



WEB COPY



S.A.(MD).No.692 of 2023

THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : **26.03.2024**

PRONOUNCED ON : 17.04.2024

CORAM:

THE HONOURABLE **MRS.JUSTICE S.SRIMATHY**

S.A.(MD).No.692 of 2023

and

C.M.P.(MD)No.16992 of 2023

1.S.Ashok

2.S.Raja

... Appellants

/Vs./

1.Nirubha Sundarrajan

2.Seenivasan Chettiar

3.S.Sumathy

4.S.Seenivasa Babu

...Respondents

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code, against the Judgement and Decree dated 25.04.2022 in A.S.No.6 of 2020 on the file of the Sessions Judge, Fast Track Mahila Court, Sivagangai, reversing the Judgment and Decree dated 18.12.2019 passed in O.S.No.49 of 2019 on the file of the Learned Sub Court, Manamadurai.

For Appellants : Mr.V.Malaiyendran

For R1 : Mr.G.Aravinthan

For R2 to R4 : Mr.P.Banu Prasath



S.A.(MD).No.692 of 2023

WEB COPY

JUDGMENT

The plaintiffs are the appellants herein and the defendants are the respondents herein. For the sake of convenience, the parties are referred as plaintiffs and defendants as per the ranking in the suit.

2. The plaintiffs namely S.Ashok and S.Raja had filed the suit for partition claiming 1/5th share each and to declare the alleged sale deed dated 14.12.2011, in Document Registration No.5875/2011 and 5876/2011 as void and permanent injunction restraining the 1st defendant from disturbing the plaintiffs' peaceful possession and enjoyment of the suit property. The Trial Court after appreciating the evidence and the deposition of the parties had allowed the suit. Aggrieved over the same, the 1st defendant had preferred first appeal and the First Appellate Court after re-appreciating the evidence and the deposition had allowed the appeal. Aggrieved over the same, the plaintiffs had preferred the present second appeal raising various substantial questions of law.

3. The brief facts are that the 2nd defendant is the father of two plaintiffs and 3rd and 4th defendants. The 1st defendant is the purchaser of the property.



S.A.(MD).No.692 of 2023

Originally the schedule property belongs to the plaintiffs' grandfather namely to Duraiswami Chettiar. On 22.02.1964, the said Duraiswami Chettiar and his three sons namely Shanmugam Chettiar, Thaandavam Chettiar and Srinivasan Chettiar (2nd defendant) had executed registered partition deed in Document No.220/1964 in Sub-Registrar Office, Manamadurai. In the said partition, the 2nd defendant was allotted with the suit mentioned properties along with some five other properties. In short, the second defendant was allotted six properties in the said partition deed. Ever since from the date of partition, the plaintiffs are in possession and enjoyment of the suit property along with the defendants 2 to 4. Since the suit properties are ancestral property, the plaintiffs and the defendants 2 to 4 have 1/5th share each in the suit property. Due to family circumstances, the plaintiffs and 3rd and 4th defendants left their native place. However, the suit properties are under the joint possession and each plaintiffs have 1/5th share in the suit property. Since the 2nd defendant is residing adjacent to the suit property, the plaintiffs were under the *bona fide* impression that the 2nd defendant would look after the suit property. While that being so, the 1st defendant made the 2nd defendant to execute registered sale deeds in Document Nos.5875/2011, 5876/2011 in Sub-Registrar Office, Madurai dated 14.12.2011 and sold the suit property to the 1st defendant including



the plaintiffs' share. The 2nd defendant was never ever authorised to execute the sale deed. Hence, on 09.07.2013 the 2nd plaintiff issued a legal notice to the 1st defendant and the 1st defendant had replied on 29.07.2013 with the false and baseless allegations. But the 2nd defendant did not reply to the said notice. On 01.08.2013 the plaintiffs had applied for true copy of the registered sale, which reveals that the 1st defendant had purchased the suit property, including the shares of the plaintiffs without the consent or signature of the plaintiffs and the 3rd and 4th defendants. The 2nd defendant alone executed the two sale deeds, which are illegal. Hence the said sale deeds executed by the 2nd defendant in favour of the 1st defendant does not affect the rights of the plaintiffs. On 19.08.2013, the 1st defendant came and tried to take illegal possession of the suit property but the same was intervened by the neighbours. Hence, the plaintiffs preferred police complaint, but the police refused to take the complaint, since it is civil matter. Hence, the plaintiffs had filed the present suit.

