
(2002) 11 MAD CK 0187
In the Madras High Court
Case No : Appeal Suit No. 1009 of 1986

Nataraja Gounder, Palani Ammal and Ramalingam	APPELLANT
Vs	
Sakthivel	RESPONDENT

Date of Decision : 25-11-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 96

Citation : (2003) 1 MLJ 409

Hon'ble Judges : P. Shanmugam, J; M. Chockalingam, J

Bench : Division Bench

Advocate : T.M. Hariharan, s 2 and 3, for the Appellant; A. Sivaji, for the Respondent

Final Decision : Dismissed

Judgement

M. Chockalingam, J.—The defendants are the appellants herein.

2. This appeal suit has been directed against the judgment and decree of the learned III Additional Subordinate Judge, Coimbatore, under which a preliminary decree was granted in favour of the respondent-plaintiff.

3. The case of the plaintiff is as follows:

The plaintiff is the son of the first defendant. The first defendant has got a daughter by name Kalamani. The marriage between the first defendant and the mother of the plaintiff Karnaiammal was held on 24.11.66. The first defendant compelled the plaintiff's mother to part with her jewels that were presented to her at the time of marriage, and she sold the same and was keeping the cash with her. The first defendant wanted to purchase lorries, and he demanded money from the mother of the plaintiff. Believing his words, she handed over the same. Subsequently, the first defendant sold the lorries and appropriated the same. The plaintiff's mother used to demand and wanted her husband to purchase jewels, but the first defendant was postponing the same. The first defendant took hostile attitude against the plaintiff. He did not educate him

properly, and in fact, he made him to discontinue his education. He never bestowed any love and affection to the children. He was also an addict and was more interested in spending lavishly. While the said pandemonium situation prevailing, there started tempest in the family. The same culminated in driving away the plaintiff, his sister and the next friend from the abode of the first defendant. They were constrained to seek asylum in the house of his maternal grandfather at Kaikattiupudhur. The plaintiff caused a notice dated 20.3.80 to be issued to the first defendant. The first defendant was called upon to effect partition of the ancestral properties and hand over possession to the plaintiff. The first defendant came to the said Village and took them stealthily. He also exerted force. Subsequently, the plaintiff was teased by the second wife of the first defendant, whose name is Balamani. She also joined hands with the first defendant. He was given spoiled food and was constrained to carry heavy loads of rubbish like cow-dung, etc. The first defendant kicked the plaintiff when he felt the difficulty of carrying the heavy loads. Such was the ill-treatment meted out to the plaintiff. The properties are ancestral properties and are worth more than Rs.1.00 lakh, and income from the land per year after defraying the expenses will be not less than Rs.5,000/-. The lands are fertile and cash crops are grown. The wells are fitted with electric motor pumpset. It is no longer possible for the plaintiff to live anymore with the first defendant. The first defendant is attempting to create and fabricate false and fictitious debts. After the filing of the suit for partition by the plaintiff, the first defendant in collusion with the defendants 2 and 3 have brought about a false sale deed with a view to defeat and defraud the rights of the plaintiff in the suit property. The alleged sale deed is nominal, and the same will not bind the plaintiff. The said sale deed was never acted upon and never intended to be acted upon. If the Court comes to the conclusion that the properties owned by the first defendant are self acquired properties, then the plaintiff is entitled for maintenance. The first defendant has not denied the relationship of the plaintiff with him. The plaintiff is entitled to claim maintenance at the rate of Rs.300/- per month from 20.10.1979. The claim made by the plaintiff is an alternative prayer for maintenance. Hence this suit.

4. The first defendant filed a written statement stating that the allegations as to the relationship are correct; that the properties are not ancestral properties, but they are self acquired properties of the first defendant; that the father of the first defendant by name Pattaya Gounder had no ancestral or joint family properties, nor had Pattaya had any self acquired property; that the first defendant took on lease agricultural lands in Mettupalayam from out of his savings; that the first defendant and one Kandasamy had purchased 8 acres of dry lands; that subsequently they effected a partition, and thereafter, from out of his savings, the first defendant dug a well and installed pumpset and improved the lands; that it is false to state that the wife of the first defendant gave away money for the purchase of the lorries; that the plaintiff has no right or share in the self acquired properties of the first defendant, and hence, the suit may be dismissed with costs.

5. On the above pleadings, the trial Court framed necessary issues, tried the suit and granted a preliminary decree. Aggrieved defendants have brought forth this appeal.

