
(2011) 09 MAD CK 0272
In the Madras High Court
Case No : A.S. No. 526 of 2006

M. Ramesh and S. Anandan Naidu

APPELLANT

Vs

Venkatammal Naidu and Others

RESPONDENT

Date of Decision : 29-09-2011

Acts Referred:

Citation : (2011) 09 MAD CK 0272

Hon'ble Judges : T. Mathivanan, J

Bench : Single Bench

Advocate : S. Gopinathan, for the Appellant; S. Shaji Paul for R1, R2 and R4 to R7, for the Respondent

Final Decision : Allowed

Judgement

Honorable Mr. Justice T. Mathivanan

1. Challenge is made in this appeal by the 4th and 5th defendant in the suit to the judgment and decree dated 29.07.2005 and made in O.S. No. 98 of 2004 on the file of the Learned District Judge, Dharmapuri, at Krishnagiri.

2. The facts germane for the disposal of this appeal:

2.1. The suit in O.S. No. 98 of 2004, is filed by the respondents 1 to 4 herein, against the respondents 5 to 7 and the appellants 1 and 2 for the relief of partition in respect of 5/8 shares in the suit properties and also for the relief of permanent injunction.

2.2. The 1st respondent/1st plaintiff is the mother of the 5th respondent/1st defendant, Mr. Devaraj. The respondents 2 to 4/plaintiffs 2 to 4 and the respondents 6 & 7/defendants 2 and 3 are the sons and daughters of the 5th respondent/1st defendant, Mr. Devaraj.

2.3. The suit properties were originally belonged to the Joint Hindu Family consisting of the 5th respondent and his father one Mr. Samu Naidu. They were in joint possession and enjoyment of the properties till the demise of Mr. Samu

Naidu. He had died in the year 1972. Inter se on his demise, the 1st respondent/ 1st plaintiff and the 5th respondent/1st defendant, had succeeded the suit properties and they had been in possession and enjoyment of the said properties.

2.4. The 1st respondent/1st plaintiff is entitled to 1/4th share and the 5th respondent/1st defendant is entitled to 3/4th share. After the birth of the respondents 2 to 4/plaintiffs 2 to 4 and the respondents 6 and 7/defendants 2 and 3 they become entitled to get share in 3/4th share which the 5th respondent is originally entitled.

2.5. The marriage of the 4th respondent was solemnized about 6 years back and as per Hindu Succession Act, as amended by Act 1 of 1990, she has become one of the sharers of the joint family. Hence, the respondents 2 to 4 and the respondents 5 to 7 are altogether entitled to 3/4th share i.e., each is entitled to 3/24 shares i.e., 1/8th share. Respondents 2 to 4 are together entitled to 9/24 share i.e., 3/8 share. Hence, the respondents 1 to 4/plaintiffs 1 to 4 are altogether entitled to $1/4 + 3/8 = 5/8$ shares. Similarly, the respondents 5 to 7 are together entitled to 9/24 share i.e., 3/8 share.

2.6. The respondents 1 to 4 were put to understand that taking advantage of the feeble mind of the 5th respondent/ 1st defendant, the 1st appellant/ 4th defendant had created a fake sale deed dated 18.06.1997 in his favour and in turn he had also created another sale deed in respect of 2 acres on 10.02.1999, in favour of 2nd appellant/ 5th defendant. The impugned sale deeds dated 18.06.1997 and 10.02.1999 are fabricated documents and hence they are not valid in law. In any event, the impugned sale deeds will not bind upon, the respondents 1 to 4/plaintiffs 1 to 4 as they are not parties to the transaction.

2.7. The respondents 1 to 4/plaintiffs 1 to 4 had demanded the 5th respondent/ 1st defendant on 16.08.1999 to effect partition. But he had vehemently refused and on the other hand he had instigated the appellants 1 & 2/defendants 4 and 5 take possession of the suit property. Accordingly they were attempting to trespass in to the suit property on 24.08.1999. However their attempt was successfully prevented by the respondents 1 to 4/plaintiffs 1 to 4. The alleged sale deeds dated 18.06.1997 and 10.02.1999 will not confer any right or interest on the 4th and the 5th defendant as they are fabricated and fraudulent documents. Hence, the defendants 4 and 5 are not entitled to have joint possession with the plaintiffs 1 to 4. The suit is therefore, filed for partition and permanent injunction.