4. The 1st defendant had filed written statement denying all the allegations as false and stated that the plaintiffs are making false claims, further the plaintiffs and the defendants 2 to 4 have instituted the collusive suit, which was filed with



S.A.(MD).No.692 of 2023

the sole intention to defraud the 1st defendant, to gain an unfair advantage to grab the property. The suit notice was issued on 09.07.2013 and the same was suitably replied by the 1st defendant. As admitted in the plaint there are two sale deeds executed the same day i.e., 14.12.2011 and it would reveal that the sale consideration in Document No.5875 of 2011 is Rs.3,85,000/- and in Document No.5876 of 2011 is Rs.2,28,750/-. Totally, the sale consideration comes to Rs. 6,13,750/-. However, the total value of the suit properties as shown in the plaint is Rs.4,78,750/-, hence, the Court fee that is paid is erroneous. Further, the 1st defendant was in possession of the property from 10.11.1997 and the plaintiffs had atrociously sought for permanent injunction instead of recovery of possession and hence, the suit is liable to be dismissed. Moreover, along with the suit property, there are other five properties available for partition which is evident from the partition deed and in such circumstances, non-joinder of other properties is fatal to the case and the suit for partial partition is liable to be dismissed. Hence, the plaintiffs may be called upon to disclose and furnish the particulars and details of properties allotted in the partition deed dated 22.02.1964. Further, the plaintiffs may be called upon to divulge and admit about the family arrangement entered into between the plaintiffs and the defendants 2 to 4, which would clearly reveal



S.A.(MD).No.692 of 2023

that the suit property was allotted to 2nd defendant in the family arrangement. The plaintiffs and the defendants 2 to 4 along with plaintiffs' mother namely Seethalakshmi are residing in Old Door No.55, Mariamman Koil Street, Manamadurai. The 1st defendant is residing for more than 35 years in Manamadurai and was residing in Old Door No.54-B, Mariamman Koil Street, Manamadurai. The suit property is situated very near to the houses of the 1st and 2nd defendants. Moreover, the 1st plaintiff and the 4th fourth defendant all along were living with 2nd defendant and only recently they are occasionally staying in outstations. But admittedly the 2nd plaintiff had been all along living with the second defendant and permanently residing along with his father and mother in the Old Door No.55, Mariamman Koil Street, Manamadurai. Hence, the plaintiffs and the defendants 2 to 4 are fully aware of each other and everyone are aware of the state of the suit properties and other properties. Only in the above cordial relationship the first defendant's husband and the second defendant had negotiations in the presence of the family members of the second defendant and sale consideration was fixed at Rs.2,35,000/- and agreement of sale dated 10.11.1997 was entered into and thereafter, the possession of the suit property was handed over to the first defendant. In pursuance of the sale agreement, the second



S.A.(MD).No.692 of 2023

defendant received the balance sale consideration of Rs.1,15,000/- on 19.03.1998.

The fact of agreement of sale, the receipt of sale consideration, the execution of sale receipt, the execution of sale deeds and the subsequent payments made by the first defendant are known to the plaintiffs, the defendant 3 to 4 and their mother Seethalakshmi. Practically for all purposes the title passed on to the first defendant and the first defendant had become absolute owner in respect of the suit property and had been in possession of the property from 10.11.1997 with absolute right. However, the formal execution and registration of the sale deed was being delayed by the second respondent under false pretext. The second defendant happened to be the neighbour and further the second defendant and his family members were having cordial terms all these years apart from that, the second defendant have been giving assurance to the first defendant's husband. Hence, the first defendant and her husband had utmost confidence and faith upon the second defendant and believed them to the core. Further, the sale agreement and the sale receipts were executed in the residence of the second defendant. As such the execution and registration of sale deeds have been delayed for past several years. Thereafter, by the intervention of the elderly people known to both the 1st defendant's husband and the second defendant and after negotiations, the



S.A.(MD).No.692 of 2023

first defendant had agreed to pay further amount for the increase in the value of the land. The second defendant agreed and came forward to execute the sale deed after receiving further amount as mentioned in the sale deed dated 14.12.2011. In fact, the said Seethalakshmi, wife of second defendant is one of the Attestors of the sale deed. One Mr.Natarajan well known and leading business man at Manamadurai, who hail from a traditional and respectable family at Madurai also stood as Attestor of the sale deeds. The wife of the second defendant came to the Registrar Office and attested as “identifying witness” before the Sub Registrar.

5. Hence, the plaintiffs and defendants 2 to 4 are estopped from questioning the validity and sanctity of the registered sale deeds. The first defendant is paying property tax from 1997 onwards to the suit property as well as paying electricity charges to the property and he had been exercising rights of absolute ownership and also is in exclusive peaceful position and enjoyment of the property to the knowledge of everyone. Moreover, in the sale deed the second defendant has accepted that he had received the amount towards his family expenses and it is not open to the plaintiffs and the defendants 2 to 4 to question the same and they are estopped from questioning the same. The second defendant had received the



