IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01.09.2008

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

A.S.(B)No.66 of 2001

1.Senthilkumar
2.Chitra .. Appellants / Plaintiffs

-vs-

1.Kuppusamy
2.Kavitha
3.Laila
4.Seetharama Raddiar .. Respondents/Defendants

Prayer:- This Appeal has been filed under Section 96 of CPC againts the decree and judgment dated 22.12.2000 in O.S.No.214 of 1998 on the file of the Court of Principal Subordinate Judge, Vridhachalam.

For appellants : Mr.R.Murugan, Advocate

For respondents : Mrs.R.Meenal, Advocate (For R3 & R4)

JUDGMENT

This appeal has been directed against the Judgment and decree in O.S.No.214 of 1998 on the file of the Court of Principal Subordinate Judge, Vridhachalam. The unsuccessful plaintiffs are the appellants herein.

2.The short facts of the plaint sans irrelevant particulars are as follows:

The plaint schedule property originally belonged to the grand father - Srinivasa Padayachi of the plaintiffs. The said Srinivasa Padayachi died intestate some 15 years back. After his death, his wife ie., the grand mother of the Plaintiffs Pattammmal was in possession and enjoyment of the plaint schedule properties on behalf of the D1 (her son), who was minor at that time. After the death of Pattammal in the year 1986 (October), D1 & 1st plaintiff were each entitled to one half share in the plaint schedule properties. Since 2nd plaintiff and D2 are unmarried till 1990, they are also entitled to a share in the plaint schedule property. So, the plaintiffs, D1 and D2 are each entitled to 1/4th share in the plait schedule property. D1(father of the plaintiffs) was leading illegal and immoral life. D1 was having concubines and he was addicted to drunkenness and has failed to maintain the family properly. Only to

meet the expenses to lead a wayward life, D1 had sold the plaint schedule properties for a song. D1 has executed a sale deed in the year 1985 in respect of plaint schedule Item Nos.1 & 2 properties and another sale deed in the year 1989 in respect of other portion of the plaint schedule properties in favour of D3 & D4. When the plaintiffs approached Defendants for partition of the plaint schedule Item Nos.3 & 4, Defendants 3 & 4 have refused to heed to the request made by the plaintiffs and they bluntly said that over the plaint schedule item Nos.1 & 2 properties the plaintiffs have no right or title to claim partition. D1 has also refused to give any share in the plaint schedule properties to the plaintiffs 1 & 2 as well as to D2. D1 had neglected to maintain the family as well as the plaintiffs and D2, who are the children of D1. After 1992, 2nd plaintiff and D2 have married. But D1 has not spent any money for the marriage expenses of D2 and 2nd plaintiff. D1 owes a responsibility to the plaintiffs to maintain and handover the properties to the plaintiffs and he had without the knowledge of the plaintiffs had executed sale deeds in favour of the plaint schedule properties. in favour of D3 & D4. The above said sale deeds in respect of the plaint schedule properties will not bind the plaintiffs. Hence, the plaintiffs have comeforward with this suit for partition of their 1/4th share each in the plaint schedule property and for recovery of possession from D3 & D4. The transfer made in the year 1985 & 1989 in respect of the plaint schedule Item Nos.1 & 2 in favour of D3 & D4 are fraudulent in nature. Hence, they will not bind the plaintiffs. The plaintiffs are in possession of the plaint schedule Item No.3 along with the other members of the family. There was no family deed at the time of the execution of the said sale deeds in respect of the plaint schedule properties of D1. Hence, the suit for partition for plaintiffs' one half share (each one half) in the plaint schedule properties.

3.The 1st defendant in his written statement would contend that in R.S.No.98/4 ten cents of land was not included in the sale deeds executed in favour of D3 & D4. On that ground alone the suit is liable to be dismissed. The plaintiffs have not properly valued the suit properties for the purpose of court fees and jurisdiction. Hence, the suit is liable to be dismissed.