2.8. The respondents 5 to 7/defendants 1 to 3 have not chosen to participate in the trial by filing their respective written statements as they remained ex parte.

2.9. The appellants 1 and 2/defendants 4 and 5 have contended in their written statement that the suit property and the other properties were the family properties of the 5th respondent/ 1st defendant. The respondents 1 to 7/ plaintiffs 1 to 4 and the defendants 1 to 3 were in the joint possession and enjoyment of those properties.

2.10. The 5th respondent/ 1st defendant alone was in management of those properties and as such he had been cultivating the same, as he was the karta of the family after the demise of his father. Their family was indebted heavily. In addition to the debts which was already in existence, they had to avail loan for the marriage expenses of the 4th respondent/ 4th plaintiff, who is none other than the daughter of the 5th respondent/ 1st defendant. In order to discharge their family debts, the respondents 1 to 7 had approached the 1st appellant/ 4th defendant and requested to purchase the first item of the suit properties. The first appellant/ 4th defendant had also agreed for the same and accordingly, an agreement of sale was entered into between them on 17.03.1997. The total sale price was fixed at Rs. 4,80,606/-. On the date of agreement of sale, the 1st appellant/ 4th defendant had parted with a sum of Rs. 10,000/- towards the advance to the respondents 1 to 7/plaintiffs 1 to 4 and defendants 5 to 7. It was agreed between both parties in the presence of village elderly people that from the balance of sale consideration, the 1st appellant/ 4th defendant shall discharge the family debts of the respondents 1 to 7. It was also agreed between both parties that the respondents 1 to 7 shall execute and register the sale deed in favour of the 1st appellant/ 4th defendant after receiving the balance of sale price.

2.11. Accordingly, the 1st appellant/ 4th defendant had discharged various family debts which were due to various co-operative banks to the extent of Rs. 1,60,606/-. Apart from this on the request made by the respondents 1 to 7, the 1st appellant/ 4th defendant had also discharged the family debts to the extent of Rs. 1,55,000/- which was obtained by them towards the marriage expenses of 4th respondent/ 4th plaintiff, who is the daughter of the 5th respondent/ 1st defendant.

2.12. After discharging all the family debts with the consent of all the members of the family and elderly people, the remaining balance was paid by the 1st appellant/ 4th defendant to the respondents 1 to 7 and in consequent thereof, they had executed a sale deed in respect of 6 acres in the first item of schedule mentioned properties on 18.06.1997. On the same date itself, the first appellant had taken possession of the said property and thereafter, his name was entered into the related Revenue records and he had been paying necessary Kist and had also been developing and cultivating the land after availing loan from Bank of India and Anjoo Agricultural Co-operative Bank.

2.13. Then out of 6 acres, he had sold an extent of 2 acres of land in favour of the 2nd appellant/5th defendant and now he has also been cultivating the said portion. Excepting 6 acres of land comprised in Survey No. 321/3 which is specified in the first item of the schedule, the appellants 1 and 2/defendants 4 and 5 are not claiming any interest or right over the remaining properties. On the instigation of the 5th respondent/ 1st defendant, in order to grab the properties from the appellant/defendants 4 and 5, the present suit has been filed by the respondents 1 to 4 with the connivance of the remaining respondents. At

the time of selling the property in favour of the first appellant, all the facts were known to the wife of the 5th respondent/ 1st defendant but, she has not been impleaded as a party to the suit. Since, she is a proper and necessary party, this suit is bad for non-joinder.

3. Based on the pleadings of the parties to the suit, the trial court has formulated the following 5 issues;

1. Whether the suit is bad for non-joinder of necessary party ?
2. Whether the sale in favour of defendants 4 and 5 will bind upon the plaintiffs ?
3. Whether the plaintiffs are entitled to the relief of partition ?
4. Whether the plaintiffs are entitled to the relief of permanent injunction ?
5. To what relief are the plaintiffs entitled ?