S.A.(MD).No.692 of 2023

amount for his family expenses and the plaintiffs, the defendants 2 to 4 and the plaintiffs' mother are benefited out of the amounts received on 10.11.1997, 19.03.1998 and 14.12.2011. When the sale deals were executed and registered, the sale deed is binding on all the parties. The plaintiffs and the defendants 2 to 4 are permanently residing in the said place all these years and the third defendant who got married would frequently visit the parent's place. Therefore, they cannot deny that they have no knowledge about the sale. Further the allegation that the first defendant made the second defendant to execute the sale deed is an atrocious, false and mischievous statement by the plaintiffs. The second defendant is the absolute owner of the properties and is entitled to deal with the property and he has no necessity to get authorisation from anybody much less from the plaintiffs as well as the 3rd and 4th defendants. Further, the allegations that the first defendant came and tried to take illegal possession of the suit property, the neighbours intervened and the plaintiffs were threatened with the dire consequences are all false and invented by the plaintiffs for the purpose of the suit. As early as 10.11.1997, the second defendant had handed over the possession of the property to the first defendant and the first defendant had put up construction in the suit property after purchase of the suit property. All these



S.A.(MD).No.692 of 2023

years, first defendant is in exclusive possession of the suit properties. Neither the plaintiffs nor the defendants 2 to 4 were in possession of the property from 10.11.1997 onwards. The plaintiffs and the defendants 2 to 4 are permanently residing at Door No.55 (New No. 87) Mariamman Koil Street Manamadurai. Hence, the address given in the legal notice as well as suit is false and is stated for the purpose of the suit. For all these reasons, the first defendant prayed to dismiss the suit.

6. The Trial Court after perusing the evidence and the deposition had allowed the suit. Aggrieved, over the first defendant had preferred the first appeal and the same was allowed. Aggrieved over the same, the plaintiffs had preferred the present Second appeal against the reversal finding.

7. The appellants / plaintiffs had raised the following substantial questions of law:

“i) Whether the Learned First Appellate Court has erroneously placed the onus of proof on the plaintiffs relating to the validity of Exs.A1 & A2, the sale deeds without even adverting that the 1st defendant being the purchaser under Exs.A1 & A2, the entire onus is on her to substantiate that the property sold under Exs.A1 & A2 was for the benefit of the family?”



WEB COPY

ii) Has not the Learned First Appellate Court committed a serious error in law in reversing the well-considered judgment and decree of the Learned Trial Judge on mere surmises and conjectures relating to the nature and character of the property as well as the right of the 2nd defendant to alienate the property in favour of the 1st defendant?

iii) Whether the Learned First Appellate Court has erred in law in not considering the very recitals of Ex. B1 which itself would suffice to hold the plea of the 1st defendant that the suit schedule property is the separate property of the 2nd defendant cannot be sustained?

iv) Whether the findings of the Learned First Appellate Court is vitiated in law in holding that the court fee paid is not acceptable one and the suit has been undervalued on complete misconception of facts and law, more specifically the Learned 1st Appellate Judge has failed to advert to the scope and ambit of Section 37 of the Court Fees Act in a right perspective?”

Based on the submission of the first defendant / first respondent herein, the following additional substantial questions of law are formulated:

“v) Whether the suit is bad for partial partition?

vi) Whether the suit is maintainable when there is no pleading by the plaintiffs that when there is no legal necessity to sell the property, the sale is bad?”



S.A.(MD).No.692 of 2023

WEB COPY

8. Heard Mr.Malaiyendran, the Learned Counsel appearing for the appellants / plaintiffs, Mr.G.Aravinthan, the Learned Counsel appearing for the first respondent / first defendant and Mr.P.Banu Prasath, the Learned Counsel appearing for the respondents 2 to 4 / defendants 2 to 4 and perused the evidence on records.

9. The substantial question of law in (vi) would affect the very basis of the suit, hence, the same is taken up for discussion primarily. The said substantial question of law is that the suit is not maintainable since the plaintiffs have not pleaded in the suit that the suit property was sold without any legal necessity.

10. It is seen that the plaintiffs had not pleaded in the plaint that the suit is sold without any legal necessity. In fact, the plaintiffs had stated in the plaint that the first defendant / purchaser had made the second defendant / father to execute the sale deed. Except for this sentence, there is no pleading that the property is sold without any legal necessity. Without pleading, the relief under legal necessity cannot be granted was the dictum laid down by the Hon'ble Supreme Court in Civil Appeal No.300 of 1966 vide Judgment dated 05.02.1971 in the case



of **Pandurang Mahadeo Kavade and others Vs. Annaji Balwant Bokil and others** reported in **AIR 1971 SC 2228**, wherein it is held as under:

“...7. ...The Learned Judge held that as the defendants had not raised any plea that Es.78 was not executed for legal necessity and as such not binding on them, the plaintiff was justified in not adducing any evidence to prove that the said document was executed for legal necessity. The Learned Judge held that Ex.78 was binding on the appellants. ...