4.The second defendant remained exparte. The third defendant has adopted the written statement filed by the fourth defendant, which runs as follows:-

The suit is bad for non-joinder of necessary parties. The suit as framed is not maintainable. The plaintiffs after the execution of the sale deed of the years 1985 and 1989 in favour of D3 & D4 has not filed the suit for setting aside the sale deeds. Hence, the suit for partition without a prayer of setting aside the earlier sale deeds in favour of D3 & D4 is not maintainable. In the above said sale deeds both the plaintiff and D1 are co-nominee parties. Further, since the plaintiffs have not filed the suit within three years from the date of attaining the majority, the suit is barred by limitation in respect of item No.1 & 2 of the plaint schedule. D3 had obtained

sale deed dated 1.8.1985 from D1. So, both the 2nd plaintiff and D2 are not entitled to claim any share in the plaint schedule properties. D3 has prescribed title to the plaint schedule properties by way of adverse possession. The suit claim as against the Item No.1 of plaint schedule properties is barred by limitation. The four boundaries sated in the plaint for plaint schedule Item No.2 is not correct. Out of 718 sq.ft in plaint schedule Item No.2, D3 has purchased 682 sq.ft on 21.3.1990 with a thatched shed. But in the plaint the plaintiff has wrongly stated the eastern boundary for Item No.2 as the property belonging to Amirkhan Saquib instead of showing 682 sq.ft and thatched shed as the boarder on the east of plaint schedule item No.2. The suit filed without a prayer for setting aside the sale deed dated 21.3.1990 in favour of D2 is not maintainable. The averments in the plaint that D1 had sold the petition schedule properties for meagre price is not true. Further, the allegation that the sale deed executed by D1 in favour of D3 is fraudulent in nature is also not sustainable. The plaintiffs are not entitled to get half share each in the plaint schedule properties. The plaint schedule properties originally do not belong to Srinivasa Padayatchi. Plaint schedule Item No.2 property was a natham porambokke and it is situate west of the property belonging to D4, which is plaint schedule Item No.1. Plaint schedule Item No.2 was sold by Pattammal, the deceased wife of Srinivasa Padayatchi, 35 years after the death of Srinivasa Padayatchi. Before executing a sale deed in respect of plaint schedule Item No.2 property Pattammal was in possession and enjoyment of 682 sq.ft of land in S.No.98/4 and was continuously paying land tax for the the said property more than the statutory period. Pattammal died leaving D1 as the sole legal representative of her. Srinivasa Padayatchi had no right, interest or title in respect of the plaint schedule Item No.1 & 2 properties or in respect of S.No.98/4 measuring 682 sq.ft, which is situated west of plaint schedule item No.2. The said properties belong to Pattammal. After the death of Pattammal, her son D1 became entitled to the plaint schedule properties as the sole heir of Pattammal. Only for the welfare of the family D1 had executed the sale deed dated 1.8.1985 for a sum of Rs.5,500/- showing the plaintiffs and D2 as minors represented by the father and guardian D1. D1 had executed the sale deed in respect of plaint schedule item No.2 in favour of D3 for a sum of Rs.1,35,000/- on 22.11.1989. Even in the sale deed the relevant recital is that D1 had executed the same for the purpose of renovating his house. On 21.3.1990 D1 had executed a sale deed in respect of the property situate west of Item No.2 ie., in R.S.No.898 to an extent of 682 sq.ft inclusive of thatched as well as tiled house for a sum of Rs.1,20,000/- in favour of D4. After the said sales, both D3 & D4 have made improvements in respect of the properties purchased by them from D1. Patta has been granted in favour of D3 in respect of the plaint schedule Item No.2 property. The sale deed executed by D1 viz., the father of plaintiffs and D2, will bind them. So, the suit for partition filed by the plaintiffs is liable to be dismissed.

