



S.A.No.1192 of 2005

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 31..03..2023

Coram

THE HON'BLE MR JUSTICE V. LAKSHMINARAYANAN

Second Appeal No.1192 of 2005

1. Pappu @ Pavayee (Died) *

2. Ravi

3. Thangammal

..... Appellants

-Versus-

1. K.P.Ramasamy (Died) **

2. P.Jaganathan

3. P.Natarajan

4. K.Athayee

5. K.Saroja

6. Ramesh

7. Kalaiselvi

**[Respondents 5 to 7 were brought on record as legal representatives of the deceased 1st respondent as per order dated 22.11.2018 in M.P.No.406 to 409 of 2015 in S.A.No.1192 of 2005]

8. P.Pappathiyammal

9. P.Rajamani

*[Respondents 8 & 9 were brought on record as legal representatives of the deceased 1st appellant as per order dated 12.10.2022 made in C.M.P.No.12896 of 2022 in S.A.No.1192 of 2005]

..... Respondents



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Appeal filed under Section 100 of C.P.C. against the judgment and decree dated 24.01.2005 made in A.S.No.201 of 2000 by the learned I Additional District Judge, Salem, confirming the judgment and decree dated 19.10.2000 made in O.S.No.94 of 1997 by the learned Subordinate Judge, Attur, Salem District.

*For Appellant (s) : Mr.A.K.Kumaraswamy,
Senior Counsel for
Mr.S.Kaithamalai Kumaran*

*For Respondents(s) : Mr.T.Murugamanickam, Senior
Counsel for
Mrs.Zeenath Begum for R2
R4 Given up*

JUDGEMENT

This Second Appeal arises against a suit for partition in O.S.No.94 of 1997 on the file of the Subordinate Judge, Attur, Salem District, (originally filed in O.S.NO.404 of 1992 on the file of Subordinate Judge, Salem), which was decreed by judgement and decree dated 19.10.2000 and confirmed by judgement and decree dated 24.01.2005 made in A.S.No.201 of 2000 by the learned I Additional District Judge, Salem, Salem District.

2. The facts that are necessary for this appeal are:- Pappu @ Pavayee (1st defendant), Ravi (2nd defendant) and Thangammal (4th defendant are wife, son and daughter-in-law of one Palanisami Gounder respectively. The said Palanisami Gounder had three other children viz., Ramasamy, Jagannathan and



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Natarajan, who are respondents 1 to 3 before this court. Athayee, the 4th

defendant is a co-sharer of one of the items of the properties along with Pappu @ Pavayee. The case of the plaintiffs is that they are a part of joint hindu family consisting of themselves, the defendants and Palanisami Gounder. The suit schedule items were purchased from and out of their labour and the income generated from the joint family funds. Palanisami Gounder died in the year 1989. Even during the life time of Palanisami Gounder, the family, in order to resolve certain disputes, had entered into a partition agreement dated 07.04.1983. As per this partition agreement, the 1st plaintiff was given half share in A-Schedule and the 2nd plaintiff - Jagannathan was given half share in the B-Schedule property (As per the document, 1st plaintiff and the 2nd defendant were given each one half share in A-Schedule property, while 2nd plaintiff and 3rd defendant were given each one half share in B-Schedule property).

3. The cause of action for the suit is that the 2nd appellant – Ravi obtained a settlement deed under Ex.A.11 dated 06.09.1991 and one day previous to the said settlement, his wife, the 3rd appellant, purchased half share of the suit property of the 1st appellant - Pappu @ Pavayee (since died) under Ex.A.10 dated 05.09.1991. Prior to the suit, the parties have exchanged notices.

Curiously enough, the appellants 2 and 3 did not respond to the notice and it



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was only the 1st respondent who had responded. She had admitted to her participation in the partition agreement dated 07.04.1983 but, took a stand that as the document was not registered, there was no transfer of title from her. Curiously enough, a written statement was filed only by the 2nd defendant - Ravi. He has not raised this plea. He has accepted to the partition and to the panchayat which had taken place before the partition agreement was entered into. He would take a stand that the partition agreement contemplated an execution of regular document on or before 19.06.1984 and that not having been done, the plaintiffs cannot choose to enforce the agreement. He would also plead that the document is a nullity and that the suit is barred by time and in any event, the suit is hit by the provisions of The Benami Transactions (Prohibition) Act, 1988.

4. On the basis of the said pleading, the trial court framed the following issues for trial:-

- (1) 7.4.1983 தேதியிட்ட பாக ஒப்பந்தப் பத்திரமானது செல்லத்தக்கதா?
- (2) 6.9.1991 தேதி 1ம் பிரதிவாதி 2ம் பிரதிவாதிக்கு எழுதிக் கொடுத்த செட்டில்மெண்ட் பத்திரமானது செல்லத்தக்கதா? அது வாதிகளை கட்டுப்படுத்துமா?
- (3) முதல் பிரதிவாதி 4ம் பிரதிவாதி பேரில் 5.9.91ம் தேதியன்று எழுதிக்கொடுத்த கிரயப் பத்திரமானது செல்லத்தக்கதா?



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அது வாதிகளை கட்டுப்படுத்துமா?

(4) பிராதில் கோரியவாறு வாதிகள் வழக்குச் சொத்தானது ஏ, பி ஜாபிதா சொத்துக்களைப் பொறுத்து நலந்திகடு கலந்து பிரித்து அதில் ஒரு பகுதியை பெற அருகதை உடையவர்களா?

(5) பிராதுப்படி பரிகாரம் பெற வாதிகள் அருகதை உடையவர்களா?