14. The second contention of the learned Counsel for the appellants does not require any serious consideration. It is no doubt true that an alienee from a karta of the joint family will have to establish that the transaction in his favour is for legal necessity and as such binding on the minor member of the family. But in this case, both the trial Court as well as the High Court have concurrently held that the appellants did not plead that Ex. 78 is not binding on them on the ground that it has not been executed by their father Mahadev for legal necessity. It has been found both by the trial Court as well as the High Court that in the absence of such a plea it was unnecessary for the plaintiff to have adduced evidence on this aspect.”

15. Mr. Sarjoo Prasad pointed out that the plaintiff himself has specifically referred in the plaint to the finding given in Civil Suit No. 80 of 1941 that Ex. 78 has not been executed for legal necessity and as such was not binding on the appellants. In view of this specific statement, the Counsel urged, it was the duty of the plaintiff to have adduced evidence to prove



*that Ex. 78 had been executed by Mahadev for purposes binding on his sons, the appellants. We are not inclined to accept this contention of the learned Counsel. The recitals relied on by the appellant have been made with reference to the plaintiff's plea that the decision in Civil Suit No. 80 of 1941 is not binding on him and that the appellants cannot rely on the same. **In answer to this plea it is significant to note that the appellants did not raise any contention that Ex. 78 is not valid and binding on them as it has not been executed for legal necessity.** On the other hand, their plea was that the decision in Civil Suit No. 80 of 1941 and the finding recorded therein operate as res-judicata. Apart from these circumstances we also find that no specific issue has been framed on this point. On the other hand, issue No. 3 to the effect :*

Do defendants prove that the sale-deed, dated 9th January, 1926, is not binding upon them?

clearly cast the burden on the appellants. They never asked for recasting the issues and they went to trial on the above issue. Here again, both the trial Court and the High Court have recorded a finding that the sale deed is binding on the appellants. In view of these circumstances the finding of the trial Court as well as of the High Court that it was unnecessary for the plaintiff to lead any evidence on this aspect is correct. In fact we find from the judgment of the High Court that a request was made by the appellants to frame an issue on the question of legal necessity and remit the case to the trial Court. But this request was in our view rightly disallowed. Therefore, the second contention has to be rejected.”



WEB COPY

11. The aforesaid judgment was relied on by the Learned Single Judge of High Court of Andhra Pradesh in ***Voleti Eswara Rao Vs. V.T.Sharat Chandra Thotraj*** in Appeal Suit No.1807 of 1993 vide judgment dated 25.02.2014 reported in ***AIR 2014 AP 101*** and it is held as under:

“23. The Pandurang Mahadeo Kavade (dead) by his legal representative and others Vs. Annaji Balwant Bokil and others reported in Manu/Sc/0581/1971 : AIR 1971 SC 2228 the Supreme Court held that although an alienee from the a Kartha of a Joint Family will have to establish that the transaction in his favour is for legal necessity and, as such, binding on the minor members of a family, unless there is a pleading about lack of legal necessity and an issue framed in that regard by the trial court, it was unnecessary for the alienee to lead any evidence to prove that the transaction in question was in fact supported by legal necessity. It held: (the paragraph of 14 and 15 of the judgment rendered in Pandurang Mahadeo Kavade’s case was extracted)

24. This proposition of law is not disputed by counsel for 1st respondent. The counsel for 1st respondent has also not placed on record any judgment taking a contrary view.

25. Therefore, in view of the above decision of the Supreme Court, I am of the opinion that in the absence of any specific pleading by plaintiff as to absence of legal necessity for sale of lot II of plaint 'C' Schedule property



under Ex. B. 7 and in the absence of an issue framed as to existence of legal necessity by the trial court in that regard, it was not necessary for D. 23 to lead any evidence as to existence of legal necessity for the sale of this item of property to her. The court below without noticing the above decision of the Supreme Court and lack of proper pleading by plaintiff and absence of issue on the aspect of legal necessity erred in holding that D. 23 failed to prove the existence of legal necessity for Ex. B. 7 transaction.”

As stated supra, in the present case the plaintiffs had not raised any pleading that the second defendant / father had sold the suit property without any legal necessity. In such circumstances, as per the judgment stated supra, the first respondent is not obligated to let in evidence that the suit property is sold based on the legal necessity. Since there is no pleading, both the Courts below had not framed the issue whether the suit was sold for legal necessity? Consequently, as held in ***Voleti Eswara Rao's case*** the first defendant / purchaser is not bound to let in evidence that the suit property was sold for legal necessity. Therefore, the substantial question of law raised in (vi) is answered against the plaintiffs.