6. The point that would arise for consideration is whether the plaintiff is entitled for division of the suit properties as asked for?

7. The appellants, who are the defendants in a suit filed by the respondent/plaintiffs for partition, have assailed the preliminary decree granted by the learned III Additional Subordinate Judge, Coimbatore.

8. It is urged in the memorandum of grounds that the judgment of the trial Court is contrary to law; that there is no presumption of joint family, especially when the suit properties stand in the name of the first appellant, and therefore, the burden is on the respondent to prove that the suit properties are the ancestral properties of the first appellant family; that the first appellant would have had only " share along with his father in the sale proceeds under Ex.A13; that the burden is also on the respondent to prove that the property under Ex.A15 was purchased out of the ancestral nucleus; that the first appellant purchased the property out of his own private acquisitions; that the attestors, scribe and other persons connected with Ex.A13 have not been examined, and therefore, the alleged sale has not been proved in law, and even assuming that it has been proved, it has not been proved that the properties under Ex.B15 have been purchased out of its sale proceeds; that out of enmity against the first appellant, the plaintiff's witnesses have given false evidence; that the trial court ought to have framed an issue as to whether the appellants 2 and 3 are bonafide purchasers for value and as to whether the sale in their favour would be protected; that the evidence given in the case is only an improvement of the case, not supported by the pleadings; and hence, the judgment of the lower court has to be set aside.

9. The learned Counsel appearing for the appellants 2 and 3 would submit that the suit itself was not maintainable for non joinder of necessary parties viz. the grandfather of the plaintiff; that it is pertinent to note that the properties were purchased by the appellants 2 and 3 as evidenced by Ex.B17 sale deed; that they were bonafide purchasers for value; and hence, the lower court should not have decreed the suit, in the absence of sufficient and acceptable evidence; and therefore, the judgment of the trial court has got to be set aside.

10. The learned Counsel for the respondent would argue that the suit properties were ancestral properties; that the first defendant in collusion with the defendants 2 and 3 have created and fabricated false and fictitious sale deed with a view to defeat and defraud the rights of the plaintiff in the suit properties; that the alleged sale deed was never acted upon; that the plaintiff has proved the case by adducing satisfactory evidence both oral and documentary; that considering the facts and circumstances of the case, the lower court has granted a preliminary decree, which does not suffer any illegality or infirmity; and thus,

the judgment and decree of the lower court have to be confirmed.

11. The appellants, who are the defendants in the suit filed by the minor by next friend and mother, who has been subsequently declared as major pending the appeal, for partition of the plaint schedule mentioned properties into two equal shares and to allot one to him and also for maintenance, as alternative relief.

12. Two grounds were urged by the learned Counsel for the appellants 2 and 3, firstly that the suit was one for partition, and the minor plaintiff has specifically averred that the suit properties were ancestral properties, and the grandfather of the minor plaintiff was well alive that time, and hence, he should have been added as a party, but the plaintiff has failed to do so, and hence, the suit itself was not maintainable for non joinder of necessary parties, and secondly that the appellants 2 and 3 have purchased the suit properties on 1.7.1981 for a valuable consideration of Rs.49,500/- under Ex.B17 sale deed, and they were bonafide purchasers of the suit properties without notice, and hence, the lower court should have framed the necessary issue and recorded a finding on that issue. It is also contended by the learned Counsel for the appellants 2 and 3 that sufficient evidence was available in the hands of the lower court to hold that the appellants 2 and 3 were bonafide purchasers of the suit properties from the first appellant without notice of any dispute, and thus, the lower Court should have dismissed the suit.

13. Admittedly, the first defendant is the father of the plaintiff, while the defendants 2 and 3 were the subsequent alienees of the plaint schedule mentioned properties. It has been specifically averred in the plaint that the suit properties were ancestral properties, and thus, the plaintiff was entitled to half share in the properties; and that even before the amendment was sought for by the plaintiff and the plaint was amended, it was specifically averred that his father, the first defendant in the suit, was trying to create and fabricate false and fictitious debts more with a view to fritter away the property of the plaintiff, and he had no right to do so. The first defendant has filed a written statement and contested the suit. Under such circumstances, the plaintiff sought for an amendment of the plaint in I.A. No. 221/84, and he was permitted to amend the plaint. It has been specifically averred in the amended plaint that the first defendant in collusion with the defendants 2 and 3 have brought about the false and fictitious sale deeds with a view to defeat and defraud the rights of the plaintiff in the suit properties; that those sale deeds were nominal documents and would not bind the minor plaintiff; that the sale deeds were never acted upon and never intended to be acted upon; that some fabricated debts seem to have been mentioned in the documents, and hence, those sale deeds would not affect the rights of the plaintiff. It is pertinent to note that the defendants 2 and 3 have filed an application before the lower Court to implead themselves as party defendants and since the application in I.A.221/84 was allowed, both these defendants were added as parties to the suit. It remains to be stated that the first defendant in the course of the written statement has not even whispered