4. In order to substantiate their respective cases, the first plaintiff Mrs. Venkatammal, who is the first respondent herein had examined herself as PW 1. During the course of her examination Exs. A1 and A2 were marked. On the other hand the 4th defendant who is the 1st appellant herein had examined himself as DW 1. Besides him three witnesses were examined as DW 2 to DW 5, on behalf of the defendants 4 and 5. During the course of their examination Ex.B1 to B12 were marked. On appreciation of the evidences both oral and documentary the Learned Principal District Judge, Krishnagiri at Dharmapuri District has found that:

1. It appears that the 5th respondent/ 1st defendant could have discharged the family debts after receiving the sale consideration from the 4th defendant.
2. From the date of Ex.B9 (Ex.A1) i.e., from 18.06.1997, the 1st appellant/ 4th defendant has been in possession and enjoyment of the first item of the suit schedule property.
3. The possession and enjoyment of the suit first item by the 1st appellant/ 4th defendant in pursuant to the sale deed under Ex.B9 has not been disputed by the respondents 1 to 4.
4. Out of 6 acres which was purchased by the 1st appellant/ 4th defendant under Ex.B9 (A1), 2 acres was sold out to the 2nd appellant/ 5th defendant and as such he has been in possession and enjoyment of 2 acres in the first item.
5. The appellant 1 and 2/defendants 4 and 5 have no stake in respect of the items 2 and 3 of suit schedule properties. They are claiming right over the first item alone.
6. The entire first item of the suit schedule property was sold to 4th defendant under Ex.B9 on 18.06.1997 only for the purpose of discharging the family debts.
7. The claim of 1/4 share by the 1st plaintiff in the suit properties are admissible.

8. Sufficient grounds are available to believe that this suit has been instituted to grab the first item of the suit properties from the hands of the appellants 1 and 2/ defendants 4 and 5, only at the instigation of the 5th respondent/ 1st defendant.

9. The wife of the 5th respondent/ 1st defendant Mrs. Gunawathi is not a proper and necessary party to the suit and hence, this suit is not bad for nonjoinder of the necessary parties.

10. The sale under Ex.B9(A1) in respect of the first item of the suit schedule property will only bind upon the 2nd respondent/ 2nd plaintiff and respondents 5 to 7/defendants 1 to 3 and not bind upon the respondents 1, 3 and 4.

11. The first item of the suit property shall be divided into 8 shares of which the 1st respondent/ 1st plaintiff is entitled to get two shares.

12. The respondents 3 and 4 are each entitled to get 1 share.

13. In aggregate the respondents 1,3 and 4/plaintiffs 1,3 and 4 are entitled to get 4/8 share in the suit first item. In respect of Item No. 2 and 3, out of 8 equal shares, the 1st respondent/ 1st plaintiff is entitled to get 2 shares. The plaintiffs 2, 3 and 4 are each entitled to get 1 share. In aggregate the respondents 1 to 5 are entitled to get 5/8 shares. The second respondent/plaintiff is not entitled to get any share as his share has already been sold out to the 1st appellant/ 4th respondent.

14. Accordingly, the learned Principal District Judge, Krishnagiri at Dharmapuri has passed the preliminary decree on 29.07.2005.

5. Being aggrieved by the preliminary decree dated 29.07.2005, the appellants being the 4th and 5th defendants in the suit stand before this court with this appeal.

6. Heard Mr. S. Gopinathan, learned counsel for the appellant and Mr. S. Shaji Paul learned counsel appearing for the respondents 1, 2 and 4 to 7.

7. It is admitted fact that on 18.06.1997, the 1st appellant/ 4th defendant had purchased the first item measuring 6 acres under Ex.B9 sale deed. This sale deed dated 18.06.1997 appears to have been executed by respondents 5 to 7/ defendants 1 to 3 and 3rd respondent/ 3rd plaintiff, Mohan along with the 5th respondent, Devaraj and his wife Mrs. Gunawathi. It also appears that Mrs. Gunawathi wife of the 5th respondent/ 1st defendant does not have any right to join in the execution of sale deed. However, she had also joined in the execution along with her husband and children.

8. It was the contention of the appellants/defendants 4 and 5 before the trial court that the suit was not maintainable as one of the executants Mrs. Gunawathi had not been impleaded as necessary party to the suit. A specific issue in this connection has also been framed under issue No. 1 by the trial court, and the trial court has also given a finding saying that the suit is not bad for the noninclusion of Mrs. Gunawathi, who is none other than the wife of the

5th respondent/ 1st defendant Devaraj.

9. It is significant to note here that the respondents 5 to 7/defendants 1 to 3 remained ex parte. They have not contested the suit. The 1st respondent/ 1st plaintiff is the mother of the 5th respondent Devaraj. The respondents 3 to 4 and 6 and 7 are the sons and daughters of the 5th respondent Devaraj. The relationship of the parties is not disputed.