12. The substantial question of law in (i) is that the onus to prove that the property is sold for the legal necessity of the family is on the purchaser of the joint family property. The plaintiffs are aggrieved, since the First Appellate Court had



fixed the onus on the plaintiffs to prove that there was legal necessity which is against the settled law. In Hindu Law, the Hindu father has special right to sell the property if there is necessity to pay any debt or for any legal purposes. The only condition is that the debt should not be incurred for immoral or illegal purposes. The substantial question of law that is raised is who has to prove that the property was sold only for the legal necessity. The issue of onus was dealt with by several Courts, High Courts and also the Hon'ble Supreme Court. The Learned Counsel appearing for the plaintiffs / appellants herein had relied on one such case rendered in Civil Appeal No.3264 of 2011 vide judgment dated 20.08.2018 in the case of ***Kehar Singh and others Vs. Nachittar Kaur and others*** reported in ***Manu/SC/ 0874/2018*** wherein it is held as under:

*“27. In our considered opinion, a case of legal necessity for sale of ancestral property by the Karta (Pritam Singh) was therefore made out on facts. In other words, the **defendants were able to discharge the burden that lay on them (defendants) to prove the existence of legal necessity for sale of suit land to defendant Nos.2 and 3.** The defendants thus satisfied the test laid down in Hindu Law as explained by Mulla in Article 254(2) read with Article 241(a) and (g) quoted above.”*

From the aforesaid judgment, the issue is settled that the onus is on the purchaser of the property to prove that the family had debts and it is for legal necessity. At



least, the purchaser ought to have ascertained that there is legal necessity for the Karta to sell the property. But this onus would be placed on the purchaser, if there is pleading by the plaintiffs as held in ***Pandurang Mahadeo Kavade's case***. In the present case, the onus is on the first defendant. But as held in ***Pandurang Mahadeo Kavade's case***, the plaintiffs have not pleaded legal necessity, hence, the onus could not be placed on the first defendant.

13. When there is no pleading, onus cannot be placed on the first defendant. In spite of the same, the first defendant had proved the “legal necessity” which would be evident from the discussion below.

14. In Ex.A1 and Ex.A2 sale deeds, it has been stated that the property is sold for the purpose of “family expenses”. The Trial Court had held that except for this sentence there is no other evidence to prove that the property was sold for family expenses. But the Learned Counsel appearing for the first defendant in the written arguments submitted that the PW3, who is the 2nd plaintiff in the suit, had admitted in the cross examination that his father had informed him that for the debts incurred by him, the first defendant had sought to execute sale deed and the



S.A.(MD).No.692 of 2023

relevant portion is extracted hereunder:

“வா.சா.ஆ.3 வழக்கறிஞர் அறிவிப்பு அனுப்பப்பட்ட விபரத்தை எனது பெற்றோர்களிடம் நாங்கள் கூறவில்லை. வா.சா.ஆ.1 மற்றும் வா.சா.ஆ.2 கிரையப்பத்திரங்கள் பற்றி வா.சா.ஆ.3 வழக்கறிஞர் அறிவிப்பு அனுப்புவதற்கு ஒரு மாதத்திற்கு முன்புதான் எனக்கு தெரியும். 1-ம் பிரதிவாதியின் மனைவி இவ்வழக்கு சொத்தை பயன்படுத்துவதை பார்த்து எனது தகப்பனாரிடம் கேட்டபொழுது தான் அக்கிரையப் பத்திரங்கள் பற்றி எங்களுக்கு தெரியும். தான் வாங்கிய கடனுக்காக மேற்கண்ட கிரையப்பத்திரங்களை தன்னிடம் இருந்து எழுதி வாங்கிக்கொண்டதாக எனது தகப்பனார் கூறினார்.”

Further, the PW3 in the cross examination had admitted that his father, the second defendant herein had obtained loan in Manamadurai Urban Cooperative Bank and the same was settled in the year 31.03.2008 for which the Ex.A7 is marked as evidence. When there is an admission by the 2nd plaintiff in the cross examination that the second defendant father had informed the 2nd plaintiff about the debts incurred by him and for such debt the suit property was sold, then it ought to be taken that the legal necessity is proved by the first defendant / purchaser. When there is no pleading that there is no legal necessity and there is no contra evidence from the plaintiffs to prove that there is no legal necessity, then it has to be taken that the legal necessity is proved. Further, it is substantiated by the Ex.A7 that the family had debt in the said Cooperative Bank. Therefore, this Court is of the



considered opinion that based on the admission of the 2nd plaintiff, it is evident that the family had debts and there was legal necessity to sell the property. Hence, the Trial Court has erred in coming to the conclusion that the first defendant / purchaser had failed to prove that the family had debts and sale is for “legal necessity”.

