

IN THE COURT OF THE I ADDITIONAL DISTRICT JUDGE, SALEM

Present: Thiru.M.Christopher, B.A.B.L.,

I Additional District Judge,

Salem.

Thursday, the 4th day of April 2019

Original Suit No.97/2014

Minor Tharun

By Guardian & Next friend

Mother Sangeetha

... Plaintiffs

/Versus/

1. Chinnusamy

2. Dhanasekaran

3. M.Prema

4. MKC. Samkumar

..... Defendants

This suit having coming up for final hearing on 28.3.2019 before me in the presence of Tvl.Pon.Ramani, P.DeviRamani, Advocates for the Plaintiff and Thiru.S.N.D.Ananthapathmanaban, Advocate for the 1st defendant and Tmt.K.Chitra, Advocate for the 3rd defendant and Selvi.Valli Advocate for the 2nd and 4th defendants and upon hearing the arguments and upon perusing the case records and having stood over for consideration till this day, this court delivered the following:

Judgment

The above suit was filed for partition, possession, declaration and Injunction.

2. The plaintiffs has stated that the suit property is the ancestral Hindu undivided joint family properties belong to the Plaintiff and defendants 1, 2 and 4. The Plaintiff is the son of 2nd defendant and the 1st defendant is the father of the 2nd defendant and grandfather of Plaintiff. The 4th defendant is the son of 1st defendant and brother of 2nd defendant. They constitute the Hindu undivided joint family. The minor Plaintiff is running 10 years of age and he is under the care and custody of his mother the guardian and next friend. The 3rd defendant is the purchaser of a portion of the 2nd

item of the suit property from the 1st defendant and hence she is added as party to the suit for a proper and complete adjudication. The first item of the suit properties and other contiguous properties are the ancestral joint family property of the great grandfather of the minor ward by name Athianna goundar and his brothers. Then the said Athianna goundar and his brothers divided the properties between them under the registered partition deed dated 4.7.1958. The said Athianna goundar died intestate about 20 years ago and after his demise, the first defendant and his brother Manickam are become the owners of the properties allotted to Athianna goundar under the above said partition deed and jointly enjoyed the same in common. Then on 18.2.2004, they have divided the said properties under the registered partition deed dated 18.2.2004 and the 'A' schedule described properties in the said partition deed are allotted to the 1st defendant and his family towards their share which is the 1st item of the suit properties as described in the schedule. The 2nd item of the suit property as described in the schedule has been purchased by the joint family out of the joint family nucleus under the registered sale deed dated 10.6.1983. In law, the minor ward is entitled to equal of 1/3rd share in the properties and the 1st defendant is entitled to 1/3rd share and the 2nd defendant is entitled to the remaining 1/3rd share. The 2nd defendant started to lead a wayward life without providing even to the education expenses of the minor ward and hence, the next friend was forced to file the maintenance case in MC.No.36/2008 before the Family Judge, Salem and the same is pending. It is further submitted that the 2nd defendant dragging on the proceedings for a while and finally to counter-blast the maintenance case, has willfully filed the petition for custody of the minor ward in GOP.No.14/2011 and both cases are taken up for trial and pending before the Family Court, Salem.

3. The next friend of the minor Plaintiff states that during th course of the trial there was a rumour spread out of the knowledge of the next friend of the minor ward that the 1st defendant on the ill advise of the 2nd defendant has created some