10. Admittedly, the family of the 5th respondent/ 1st defendant was heavily indebted to various co-operative banks and they were also in necessity to solemnize marriage for the 4th plaintiff. Under such circumstance, as alleged by the appellants/ defendants 4 and 5, the 5th respondent/ 1st defendant along with the 1st respondent/ 1st plaintiff had approached the 1st appellant/ 4th defendant and requested to purchase the first item of the suit property.

11. The appellants have also contended that at the time of execution of sale agreement on 17.03.1997, the 4th defendant had parted with a sum of Rs. 10,000/- as advance and it was agreed between both parties in the presence of their family elderly people that the family debts should be discharged by the 4th defendant, out of the remaining balance of sale consideration and after discharging all the family debts the respondents 5 to 7 should execute and register the sale deed in favour of the 4th defendant on receipt of the remaining balance. It is also contended that accordingly, he had discharged all the family debts which were due to various co-operative banks and thereafter the sale deed was executed in his favour on 18.06.1997. In order to substantiate his contention, the 1st appellant/ 4th defendant while examining himself as DW 1 had produced Exs.B2 to B5 and B 10 to B12. It is also his contention that on the date of registration itself, the possession of the first item of the suit property was taken over and brought under his enjoyment. It is also the case of the appellants that out of 6 acres which was purchased by the 4th defendant under Ex.B9, a portion measuring 2 acres on the eastern side was sold to the 5th defendant/ 2nd appellant under Ex.A2. Now they have been in possession and enjoyment of the suit first item of the properties. This has not been disputed by the respondents 1 to 4.

12. It is pertinent to note here that respondents 5 to 7 who are the defendants 1 to 3 have not chosen to resist the claim of the respondents 1 to 4/plaintiffs as well as the appellants/defendants 4 and 5. Conveniently, they remained ex parte and allowed the suit to be decreed in favour of the plaintiffs. In this connection a contention was made by the appellants that at the instigation of the 5th respondent/ 1st defendant, in order to grab the suit first item of properties from the hands of the appellants, the respondents 1 to 4/plaintiffs 1 to 4 have filed this suit which is liable to be dismissed. The trial court has also given a finding in its judgment that adequate grounds are available to believe the contention of the appellants viz., defendants 4 and 5, that this suit has been filed by the plaintiffs with the collusion of the defendants 1 to 3 with the intention to frustrate the sale in respect of the first item of the suit property and also to grab the same from

the possession of the defendants 4 and 5.

13. It is significant to note here that the 1st plaintiff who is the 1st respondent herein has given evidence as PW 1. During the course of her examination both in chief as well as in cross, she has not denied the contention of the appellants/defendants 4 and 5. When questions were put to her in her cross examination, she has not even come forward to deny the various payments made by the 1st appellant. Equally she has also not denied the sale price specified in Ex.B9(A1). In fact she has admitted the execution of sale deed by the respondents 1 to 3 in favour of the 1st appellant.

14. From the facts of the case it can easily be understood that the respondents 1 to 7 viz., the plaintiffs and the defendants 1 to 3 are still residing under one roof as a joint family. PW 1 has not denied the fact that the family was indebted heavily to various co-operative banks. She has also not disputed the circumstances which warranted the sale of the first item of the suit property in favour of the 1st appellant. There is no contra evidence on the part of the plaintiff to rebut the contention made on behalf of the appellants/defendants 4 and 5.

15. In this regard Mr. S. Gopinathan, the learned counsel for the appellant would submit that the respondents 5 to 7/defendants 1 to 3 had not chosen to contest the suit but they opted to remain ex parte. The trial court has also given a finding stating that sufficient grounds were available to believe the contention of the appellants to say that the suit was filed by the plaintiff with the instigation of the 1st defendant to grab the properties.

16. He has also argued that the trial court, having accepted the contention of the appellants that at the instigation of defendants 1 to 3, the suit was filed by the plaintiffs to defraud the 4th defendant, ought to have dismissed the suit in respect of the 1st item of schedule mentioned properties.

17. It may also be quite relevant to note here that the trial court on evaluating the evidences has accepted the possession of the suit property with the appellants and even inspite of this the prayer of injunction was rejected.