15. Further in the cross examination the PW3 was asked when was the marriage of the four siblings (two plaintiffs and the 3rd and 4th defendants) were celebrated, the PW 3 stated that he was not remembering the dates of marriage. Surprisingly the PW3 / 2nd plaintiff has deposed that he is not remembering his own marriage date. When a specific question was put to the PW3 whether his marriage was celebrated in the year 1997, he had again stated that he does not remember. Such a statement ought to be taken against the plaintiffs, since it is obvious that the 2nd plaintiff is lying. Even though the PW3 stated that he was not remembering the dates of his marriage and also his siblings' marriages, it is evident that the parents of the plaintiffs had borrowed money for various family expenses including celebrating marriages for all the four children. Moreover, it is admitted by the second plaintiff that the family had rice mill but the same was not



functioning and the second defendant was not doing any work, which would indicate thta the family was in need of liquidity, hence, the second defendant / father had borrowed money. Based on the above discussion, it is amply clear that in order to settle the debts, which is a legal necessity, the second defendant had sold the property to clear the debts. Therefore, this Court is of the considered opinion that the first defendant had ascertained that there is legal necessity for the Karta to sell the property and consequently, had proved the legal necessity and had discharged the onus placed on the first defendant.

16. If the fact of legal necessity is proved by the purchaser, then the plaintiffs who hold the property as coparcener along with their father have no right to challenge the sale. Further, the legal necessity is proved by the purchaser / first defendant and the plaintiffs have not submitted any contra evidence to prove that there is no legal necessity, in such circumstances, the plaintiffs have no right to challenge the sale. In fact in the case of ***Kehar Singh and others Vs. Nachittar Kaur and others***, the judgment cited supra, which the plaintiffs had relied on, had held once the purchaser had proved the legal necessity, then it is for the plaintiffs to prove through evidence that there is no legal necessity. In the present case, the



plaintiffs have not taken any steps or efforts to prove that there is no legal necessity. Therefore, the first substantial question of law is answered against the plaintiffs / appellants herein.

17. The second and third substantial questions of law are similar and hence, both are taken together and discussed. The plaintiffs submitted that the on mere surmises and conjectures, the First Appellate Court had come to the conclusion about the nature and character of the property and the right of the 2nd defendant to alienate the property in favour of the 1st defendant. Further, the recitals of Ex. B1 would indicate that the property is joint family property and all the plaintiffs and defendants have equal rights and it is not a separate property of the 2nd defendant. It is seen that the plaintiffs claim that the suit property is joint family property for which they rely on Ex.B1 which is sale agreement, wherein it is stated that once the sale consideration is paid, the sale deed shall be executed by the second defendant and the sons and daughter of the second defendant. But the first defendant claims that the second defendant was informed about family arrangement and hence, claims that the suit property is individual property of the second defendant. The first defendant specifically submitted that after the



execution of partition deed, dated 22.02.1964, the second defendant had inherited the property, thereafter, the plaintiffs and defendants 2 to 4 had arrived at family arrangement and the suit property was allotted to the second defendant. But absolutely there is no evidence to substantiate the contention of the first defendant. Further, the plaintiffs deny such family arrangement. In such circumstances, this Court is of the considered opinion that the plea of the first defendant regarding family arrangement fails. The suit property still has the character of joint family property. Having held that the property is joint family property, the next question arises is the right of the second defendant to sell the property. This Court had already held that the second defendant had right to sell the property, if it is for legal necessity. Therefore, the second and third substantial question of law are held partly in favour of the plaintiffs and partly in favour of the first defendant.

18. The next substantial question of law is the suit is undervalued and the plaintiffs had paid incorrect Court fees. In any partition suit, if the parties are in possession of the property / joint family property then the Court fees payable is under Section 37(2). But if the parties are not in possession of the property / joint



S.A.(MD).No.692 of 2023

family property then the Court fees payable is under Section 37(1) based on market value. The First Appellate Court had relied on the deposition of the PW1 Ashok and had come to conclusion that the plaintiffs are not in possession of the suit property for the past twenty years. But the PW1 had admitted that the plaintiffs and his family members reside in Old Door No.55 and the New Door No.87. He also admitted that the first defendant had constructed buildings and was in possession of the suit property for the past 20 years. Further, the PW2 and PW3 also had admitted in their cross examination that the first defendant has put up construction and the first defendant was in exclusive possession of the suit property for the past 20 years. Further, both the PW1 and PW3 admitted that both the family had cordial relationship for all these years. When the plaintiffs are aware that the first defendant was in possession of the suit property for the past 20 years, then it is evident that the plaintiffs are not in possession of the suit property. Then the Court fees payable is under section 37(1) and not under section 37(2). Therefore, the First Appellate Court had rightly come to the conclusion that the suit is undervalued and this substantial question of law is answered against the plaintiffs / appellants.



