

(1993) 04 MAD CK 0033
In the Madras High Court

K.V. Duraisamy and Another

APPELLANT

Vs

D. Perumalsamy and Another

RESPONDENT

Date of Decision : 21-04-1993

Acts Referred:

Citation : (1993) 2 MLJ 613

Hon'ble Judges : Thangamani, J

Bench : Division Bench

Judgement

Thangamani, J.—Appellants K.V. Duraisamy and Pemmakkal in A.S. No. 815 of 1981 are brother and sister. The first item of the subject matter of the appeal is the land measuring 5.70 acres in Survey No. 68 of Pasur village. This land was purchased jointly by their mother Gengemmal and Pemmakkal under Ex.B-1 the sale deed dated 18.11.1957. In the family partition between first appellant Duraisamy and his brother Rangasamy under Ex.B-3 dated 28.10.1966 a moiety of this land was allotted to the share of the first appellant. The remaining half was settled in his favour by sister Pemmakkal under Ex.B-4 dated 29.10.1966. Respondents who are the minor sons of first appellant Duraisamy represented by their mother Rukkammal instituted O.S. No. 98 of 1977 on the file of learned Subordinate Judge of Coimbatore for partition and separate possession of their 2/3rd shares in this item as well as items 2 and 3 described in the plaint. While the third item is movables, the second item comprises of an extent of 5.88,2 acres in Survey Nos. 72/1,4 and 5. These lands were purchased by the first appellant under Ex.B-31, dated 28.4.1974, Ex.B-32, dated 28.1.1974, Ex.B-33, dated 1.3.1971 and Ex.B-34, dated 11.6.1970. It is the case of the respondents that these lands partake the character of the joint family properties as they were purchased from out of the income of the ancestral lands. And their father who is given to an immoral and wayward life, in order to defeat the rights of the respondents and their mother, had executed Ex.B-51 sale deed dated 18.1.1977 in the name of his sister the second appellant with false and make-believe recitals. And this sale deed executed neither for necessity nor for family benefit is invalid and they are entitled to ignore the same.

2. Subsequent to the institution of the suit, Rukkammal, wife of the first appellant filed O.S. No. 249 of 1977 in the court of District Munsif of Tirupur and numbered as O.S. No. 1138 of 1978 on the file of Subordinate Judge of Coimbatore against the appellants for directing the first appellant to pay her past maintenance of Rs. 600 and future maintenance at rate of Rs. 300 per month from the date of suit and for creating a charge over the suit property for the due payment of the maintenance amount. Second appellant Pemmakkal filed O.S. No. 117 of 1977 in the Court of the Subordinate Judge of Coimbatore seeking permanent injunction restraining Rukkammal and five of her close relatives from interfering with her enjoyment of the suit properties on the allegation that on account of B-51 sale deed dated 18.1.1977 in her favour, her possession was sought to be disturbed.

3. The first appellant resisted these actions contending that he got only an extent of 2.85 acres in Survey No. 68 of Pasur village under Ex.B-3 partition deed dated 28.10.1966. It was a dry land yielding practically no income. He borrowed and sunk a new well. But he was not able to raise any garden crop in the said land since there was no water in the well. As there was no water, the motor and pumpest purchased by him were also disposed of in or about 1973. A moiety of the first item was given to him by his sister the second appellant out of love and affection under Ex.B-4 settlement deed of love and affection under Ex.B-4 settlement deed dated 29.10.1966. This is his separate property in which his sons cannot claim any right. At no time there was any income from the property got by the first appellant under Ex.B-3 partition deed. The properties covered by Exs.B-31 to B-34 described as item 2 were purchased by the first appellant from out of the earnings in his arecanut business. Ex.B-51 sale deed in favour of the second appellant is a genuine document executed for valid consideration. He was constrained to sell the second item of property in order to discharge the debts binding on the respondents also. He further contended that though he agreed to pay maintenance to his wife in a Panchayat, he never refused to pay the money as alleged by his wife. The contention of the respondent in O.S. No. 117 of 1977 is to the effect that suit has been instituted only as a counter-blast to the earlier action for partition.

4. The second appellant claimed that she was an unnecessary party to the partition and maintenance suits.

5. In a common judgment the trial court found that only half of the property described in the first items is the joint family land and respondents can claim their share only in the said half. It also came to the conclusion that there was some joint family nucleus which was capable of yielding income when the first appellant started arecanut business and so the lands comprised in item 2 are joint family properties. Ex-B-51 sale deed executed by the first appellant in favour of the second appellant is a sham and nominal document and the debts quoted therein are all fictions. In any event the sale deed is not binding on the shares of the minor sons. And the first appellant is liable to pay maintenance to

his wife at the rate of Rs. 100 per month. Accordingly in O.S. No. 98 of 1977 preliminary decree for partition and separate possession of the plaintiffs 2/3rd share in one-half of the first item and the entire second item was passed. The defendants therein were directed to pay mesne profits at the rate to be decided in separate proceedings. In other respects the suit was dismissed without costs.