instruments behind back of the next friend in the name of 3rd defendant herein. Therefore the next friend of the minor ward verified the fact in the Sub-Registrar's office and found that the 1st defendant has created a nominal sale deed in favour of the 3rd defendant on 27.4.2011 under document No.2851/2011 in respect of a specific portion of 4000 sq.feet of land in the 2nd item of the suit property with specific boundaries. Further submitted that the 2nd item of the suit property has been purchased from the Joint family nucleus and the 1st defendant has got no individual right to sell any portion in his individual status with specific boundaries. Therefore the sale deed allegedly executed by the 1st defendant in favour of the 3rd defendant, even if it is true, is voidable under section 8(3) of the Transfer of Property Act. Under these circumstances, the next friend having found that the defendants conspired and making attempts to cheat the minor ward and the next friend, at the option of the next friend on 15.3.2014 mediation was convened in the presences of respectable persons of the locality and the next friend questioned about the same to the 1st defendant and demanded partition of the properties and to allot the share of minor ward. The suit properties are the ancestral undivided joint family of the plaintiff and the defendants 1 and 2 and they are in common possession and enjoyment without any division between them by mets and bounds. In law, by birth the minor ward is entitled to common 1/3rd share and hence the defendants 1 and 2 have no right to refuse to allot the minor share to him and further the 1st defendant has no right to execute any deed with specific boundaries to the 3rd defendant. Hence, the plaintiff in law can ignore the instrument stands in the name of 3rd defendant and to file the suit for partition.

4. Further stated that though the sale deed stands in the name of 3rd defendant is deemed to be non-est in the eye of law as far as the minor ward is concerned, the sale deed is registered instrument under the Registration Act, and hence the minor plaintiff reasonably apprehends that the 3rd defendant may enforce the same legally against the minor plaintiff, and for the purpose the sale deed stands in the name of 3rd defendant is

to be declared as null and void as far as the minor plaintiff's 1/3rd share is concerned. The minor Plaintiff submits that although he need not set aside the same under Section 40 of the C.F.Act since the minor ward is not consented party to the instrument, in law he may pray for the relief of declaration to declare the sale deed as null and void under Section 25(d) of the C.F.Act as far as his 1/3rd share is concerned. Therefore the next friend of the minor ward has decided that to have the suit properties partitioned in the court of law as the welfare of the minor ward is paramount. Hence, she has come forward with the suit for partition of the suit properties items 1 and 2 and for the allotment of the minor 1/3rd share and also for the relief of permanent injunction since, there are chances for the defendants to create further encumbrances over the suit properties in order to defeat and defraud the minor ward besides with the relief of declaration to declare the sale deed stands in the name of 3rd defendant is null and void as far as the plaintiff's 1/3rd share is concerned. The Plaintiff very respectfully submits that unless the partition is ordered and the sale deed is declared as null and void as far as the 1/3rd share of the minor ward is concerned, complications may arise out in future in respect of his title and his legal right that vested to him by birth would certainly be infringed, and the defendants are restrained from creating any kind of encumbrance over the suit properties the minor plaintiff will be put to very great loss and hardship. Hence this suit.

5. The 1st defendant has filed written statement stating that it is false that the suit properties are ancestral Hindu undivided joint family properties belonging to the Plaintiffs and the defendants 1 and 2. The allegation that the Plaintiff is the son of the 2nd defendant is admitted. It is true that the 1st defendant is the father of the 2nd defendant. It is false that the 2nd defendant is attempting to defraud the minor plaintiff. There is absolutely no cause of action as against the 3rd defendant since what was purchased by her from this defendant is only the self acquired property of this defendant over which none could have any claim whatsoever. The yearly expenditure