5.On the above pleadings the learned trial Judge has framed as many as five issues for trial. The 1st plaintiff has examined himself as P.W.1. But on the side of the plaintiffs no documentary evidence was produced. On the side of the defendants, D4 was examined as D.W.1 besides examining one Thiyagarajan as D.W.2 and Ex.B.1 to Ex.B.32 were marked. After scanning the evidence both oral and documentary, the learned trial Judge has come to the conclusion that the suit filed for partition by the plaintiffs is liable to be dismissed, had dismissed the same, which necessitated the plaintiffs to approach this Court by way of this appeal.

6.The point for determination in this appeal are as follows:-

1.Whether the suit for partition filed by the plaintiffs without asking for a relief to set aside Ex.B.2 to Ex.B.4 – sale deeds executed by the 1st defendant, father of the plaintiffs & D2, is maintainable?

2.Whether the judgment and decree in O.S.No.214 of 1998 on the file of the Court of Principal Subordinate Judge, Vridhachalam, is liable to be set aside for the reasons stated in the memorandum of appeal?

7.Point No.1 :- The genealogy appended to the plaint shows that plaintiffs and D2 are the descendants of one Srinivasa Padayatchi, whose wife was one Pattammal, who died in the year 1986 leaving her sole heir Kuppusamy (D1), whose wife was Chenthamarai. Plaintiffs 1 & 2, D2 are the children of D1 & his wife chenthamarai. As the heirs of Kuppusamy & Senthamarai, the plaintiffs have filed the suit for partition of their one half share in the plaint schedule properties. D3 & D4 are the purchasers of the plaint schedule properties under Ex.B.2 to Ex.B.4 from D1. The 1st plaintiff as P.W.1 would admit that in the year 1985 his father (D1) to meet the expenses incurred by D1 for illegal and immoral purpose, had executed the sale deed in respect of the plaint schedule properties. But in the plaint, the plaintiffs have not stated that only to meet the illegal and immoral expenses incurred by D1, D1 had executed the sale deed in respect of the plaint schedule properties in the year 1985. In the cross-examination P.W.1 would admit that Ex.B.1 is the birth certificate for him and according to Ex.B.1 his date of birth is 29.6.1977. He would further admit that Ex.B.2 is a sale deed executed by his father in respect of plaint item No.2 on 22.1.1989. But a perusal of Ex.B.2 would go to show that it is in respect of plaint schedule Item No.1 measuring 128 ¼ sq.ft of land in S.No.98/7 & 98/4. Ex.B.3 is dated 22.11.1989 executed by D1 in favour of D4 in respect of Item No.2 to the plaint schedule property to an extent of 718 sq.ft in S.No.98/7. Ex.B.4 is a house in S.No.98/4 in favour of D4. These facts are being admitted by P.W.1 in the cross-examination. In the above said sale deeds - Ex.B.2 to Ex.B.4, D1 has shown Plaintiffs 1 & 2 as well as D2 (his children) as minor vendors represented by natural guardian / father D1. The plaintiffs have not filed the suit for setting aside the above said sale deeds Ex.B.2 to Ex.B.4 on the ground

enumerated under Section 8 of the Hindu Minors and guardianship Act, 1956. It is not the case of the plaintiffs that the sale deeds Ex.B.2 to Ex.B.4 executed by their father D1 without obtaining the prior permission of the Court as contemplate under Section 8(2) of the Hindu Minority and Guardianship Act, 1956 are not valid. A Kartha of a Hindu family is entitled to alienate the property belonging to the family for legal necessity or for the benefit of the family. Hindu Law by N.R.Raghavachariar, IX edition, at page 268, deals with the manager's power of alienation, as follows:-

> "An alienation by the manager by way of mortgage or sale of joint family property will be good as against the other coparceners either when all the coparcenes had consented to the transaction, or the creditor is able to show that it was supported by legal necessity or benefit of the family or that he made bona fide and reasonable enquiries which made him believe that such necessity existed, even though no such necessity did in fact exist [Hunooman Persaud Vs. Mussumat Babooee, 6 M.I.A. 393 ; Ramanathan vs. Viswanathan, 54 L.W. 1 : 1941 M.W.N. 654 : A.I.R 1941 P.C. 43. In the case of a sale which is justified by necessity, it must be further proved that the consideration paid is adequate. Nagaratnamba Vs. Ramayya, (1962-2 An. W.R. 159]. Where one purpose of the sale by the manager was to avoid paying interest on an earlier mortgage of joint family."