18. On the other hand the learned counsel for the respondents appearing for the respondents 1, 2 and 4 has contended that in fact the father of the 1st appellant/4th defendant had paid money to the respondents 5 to 7/defendants 1 to 3 and based on this the said two sale deeds viz., Ex.A1(B9) & Ex.A2 were fabricated as if they were executed on 18.06.1997 and 10.02.1999 respectively. He has also maintained that those two sale deeds were forged by the appellants only for the purpose occupying the first item of the suit property, unlawfully.

19. He has also submitted that as observed by the trial court, the plaintiffs 1, 3 and 4 are entitled in aggregate to 4/8 share in the first item of the suit property and in the remaining two items viz., items 2 and 3, the plaintiffs 1 to 4 are entitled to get 5/8 shares. He has also submitted that no appeal could be filed

against the finding of the trial court.

20. In support of his contention, he has placed reliance upon the decision in Smt. Ganga Bai Vs. Vijay Kumar and Others, . In this case the apex court has held that the provisions of Sections 96, 100, 104(1), 105 read with Order 43, Rule 1 of the Code show that an appeal lies only as against a decree or an order passed under rules from which an appeal is expressly allowed by Order 43, Rule 1. No appeal can lie against a mere finding for the simple reason that the code does not provide for any such appeal.

21. He would submit further that with regard to Item No. 1 of the said property, the trial court had not chosen to frame any issue. Under this circumstance, he has urged that the preliminary decree passed by the trial court need not be disturbed.

22. This court has carefully scrutinized the evidences available on record. This court has also considered the submissions made on behalf of both sides. Having regard to the nature of the suit and the other circumstances, this Court is of considered view that as rightly observed by the trial court, the appellants/defendants 4 and 5 have substantiated their case by adducing unassailable legal evidence. It may also be relevant to note here that they have not claimed any semblance of right or interest over the suit item Nos.2 and 3. But having been purchased the first item of the suit property they have claimed right over the same. The trial court has also confirmed their possession in respect of the first item of the suit property. It is also revealed from the records that the first item of the suit property was sold to the 1st appellant/ 4th defendant by the respondents 1 to 3 only for the purpose of discharging the family debts as well as to meet out the marriage expenses of the 4th plaintiff. This has not been emphatically denied by the 1st respondent/ 1st plaintiff who was examined as PW 1. It is also quite relevant to note here that the 5th respondent/ 1st defendant is the karta of the family and he only has been managing the family. Since the first item of the suit property was sold only for the family benefit and to discharge the family debts, now it cannot be heard to say that the 5th respondent/ 1st defendant had acted on his own accord and the first item of the suit property was sold by him to meet out his personal expenses which were not germane to the benefit of the family. This contention is not discernible, as it does not sound much.

23. The trial court as also given a finding in its judgment that the first item of the suit property comprised in Survey No. 321/3 measuring 2.45.5 hectares i.e., 6 acres. This piece of land measuring 6 acres was purchased by the 4th defendant/ 1st appellant herein. It does not appeal that barring the extent of 6 acres, the plaintiffs and the defendants 1 to 3 and their family members have retained another portion of the land in the same Survey No. viz., 321/3 for their family. The trial court has also found that the entire first item of the suit property was transferred to the 4th defendant as early as on 18.06.1997 and it also appears that the said sale was made only for the purpose of discharging the family debts.

It is surprising to note here that despite a finding given in favour of the appellants/defendants 4 and 5, the trial court by ignoring its own finding, had proceeded to decree the suit in respect of the first item of the suit property by saying that the plaintiffs 1 to 4 are having share over the first item of the suit property which is absolutely erroneous and on this ground also it is liable to be set aside.

24. Having brought the suit for partition in respect of three items of the suit properties, the respondents 1 to 4/plaintiffs are able to substantiated their case only in respect of the items 2 and 3 of the suit properties. Since the first item of the suit property was sold to the 4th defendant, for discharging the family debts and since the defendants 4 and 5 are in possession thereof, the respondents 1 to 4/plaintiffs 1 to 4 are not entitled to claim any share in the first item of the suit property. Hence, the suit in respect of the first item of the suit property is liable to be dismissed.

25. In the result the appeal is allowed. The decree and judgment dated 29.07.2005 and made in O.S. No. 98 of 2004 on the file of the learned Principal District Judge, Krishnagiri at Dharmapuri in respect of the first item of the suit property are set aside with the cost of the appellants/defendants 4 and 5 through out.