WEB COPY

19. The next substantial question of law is that the suit is bad for partial partition. There is no dispute that originally several properties belong to one Duraisami Chettiar and he had three sons namely Shanmugam Chettiar, Thaandavam Chettiar and Srinivasa Chettiar. All the four had executed a registered partition deed dated 22.02.1964. The said Srinivasa Chettiar is the second defendant herein and the second defendant was allotted six properties and the suit property is shown as Item No.3 in the properties allotted to the second defendant in D schedule of properties. The present suit is filed for dividing the said Item No.3 as 1/5th share each. But the other five items mentioned in the partition deed are still in the possession of the second defendant father and the suit is not filed for partition of other properties. It is a settled issue that when there are several properties and the person claiming partition is also aware of the existence of such properties, then seeking partition for one property alone is hit by the principles of partial partition. In the present case, the 1st plaintiff in his cross examination had admitted that the suit property is shown as Item No.3 in the partition deed, also admitted that there are five other properties allotted to the second defendant and the said five properties are still in possession of the second defendant. The relevant portion of cross examination is extracted hereunder:



S.A.(MD).No.692 of 2023

WEB COPY

“எனது தகப்பனார் 1-ம் பிரதிவாதியின் கணவருக்கு கிரையம் கொடுத்த சொத்தானது வா.த.சா.ஆ.6-பாகப்பிரிவினைப் பத்திரத்தில் மூன்றாவது இலக்கச் சொத்தாக உள்ளது. எனது தகப்பனார் விற்றது போக, வா.த.சா.ஆ.6 பாகப்பிரிவினை பத்திரத்தில் எனது தகப்பனாருக்கு ஒதுக்கப்பட்ட மீதம் உள்ள ஐந்து இலக்கச் சொத்துக்கள் எனது தகப்பனார் வசம்தான் உள்ளது”

When the plaintiffs are aware of existence of other properties which are available for partition but have not included the same in the suit for partition, then the suit is bad for partial partition and hence, on this ground the suit is liable to be dismissed. But the Trial Court has held that the first defendant, who is the purchaser of the property ought to prove that other properties are available for partition. This Court is of the considered opinion that the Trial Court had terribly erred in fixing the onus of proof on the purchaser to prove that other properties are available for partition. Further, the Trial Court had held that the plaintiffs also plead ignorance of the fact and they are not aware of the fact that other properties are available for the partition. But the first plaintiff in his cross examination had admitted that the second defendant father is in possession of the other items of the property. When there is an admission by the plaintiffs themselves that the second respondent is in possession of the other properties which were allotted under partition, then the suit is hit by partial partition.



20. While discussing about partial partition, the Trial Court has held if a coparcener files a suit against a third-party purchaser in respect of the property sold to him, though other coparceners have been added as parties, the real contestant is the third-party purchaser and it is not necessary to add all the family properties in such suit. For this proposition the Trial Court has relied on the judgment dated 08.08.2008 rendered in ***P.Arumugham and another Vs. P.Bala Subramaniam and others*** in A.S.No.981 of 1993 reported in ***(2008) 7 Mad LJ 1210***. In the said judgment, the Learned Single Judge has referred Mulla Hindu Law (19th edition) and has held as under:

“Whether a suit for partition should comprise all the joint family properties, in other words, whether the suit should be one for general partition, or whether it can be one for a partial partition only depends upon who the parties to the suit are:

(i) The general rule is that where a suit for partition is brought by a coparcener against the other coparceners, it should embrace the whole family property. This rule is subject to certain qualifications. Thus, where a portion of the property is not available for actual partition, as being in the possession of a mortgagee, or where it is held jointly by the family with a stranger; a separate suit for partition may be brought in respect of that portion in the court of the place where that portion is situated.

(ii) The next case is where a coparcener sells his undivided interest in one



*of several properties belonging to the coparcenary, and a suit for partition is brought by the purchaser of such interest against his vendor and the other coparceners. In this case, there is a conflict of decisions as to whether he can sue for partition of that property alone in which he is interested as a purchaser, or whether he should sue for general partition of all the family properties. **This subject is dealt with in 261(3).***

*(iii) The third case is where a coparcener sells his undivided interest in one of several properties belonging to the coparcenary, and a suit for partition is brought by the other coparceners against the purchaser. As to the rights of the other coparceners in such a case, **see 261(3).***

(iv) The last case may be put in the form of an illustration. A and B are members of a joint family property consists of three houses, X, Y and Z. A sells his interest in house X to C. B sells his interest in the same house to D. In such a case, D can sue C for partition of house X, without asking for a partition of houses Y and Z. A and B, no doubt, must be joined as defendants; but the real contest in this case is between strangers to the family, namely, C and D, and there is no reason why such contest should not be determined without reference to the remaining property of the family."

69. It is therefore clear from the above excerpts that the view taken by me that those two houses and the compensation amount even though not included in the suit properties, the same could be ordered to be included during the final decree proceedings for effective partition. Accordingly, point No.(iii) is decided that the suit is not bad for partial partition."