anything about the sale deeds executed in favour of the defendants 2 and 3. Though the defendants 2 and 3 were added as parties at their instance, they have not chosen to file any written statement on their behalf, but have chosen to adopt the written statement filed by the first defendant by filing a memo.

14. It has to be pointed out that the first defendant has not filed any additional written statement after the amendment of the plaint. Nowhere in his written statement, the first defendant has averred that the defendants 2 and 3 were bonafide purchasers of the suit properties for valuable consideration without notice. Having failed to file a written statement in the trial court stating that they were bonafide purchasers of the suit properties without notice, now the appellants 2 and 3 cannot be permitted to advance any plea at the stage of appeal that they were bonafide purchasers of the suit properties without notice, nor can they expect the lower court to frame an issue, in the absence of any pleading in that regard. It is true that third defendant has examined himself as D.W.3 and has deposed that the defendants 2 and 3 purchased the property from the first defendant for a consideration of Rs.49,500/-, and they had no notice of the dispute between the parties. Needless to say that any amount of evidence without pleadings would be of no avail to a party. Though the defendants did not raise the plea in the written statement and no issue was framed in that regard, the lower court has permitted the defendants to march evidence and has elaborately discussed and recorded a finding that the first defendant in connivance of defendants 2 and 3 created a sale deed in order to defeat the rights of the plaintiff. The averments in the plaint stating that after the filing of the suit, the first defendant in collusion with the defendants 2 and 3 have brought about false and fictitious sale deed with a view to defeat and defraud the plaintiff's right in the suit property, and hence, it would not affect the plaintiff's share therein, are not all denied either by the first defendant in his written statement or by the defendants 2 and 3, who call themselves as the bonafide purchasers without notice, and hence, the appellants 2 and 3 cannot raise a new plea that they were bonafide purchasers of the suit properties without notice at this stage, in the absence of the same being put forth before the trial court.

15. The next ground that the suit is hit by the non joinder of parties viz. the grandfather of the minor plaintiff would also be of no avail to the appellants 2 and 3. It is contended by the appellants' side that the appellants 2 and 3 did not file a separate written statement, but adopted the written statement of the first appellant, since their case was one and the same with regard to the suit properties. A perusal of the written statement filed by the first appellant would clearly show that he has raised his only defence that the suit properties were not ancestral properties, but were his exclusive properties. The lower court has framed necessary issue whether the suit properties were ancestral in character or joint family properties. In order to prove the same, the plaintiff has adduced both oral and documentary evidence, which the lower court has elaborately discussed and found that the properties were not exclusive properties of the first defendant, but belonged to the joint family, in which the plaintiff was also

entitled to a share. It has to be stated that the first defendant has not raised any defence stating that the suit was bad for non joinder of parties, and hence, no issues were framed in that line. Having adopted the written statement of the first defendant, now the appellants 2 and 3 cannot come forward to state that the grandfather of the minor plaintiff was also a necessary party, and hence, he should have been added as a party. At this juncture, the Court is able to see some force in the contention put forth by the learned Counsel for the appellants 2 and 3 that the appellants 2 and 3 have filed C.M.P. No. 8299/96 for transposition of the first appellant as one of the respondents, and they could not prosecute the defence, which was put forth by the first defendant before the lower court and negated also. From all the above, it would be clear that the appellants 2 and 3 who have purchased the properties pending the partition suit have made their attempts to prosecute the appeal on new grounds and pleas what were not pleaded by them in the trial court. A careful scrutiny of the available materials would lead to the irresistible conclusion that Ex.B17 sale deed would not convey any right or interest to the appellants 2 and 3 in the suit properties, since the said transaction was hit by the doctrine of lis pendens. The Court is unable to see any substance in the appeal, and the same is liable to be dismissed, and the judgment of the court below be confirmed.

16. In the result, this appeal suit is dismissed, confirming the judgment and decree of the trial court. No order as to the costs. In view of the disposal of this appeal, C.M.P. Nos.8299 of 1996 and 11158 of 2002 are dismissed.