At page 269 of the same edition the other reference to what is legal necessity and benefit in Section 293 is as follows:-

> "The terms 'legal necessity' and 'benefit' are generally used side by side in dealing with the manager's power of alienatin. ' Legal necessity' implies pressure to the estate and relates to its preservation, and does not mean actual compulsion, but only the kind of pressure which the law recognises s serious and sufficient [Ventakaram Vs. Sivagrunatha, 144 I.C. 584 ; A.I.R. 1933 Mad. 639 See also Rani v. Shanta Bala Debnath, 1971-2 S.L.J 550 : A.I.R. 1971 S.C. 1028 ; Mukhtiar Singh Vs. Amarjit Singh, 1975 Cur L.J. 121], while the term "benefit" implies something done for the improvement or the enlargement of the estate. A transaction by the manager which is neither risky nor speculative but calculated to confer a positive advantage on the family can be said to benefit the estate. But what transaction would be for the benefit of the family must necessarily depend upon the facts of each case [Siva Kumari Vs. Indian Overseas Bank, 1977-2 An. W.R. 523]. Family necessity must receive a reasonable construction, and the head of the family and those dealing with him, must, in the interest of the family itself, be supported in transactions, which, though, in themselves diminishing the estate, yet prevent and tend to prevent still grater lossses (Babaji Vs. Krishnaji, I.L.R. 2 Bom. 665]"

The relevant recitals in Ex.B.2 to Ex.B.4 read that D1 has executed the sale deeds only for the benefit of the family and also to meet the family expenses. Further in Ex.B.3 – sale deed dated 22.11.1989 it has been stated that the said sale deed was executed to meet the marriage expenses of his (D1's) daughter and also to meet the expenses relating to the renovation charges of his house. Under such circumstance, it cannot be said that Ex.B.2 to Ex.B.4 are executed by D1, father of 1st & 2nd plaintiffs and D2 to meet the avyavaharika debt. What is Avyavaharika debt has been enumerated at page 286 of the same edition of Hindu Law by N.R.Raghavachariar. So it is not open to the plaintiffs to contend that the sale deeds – Ex.B.2 to Ex.B.4 executed by their father D1 will not bind them since Ex.B.2 to Ex.B.4 were not executed by D1 to meet his illegal and immoral expenses. So, as correctly held by the learned Principal Subordinate Judge, Vridhachalam that without asking for a relief to set asdie Ex.B.2 to Ex.B.4, it is not open to the plaintiffs to ask for partition of their share in respect of the plaint schedule property. Hence, I hold on Point No.1 that the suit for partition filed by the plaintiffs without asking for a relief to set aside Ex.B.2 to Ex.B.4 – sale deeds executed by the 1st defendant, father of the plaintiffs & D2, is not maintainable.

8.Point No.2 :- In view of my discussion in the earlier paragraphs and findings to the effect that the suit itself is not maintainable for partition, I hold on Point No.2 that the decree and judgment in O.S.No.214 of 1998 on the file of the Court of Principal Subordinate Judge, Vridhachalam, need not be set aside for the reasons stated in the memorandum of appeal.

9.In fine, the appeal fails and the same is dismissed confirming the judgment and decree in O.S.No.214 of 1998 on the file of the Court of Principal Subordinate Judge, Vridhachalam. No costs.

Sd/-
Deputy Registrar

/true copy/

Sub Asst. Registrar

ssv

To

1.The Principal Subordinate Judge,
Vridhachalam.

Copy To

2.The Section Officer,
V.R.Section,
High Court, Madras.

+1 cc to Mr.R.Subramanian, Advocate, SR.No.49479

+1 cc to M/s.Sarvabhuaman Associates,SR.No.49425

A.S.No.66 of 2001

RSY(CO)
SMK/30.9.08