S.A.(MD).No.692 of 2023

The Trial Court has taken the last illustration and has come to the conclusion that the suit is not hit by partial partition. The last illustration is between two purchasers who had purchased from two different coparceners. But in the present case, the suit is filed by two coparceners against other three coparceners along with a sole purchaser and hence, the said illustration relied on the by the Trial Court may not applicable to the present case.

21. Further, on referring to Mulla Hindu Law, under 259, the sale of undivided coparcenary right is dealt with and under 261, the mortgage is dealt with. Under both 259 and 261, the coparcener's right is protected, at the same breath, the rights of purchaser is also protected. While protecting the rights of the purchaser, it is stated the purchaser is entitled to equity relief. Therefore, this Court is of the considered opinion that the Trial Court has erred in not considering the equity relief as stated under the Mulla Hindu Law as well as the aforesaid judgement rendered in the case of ***P.Arumugham and another Vs. P.Bala Subramaniam and others***

22. While considering the case on equity, the plaintiffs submitted that the



S.A.(MD).No.692 of 2023

plaintiffs and the defendants 3 and 4 would be affected by the sale deeds executed in favour of the first defendant by the second defendant. If this plea is entertained, the sale deed may not be binding on the plaintiffs and the defendants 3 and 4 but the sale deed executed by the second defendant / father is binding on the second defendant and second defendant cannot claim that the sale deed is bad. Moreover, it is not the case of the plaintiffs that the sale deed is not binding on the second defendant. In such circumstances, when the second defendant / father had inherited six properties in the partition deed dated 22.02.1964 and the other properties are available for partition, if suit for partition is filed in future, then the present suit property ought to be allotted to the share of the second defendant / father. In such circumstances, the plaintiffs would not be affected by upholding the sale deeds, hence, on equity also the plaintiffs are not affected by the sale deeds executed in favour of the first defendant. In the above circumstances, the plaintiffs ought to have filed a suit for partition claiming partition for all the six properties available for partition. Therefore, this Court is of the considered opinion that the suit is bad for partial partition and the First Appellant Court had rightly held that the suit is hit by partial partition. Hence, this substantial question of law is answered in favour of the first defendant.



WEB COPY

23. Further, this Court is bound to record the attitude of the parties especially the defendants 2 to 4, since the defendants / coparceners are not contesting the case at all. Even though the plaintiffs state that the 3rd and 4th defendants are contesting through separate counsel, they have not filed a separate written statement, have not deposed before the Trial Court and remained ex-parte in the Trial Court. The 2nd defendant / father, who had sold the property has not filed any written statement and has not contested the case and he remained ex-parte in the Trial Court. Finally, in the present case, the sale agreement was executed, the entire agreed sale consideration was paid and the first defendant was put in possession of the property long back in the year 1997 itself. Thereafter, the first defendant has put up construction and is residing in the said property with her family. It is admitted by the plaintiffs that the both their families have cordial relationship until the execution of the sale deed, from which it can be inferred that the first defendant was allowed to put up construction and the plaintiffs are fully aware of the sale and the enjoyment of the suit property by the first defendant. But the second defendant had prolonged the execution of the sale deed and the sale deed was executed after the lapse of 14 years. While executing the sale deed, the first defendant had paid an extra amount of Rs.4,00,750/- (Rs.6,35,750 – Rs.



2,35,000) which is over and above the amount agreed in the sale agreement. Both the families had disagreed to the fixation of additional amount. The plaintiffs and the defendants would have demanded more from the first defendant. Further, the PW3 had stated that his parents are aware of the present litigation in his cross examination. In addition to the above, the second defendant / father was not contesting case and the lies stated by the PW3 which are stated supra are all indication that the suit is frivolous suit. Therefore, this Court is of the considered opinion that the First Appellate Court is right in holding that the suit is vexatious and speculative litigation.

24. For all the discussions, reasons and observations, the suit is liable to be dismissed and the First Appellate Court is right in dismissing the suit. All the substantial questions of law are answered against the plaintiffs / appellants except second (ii) and third (iii), wherein it is partly held that the property is joint family property and not individual property of second defendant and hence, the same is partly held in favour of the plaintiffs / appellants.

25. Thus, the judgment and decree of the First Appellate Court is confirmed



S.A.(MD).No.692 of 2023

and the judgment and decree of the Trial Court is set aside. With the above said observations, the second appeal is disposed of. No costs. Consequently, connected miscellaneous petition is closed.

17.04.2024

Index : Yes / No
NCC : Yes / No

Tmg

TO:

1. Sessions Judge, Fast Track Mahila Court, Sivagangai,
2. The Sub Court, Manamadurai.
3. The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



WEB COPY



S.A.(MD).No.692 of 2023

S.SRIMATHY, J.

Tmg

Judgment made in
S.A.(MD)No.692 of 2023

Dated:
17.04.2024