O.S. No. 117 of 1977 was dismissed without costs. In O.S. No. 1138 of 1978 the first defendant was directed to pay maintenance at the rate of Rs. 100 per month and Rs. 850 byway of past maintenance. A charge was also created over the first schedule property. There was no order as to costs.

6. While A.S. No. 815 of 1981 has arisen out of the judgment and decree in O.S. No. 98 of 1977, A.S. No. 584 of 1984 is against the decision in O.S. No. 117 of 1977 and A.S. No. 188 of 1990 is against the decision in O.S. No. 1138 of 1978.

7. There is no dispute now that in the first item the joint family owns half of it and the remaining moiety is the separate property of the first appellant. Learned Counsel for the appellants submitted that the extent got by the first appellant in the family partition under Ex.B-3 is 2 acres and 85 cents of dry land. The evidence of the first appellant as D.W. 1 is to the effect that he sunk a well in that land at a cost of rupees ten or fifteen thousand within two or three years after partition. He installed an electric motor and pumpset in that well. Since there was no water in the well, he sold away that motor also. He raised only dry crops in the field. So there was no ancestral nucleus which could have formed the source of purchase money for the acquisition of the lands described in suit item No. 8 under Exs.B-31 to B-34 during the years 1970-74. The next argument of learned Counsel for the appellants is that in 1960 the first appellant started his arecanut business and continued the same. D.W.1 states in his evidence that the business yielded good profit. And from the surplus he made in the business and by borrowing the lands were purchased under the sale deeds referred to above. Ex.B-23 in the Certificate of Registration issued by A.C.T.O., Avinashi to the first appellant on 18.4.1966. Exs.B-25 and B-27 are the summons issued by A.C.T.O., Avinashi to the first appellant on 19.9.1966 and 21.12.1971 respectively. Ex.B-26 is the permit granted by D.C.T.O., Avinashi to the first appellant on 20.4.1967. Exs.B-5 to B-10 are receipts issued by Assistant Commercial Tax Officer, Avinashi to the first appellant for payment of sales tax from 1965 to 1968. Exs.B-11 to B-15 are receipts passed by Deputy Commercial Tax Officer for payment of sales tax by the first appellant from 1968 to 1970. Ex.B-16 is the refund voucher issued by D.C.T.O., Avinashi to the first appellant for a sum of Rs. 14. Ex.B-17 is the licence granted to the first appellant under Commercial Taxes Act to carry on arecanut business for the year ending 31.3.1965. Ex.B-50 is another licence granted by D.C.T.O. in favour of the first appellant. He has renewed licences for the years 1967-68 and 1968-69 under Exs.B-19 and B-20 respectively. Ex-B-49 dated 21.7.1965 and B-18 dated 21.7.1967 are temporary receipt and Certificate of verification of Controller of Weights and Measures issued to the first appellant. Exs.B-21 and B-22 are

notices of demand for payment of Profession Tax given to the first appellant on 21.9.1972. Ex.B-24 dated 15.6.1967, Ex.B-29 dated 3.9.1967 and Ex.B-30 dated 11.11.1972 are notices passed from the Commercial Tax Department to the first appellant. Ex.B-28 is the order issued by D.C.T.O. on 16.9.1967. These documents go to show that the first appellant was engaged in arecanut business from 1965 onwards. On the basis of the evidence of D.W. 1 that he commenced his business 10 years prior to his purchases, learned Counsel for the appellate wanted us to infer that the starting of the business was in the year 1960. However, excepting the abovesaid verbal version of D.W. 1 the documents indicate that the business was started only in the year 1965. Whatever may be the year of commencement of arecanut trade, D.W. 1 admits in cross-examination that he cannot say in which year he commenced his business. Though he claims that there are accounts for his business and he was getting Rs. 15,000 as profits, he has not chosen to file those accounts to prove his business income. Admittedly he has not paid Income Tax for his business income. He has not invested the surplus from the business in any Bank. So there is no material to come to the conclusion that there was sufficient income from the business which could have formed the source of purchase money for the acquisition of item 2 lands. The first appellant also commented upon the absence of any plea on the part of the respondents that D.W. 1 started arecanut business only out of the ancestral nucleus. However, in view of the specific admission of the first appellant in the witness box that joint family funds alone were initially invested for the purpose of commencing the trade, this argument of learned Counsel has no substance.

8. There is a positive admission on the part of the first appellant in the witness box which totally belies his claim that item 2 properties are his self-acquisitions. D.W.1 states that he invested a capital of Rs. 500 for his arecanut business. That sum was the income he got from the joint family property. Besides, he received Rs. 1,300 as owelty under Ex.B-3 partition deed on account of the excess land given to his brother. His categorical admission in the witness box is

So it is quite evident that there was some joint family nucleus with the aid of which the first appellant started arecanut trade and derived income therefrom. Since he was the manager of the family at the time of acquisition of the lands, as it has been laid down by the Supreme Court in *Mallesappa Bandeppa Desai and Others Vs. Desai Mallappa and Others*, , it is for him to prove by clear and satisfactory evidence that the lands were acquired by him with his own separate funds and not with the help of joint family funds of which he was in possession and charge. The onus of proof must in such a case be placed on the manager and not on the coparceners. Further any property acquired with the aid of joint family property is joint family property.