for cultivation of the land invariably exceeded the income there from since the yield was low due to monsoon failure and the price for the produce was also comparatively low. Though the compensation amount obtained over acquisition of a portion of the property helped wipe out a portion of the debt, there still remains a debt of Rs.10 lakhs payable by the joint family to various persons namely State Bank of India, Mallur, Srinivasan, Vijayakumar, Vasudevan. The Plaintiff therefore will be liable not only to a share in the property so far as the 1st item is concerned but also to the liability and debt payable by the joint family. There cannot be a preliminary decree in respect of the 1st item of the suit property without provision for payment of debt which is set out in detail in the schedule here under. The Plaintiff in any event is not entitled to 1/3 share in the suit property. The Plaintiff will be entitled only to 1/6th in the 1st item of suit property with due provision for discharge of liability, that too only after adding the said other son as a party to the suit. It is false that the 2nd item of the suit property has been purchased from the joint family nucleus by the joint family on 10.6.1983 and the sale deed was taken in the name of this defendant, he being the kartha. The 2nd item of the property is the absolute, self acquired property of this defendant. So far as the allegations made in para 5, this defendant submits that the next friend of the Plaintiff is the root cause of all the troubles between her and the 2nd defendant. All the adverse allegations made in the said paragraph are denied word by word. It is false that this defendant has got no individual right to sell any portion in his individual status with specific boundaries in respect of the 2nd item. The recitals made in the sale deed dated 27.4.2011 in favour of the 3rd defendant are true. This defendant can only describe him as the absolute owner in the deed dated 27.4.2011 and the same is correct. The proclamation alleged is false. The further allegation that the entire suit properties are ancestral is false. It is false that the sale is non-est in the eye of law. The Plaintiff is not entitled to the relief of declaration relating to the sale. Neither Section 40 of CF Act nor Section 25 (d) of C.F.Act is applicable to this case. Hence he prayed to dismiss the suit.

6. The second defendant has filed a written statement stating that it is false that the suit properties are ancestral Hindu undivided joint family properties belonging to the Plaintiffs and the defendants 1 and 2. It is false that the 2nd defendant is attempting to defraud the minor Plaintiff. There is absolutely no cause of action as against the 3rd defendant since what was purchased by her from the 1st defendant is only his self acquired property over which none could have any claim whatsoever. The yearly expenditure for cultivation of the land invariably exceeded the income there from since the yield was low due to monsoon failure and the price for the produced was also comparatively low. There cannot be a preliminary decree in respect of the 1st item of the suit property without provision for payment of debt which is stated above. The Plaintiff in any event is not entitled to 1/3 share in the suit property. The Plaintiff will be entitled only to 1/6th share in the 1st item of suit property with due provision for discharge of liability, that too only after adding the said brother of this defendant as a party to the suit. It is false that the 2nd item of the suit property has been purchased from the joint family nucleolus by the joint family on 10.6.1983. The 2nd item of the property is the absolute, self acquired property of the 1st defendant. The next friend had given lot of troubles to this defendant and treated him with utmost cruelty. The various acts of the next friend which pained this defendant need not be set out in this written statement as this is not a matrimonial proceeding. It is false that the 1st defendant has got no individual right to sell any portion in his individual status with specific boundaries in respect of the 2nd item. The recitals made in the sale deed dated 27.4.2011 and the same is correct. The further allegation that the entire suit properties are ancestral is false. It is false that the sale is non-est in the eye of law. The plaintiff is not entitled to the relief of declaration relating to the sale. There is no merit whatsoever in the plaint. Hence he prayed to dismiss the suit.

7. The 3rd defendant has filed a written statement stating that, the 1st defendant as kartha of the family, took the sale deed in his name. The Plaintiff is not entitled to

even an inch of land in the second item of the suit property. This defendant reliably understands through enquiry that the second item of the suit property is only the separate and self acquired property of the 1st defendant who, out of the income earned by him as a Village Karnam, had purchased it on 10.6.1983. It is false and fraudulent that the 1st defendant created the deed of sale in favour of this defendant on 27.4.2011 under document No.2851/2011 on the ill advice of the 2nd defendant. This defendant is a bonafide purchaser for value without notice. It is false that 1st defendant has not right to execute the sale with specific boundaries in favour of this defendant. The allegation with respect to ignoring the sale deed in favour of this defendant is untenable. The sale in favour of this defendant will bind all in the world including the plaintiff. The allegation that the sale deed in the name of this defendant is non-est is false. The Plaintiff is not entitled to the relief of declaration relating to the sale. The suit is not properly valued for the purpose of court fee and jurisdiction. This defendant purchased only vacant land ad-measuring 4000 sq.ft from the first defendant upon which, even about 2 years back, she and her husband have constructed a huge two storey building at a cost of more than Rs.16 lakhs. The existence of the said building is purposely suppressed by the Plaintiff. The suit is liable to dismissed for this very suppression. The Plaintiff ought to have come to court before construction. The Plaintiff would have so come if her claim were really bonafide. Since it is not bonafide, the Plaintiff has kept silent all these years, allowed the construction to get completed and has come to court now which is hit under the doctrine of delay and latches. Hence he prayed to dismiss the suit.

