiar*'s case, the Hon'ble Supreme Court has held that it is not necessary for a plaintiff to always seek cancellation of alienations in a suit for partition.

10. The ratio laid down by the Hon'ble Supreme Court in the above decisions would squarely apply to the facts of the present case. Admittedly, the plaintiff who was a minor and had an interest in the suit property. Her share, along with other co-owners had been alienated by her father, along with one of her brothers. It is for the purchasers/alienees to have established that the sale is for family necessity. There is absolutely no shred of evidence let in by the



defendants in this regard. Further, the Courts below have non-suited the plaintiff on the ground that she has not challenged the sale deed executed by her father and brother in favour of the defendants 4 and 5, who in turn sold the suit property to the 6th defendant.

11. Admittedly, this is a suit for partition. When the defendants are unable to establish the fact that the property was sold only for family necessity and that the sale would bind the plaintiff, then a minor, it cannot be said that the plaintiff has to necessarily challenge the sale deed conveying her interest also. Applying the ratio laid down by the Hon'ble Supreme Court in *Umadevi Nambiar*'s case, the shares in a partition suit can never be constant in the event of alienations or in the event of death of any of the parties to the suit. The shares of the parties to the lis keeps changing and therefore, as held by the Hon'ble Supreme Court, equities can be worked out during the stage of final decree proceedings and merely because the alienation was not challenged, the suit for partition cannot be dismissed. Here, excepting



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the plaintiff, none of the other co-owners viz., her brothers have chosen to challenge the sale in favour of the defendants 4 and 5 who in turn conveyed the property to the 6th defendant. Thus, the plaintiff 1/5th share is to be declared and it is open to the defendants, especially the 6th defendant who claims the share of the other defendants as well to work out equities at the time of the actual division of the suit property by metes and bounds, in the final decree application.

12. In view of the above, the substantial questions of law are answered in favour of the appellants. The judgment and decree of both the Courts are set aside and a preliminary decree is passed declaring the plaintiff share of 1/5th in the suit property. There shall be no order as to costs.

31.01.2024

Index : Yes/No

Internet : Yes/No

kpr

To

1. The Subordinate Judge, Arakkonam.

2. The District Munsif, Arakkonam.



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P.B.BALAJI, J,
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Pre-delivery Judgment in

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