9. Learned Counsel for the appellants next assailed the finding of the trial court that the debts quoted in Ex.B-51 sale deed executed by the first appellant in favour of the second appellant are all fictitious, the document is a sham and

nominal one created to defeat the maintenance claims of mother Rukkumani and in any event his sale deed is not binding on the shares of the minor sons-respondents.

The sale consideration mentioned in Ex.B-51 in Rs. 36,100. This deed recites that the vendor of the first appellant has received Rs. 10,000 from the vendee the second appellant in order to discharge the pronote debt of Rs. 8,500 due by him to one Chinnammal. Ex.B-48 purports to be the discharged promissory note executed by the first appellant in favour of Chinnammal on 30.1.1974 for Rs. 8,500. According to the respondents, this Chinnammal is none other than the concubine of the first appellant and that this pronote has been created only for the purpose of this case. No doubt, the first appellant denies the relationship between himself and Chinnammal in the witness box. However, there is no endorsement on Ex.B-48 to evidence the discharge of the promote debt by payment of Rs. 10,000 to Chinnammal and this Chinnammal has also not been examined on the side of the appellants. There is also no evidence as to when the first appellant discharged Ex.B-48 pronote. Neither the first appellant as D.W. 1 nor the second appellant as D.W.2 is able to say the time of discharge of this debt. Further, D.W.1 states that for the purchase of the property under Ex.B-32 he obtained a loan of Rs. 8,500 from Chinnammal. But the recital in Ex.B-32 does not support such a claim. According to D.W. 1, he had not paid any interest on Ex.B-48 pronote. While Ex.B-48 is of the year 1974, first appellant has sold the property under Ex.B-51 only on 18.1.1977. There is no endorsement on the promissory note to evidence the payment of interest.

10. The next set of pronote debts quoted in Ex.B-51 are those covered by Ex.B-47 dated 17.8.1970 and another dated 25.5.1970 stated to have been executed by the first appellant in favour of the second appellant for Rs. 9,500 and Rs. 5,000 respectively. The deed recites that a sum of Rs. 17,000 representing the principal and interest due under these two pronotes have been adjusted towards part of the sale consideration. Ex.B-47 recites that the first appellant has borrowed Rs. 9,500 on 17.8.1970 from second appellant for the purpose of his family expenses and for discharging earlier debts incurred in connection with the purchase of the land. However, the pronote dated 25.5.1970 has not been filed in Court. The evidence of D.W. 1 is to the effect that he borrowed money for the purchase of lands under Exs.B-31 to B-34 and discharged the debts by selling the land. According to him, Exs.B-42 to B-48 are the discharged pronotes. But we have already seen that the pronote dated 25.5.1970 quoted in Ex.B-51 has not been exhibited. Further under Ex.B-42 the pronote dated 17.2.1969 executed by the first appellant in favour of the second appellant for Rs. 5,000 the money has been borrowed for the purpose of making a well and not for purchase of land. Ex.B-43 is another pronote dated 25.5.69 under which the first appellant has borrowed Rs. 5,000 from the second appellant for the purpose of his family expenses. Ex.B-45 is also a pronote dated 1.6.1970 executed by the first appellant in favour of one Ramasany Chettiar for Rs. 5,000 received for the purpose of his family expenses. Exs.B-44 and B-46

are also pronotes dated 16.6.1970 and 11.9.1970 executed by the first appellant in favour of one Palaniappa Chettiar and Ponnammal for Rs. 1,200 and Rs. 6,000 respectively borrowed for the purpose of his family expenses. Evidently these pronotes have nothing to do with the purchase of land and they have not been quoted in Ex.B-51 also. D.W.2 the second appellant has also not satisfactorily accounted for these pronote debts. Considering the relationship between the first appellant and the second appellant and the infirmities in the evidence of P. W.2 regarding these two promissory notes, we cannot say that the trial court went wrong in holding that these pronotes should have been created only for the purpose of the case. We are not impressed with the argument of learned Counsel for the appellants that the debts quoted in Ex.B-51 sale deed are genuine and for the discharge of antecedent debts, the father manager had parted with the property under this impugned sale deed. So the sale under Ex.B-51 is not binding on the shares of minor plaintiffs herein.

11. Learned Counsel for the appellants did not seriously dispute the correctness of the judgments of the trial Court in fixing the maintenance at Rs. 100 per month and awarding Rs. 250 towards past maintenance and the value of five bags of paddy at Rs. 600. Since the shares of minor plaintiffs are not conveyed to the second appellant under Ex.B-51, her suit for permanent injunction is also not maintainable. So the judgment and decree of the Court below in all the three suits remain unassailable.

12. In the result, we find no merit in these appeals and hence dismissed. No costs.