8. Based on the above pleadings this court has framed the following Issues:-

1. Whether the Plaintiff is entitled to 1/3 share over the suit property?
2. Whether the Plaintiff is entitled to the relief of declaration with regard to sale deed dated 27.4.2011?

3. Whether the Plaintiff is entitled to Permanent Injunction?

4. Whether the Plaintiff is entitled to Preliminary decree?

5. Whether the suit is bad for non joinder of necessary party?

6. What other relief?

9. On the side of plaintiff, the mother was examined as P.W.1 and Ex.A1 to Ex.A9 were marked. On the side of Defendants D.W.1 was examined and Ex.B1 to Ex.B.4 were marked.

10. Issue No.1 & 4:-

1. Whether the Plaintiff is entitled to 1/3 share over the suit property?

4. Whether the Plaintiff is entitled to Preliminary decree?

11. According to the Plaintiff the suit first item of property was ancestral property of first defendant herein. The suit second item of property was purchased from the nucleolus of first item of property and it has to be treated as joint family property. The minor Plaintiff is having 1/3 share in the both item of properties. The minor Plaintiff is son of 2nd defendant. The defendants 2 and 4 are sons of first defendant. There was a matrimonial dispute between the 2nd defendant and mother of Plaintiff. The minor Plaintiff is living with his mother at his maternal grand father house. The 1st defendant has sold the portion of property in the 2nd item of suit property to 3rd defendant herein and they are attempt to alienate the property against the interest of plaintiff. The mother of the Plaintiff sought partition of suit properties but the defendants 1 and 2 did not come forward for amicable partition. Hence the suit.

12. The 1st defendant has filed a written statement admitting that the 1st item of suit property is ancestral property and the Plaintiff is entitled for 1/6 share in the said property. According to him the 2nd item of property is self acquired property of him and the Plaintiff is not entitled to seek partition of said property. The 2nd defendant has filed separate written statement but he reiterated what is stated by 1st defendant. The 3rd defendant has filed written statement stating that the 1st defendant is absolute owner of the property which she has purchased and the sale is bonafide one.

13. So the question before the court is whether the suit 2nd item of property was purchased out of income from ancestral property or it is self acquired property of 1st defendant. The mother of the minor Plaintiff was examined as P.W.1 and she has marked Ex.A1 to A9 documents on her behalf. The P.W.1 the mother of plaintiff was married to the 2nd defendant only on 18.2.2002. The second item of property was purchased in the year 1983. The said document was marked as Ex.A2. The recitals of Ex.A2 does not say the source of income for purchase of the property. The P.W.1 who is not a member of first defendant family at the time of purchase she could not tell how the said property was purchased. She says in her evidence that she was told by her husband that the property was purchased out of the income from the first item of property. She could not produce any evidence either oral or documentary before this court to substantiate her claim that the second item of property was purchased out of the ancestral property.

14. On the other hand the first defendant has produced certain document to show that he has independent income to purchase the property. According to him he was worked as village munsif and he was retired from service as per the Policy decision of the Government. He was given with compensation Rs.40,000/- at the time of retirement. He is also receiving pension. He produces certificate to show that he was licensed document writer and surveyor. Hence he was able to show his independent

income to purchase the property. Apart from that the joint family property was divided only on 18.2.2004 between the first defendant and his brother. The said document was marked as Ex.A1. As per the said document the ancestral properties were divided between them only on the said date. If really the second item of property was purchased on 10.6.1983 out of joint family income then this property should have subjected to the partition dated 18.2.2004. It was not made as a property in the said partition deed. If the second item of property was purchased from the profit from the first item of property then the brother of first defendant should also made as party to this suit. Hence in any event the second item of property cannot be treated as joint family property purchased out of the income from 1st item of property. So the minor Plaintiff is entitled for share in the first item of property and he is not entitled for any share in the second item of property. In the first item of property the minor plaintiff is having half share in the share of his father. His father is entitled for 1/3 share in the suit first item of property. So the Plaintiff is entitled for 1/6 share in th said property not 1/3 share. The defendant in the written statement has stated that there is a Joint family debt and the Plaintiff has to share the debt also. But he has not substantiated the same by producing evidence.

15. Issue No.2 & 3:

2. Whether the Plaintiff is entitled to the relief of declaration with regard to sale deed dated 27.4.2011?
3. Whether the Plaintiff is entitled to Permanent Injunction?

16. This court has held that the Plaintiff is not entitled for any share in the second item of property as this said property is separate property of first defendant. The first defendant is having every right to deal with the said property. So the Plaintiff cannot question the sale deed executed by the 1st defendant. Hence he is not entitled for the relief of declaration. The prayer of injunction in respect of suit properties cannot be

granted for the simple reason that injunction cannot be granted against the co-sharer. Hence he is not entitled for injunction also.

17. Issue No.5 &6

5. Whether the suit is bad for non joinder of necessary party?

6. What other relief?

18. This issue was rectified by the Plaintiff by impleading the 4th defendant in the suit. Originally one of the son namely Samkumar was not impleaded as defendant in the suit even though he is having a share in it. But subsequently the Plaintiff has impleaded him as 4th defendant. Hence the suit is no bad for non joinder of party.

In the result this suit is decreed partially that the Plaintiff is entitled for partition of 1st item of suit property and he is having 1/6 share in the said 1st item of property. This suit is dismissed in respect of 2nd item of property, declaration and injunction. Considering the relationship between the parties both parties shall bear their own cost.

Dictated to the Steno-typist, directly typed by her corrected and pronounced by me in open court on this the 4th day of April 2019.

Sd/- M.Christopher

I Additional District Judge,

Salem

Plaintiff Side Witness:-

P.W.1 –Tmt. Sangeetha

Respondents side Witness:

D.W.1- Thiru.Chinnusamy

Plaintiffs side Exhibits:-

Ex.A1	18.2.2004	Partition deed between 1 st defendant and his brother Manickam	Registration copy
Ex.A2	10.6.1983	Sale deed executed by Krishna Rettayar in favour of Chinnusamy	Registration copy
Ex.A3	27.4.2011	Sale deed executed by Chinnusamy in favour of Prema	Registration copy
Ex.A4	-	Copy of M.C.No.36/2008 on the file of Family Judge, Salem	Office Copy
Ex.A5	18.2.2002	Marriage Invitation between Dhanasekaran and Sangeetha	True copy
Ex.A6	8.10.2003	Birth Certificate of Dharun	Original
Ex.A7	17.4.2008	Legal Notice	True Copy
Ex.A8	23.6.2008	Postal Acknowledgement Card	True copy
Ex.A9	19.7.2016	Order in M.C.No.36/2008 on the file of Family Judge, Salem	True copy

Respondents side Exhibits:

Ex.B1	26.6.64	Karnam's Special Test Certificate issued by Tahsildar, Salem	True copy
Ex.B2	17.6.67	Appointment order in the name of Chinnusamy issued by Revenue Divisional Officer, Salem.	Xerox copy
Ex.B3	11.4.1997	Pension payment order	Xerox copy
Ex.B4	31.12.90 -	Document writer Licence	Xerox copy

Sd/- **M.Christopher**

I Additional District Judge,
Salem.