(6) இவ்வழக்கில் வாதிக்கு கிடைக்கக்கூடிய பரிகாரம் யாது?

கூடுதல் எழுவினா

(1) தாவா 'ஏ' அட்டவணைச் சொத்து கூட்டுக் குடும்ப பொதுச் சொத்து என்பது சரியா?

5. In order to substantiate their case, the plaintiffs viz., Ramasamy and Jaganathan entered into the witness box, examined three witnesses, in addition to themselves and marked Ex.A.1 to A.15. On the side of the defendants, 2nd defendant - Ravi and the 1st defendant – Pappu @ Pavayee examined themselves as D.W.1 and D.W.2 respectively and a stranger to the their family one Varadharajan was examined as D.W.3. On the side of the defendants Ex.D.1 to Ex.D.17, most of which are only revenue records.

6. The suit, as pointed out already, has been decreed in full. Out of the 5 defendants, it was only the appellants before me who had preferred the regular appeal in A.S.No.201 of 2000. The learned first appellate judge while confirming the findings of the trial court, he exercised his discretion under Order 41, Rule 33 of CPC and modified the decree of the trial court. Against



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this concurrent finding of fact, the present appeal has been presented.

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7. This court at the time of admitting the Second Appeal, framed the following substantial question of law for consideration:-

When under Ex.A5, a division *in praesenti* takes place, is not that document compulsorily registrable and in the absence of registration, can a Court of Law grant a decree for partition based on that document?

8. I have heard Mr.A.K.Kumaraswamy, learned Senior Counsel appearing on behalf of Mr.S.Kaithamalai Kumaran for the appellants and Mr.T.Murugamanickam, learned Senior Counsel appearing on behalf of Mrs.Zeenath Begum, learned counsel for the 2nd respondent.

9. Mr.A.K.Kumaraswamy, would argue that there is no proof to show that the purchase of the assessts in the name of the 1st appellant was from and out of the joint family assessts. He would focus on Ex.A.5, which is an unregistered document and therefore, plaintiffs 1 and 2 cannot claim title through such document. He added, since Ex.A5 is an unregistered, title continues with the mother and as she was the owner of the property, she can deal with the same as she pleases and has accordingly settled the property in the name of her son and sold a portion to her daughter-in-law.



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10. Mr.T.Murugamanickam, learned counsel for the 2nd respondent

would on the other hand argue that

- (i) Ex.A5 has to be read as a whole
- (ii) There is no division *in praesenti* under the document.
- (iii) The document under Ex.A.5 remains as an agreement.
- (iv) The first appellant court applied its mind and modified the decree in exercise of its power under Order 41, Rule 33 of CPC and has rectified the decree passed by the trial court decreeing the suit as a whole and in declaring $\frac{1}{2}$ share in A-Schedule in favour of the 1st plaintiff and $\frac{1}{2}$ share in B-Schedule favour of the 2nd plaintiff.

He would forcefully point out that there was no separate written statement was filed by the 1st appellant, though she was the only person who issued a reply notice to the pre-suit notice. He would state that there is no denial on Ex.A.5 in the written statement, or in the chief or cross examination of Pappu @ Pavayee and finally, though a new plea of stridhana was taken in the evidence, it was not substantiated by material evidence and therefore, he would plead that the



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second appeal does not merit any acceptance and deserves to be dismissed.

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11. The entire case revolves around Ex.A.5. The document has been placed before me. I have carefully gone through it. Ex.A.5 reads “பாக கரார் ஒப்பந்தப் பத்திரம்”. This implies that it is an agreement to enter into a partition. I am alive to the fact that the nomenclature of a document does not determine the contents thereof. But, I need not ignore the nomenclature as a whole. In pursuance of this agreement, the words “ஒப்பந்தப் பத்திரம்” “அடைந்து கொள்ள வேண்டியது என்றும்” “கொடுத்துவிட வேண்டியது” written in the document shows that the parties were before a few panchayatars and had agreed to a division of the property and the said agreement was reduced into writing. I am not able to read the document as it was under this document the properties were partitioned. If it was the later case, it would attract the mischief of Section 17 & 49 of The Registration Act, 1908 and cannot be looked into by this court except for collateral purpose.

12. Apart from this, document also reads “நாம் ஆறு பேரும்” This line would show that all of them were clear in their minds and had agreed that from and out of the joint family assessts, properties had been purchased in the name of the mother as well as in the name of the father. I have to point out here that the assessts purchased in the name of the mother are covered under A-Schedule



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and those purchased in the name of Palanisami Gounder is under B-Schedule.

The 3rd defendant who got a share property in the A-Schedule has not objected to the same. In addition, there is no dispute with respect to the assessts in B-Schedule, which had been purchased in the name of Palanisami Gounder. I am unable to accept the contention that there is evidence with respect to purchase of property in the name of Palanisami Gounder as joint family assessts whereas when it comes to Pappu @ Pavayee, there is no evidence at all.

13. To expand on this, the initial onus burden lies on the plaintiffs to prove that the property was purchased from the joint family assessts in the name of the 1st appellant. I would read the document under Ex.A.5 to show that the burden had been discharged and now, it fell to the lot of the appellants before me to show that Pappu @ Pavayee had income to purchase the property under A-Schedule. In her cross examination, she had stated that her father had predeceased and she was married as the second wife to Palanisami Gounder by her brothers. Therefore, she had taken a plea that her brothers had given stridhana property and she had invested the same in a bank and from the interest thereof, she had purchased the assessts. However, no document has been marked in order to substantiate the same. In other words, she has failed to prove to the court that she had sufficient funds to purchase the properties in Item-A to the schedule. As I have found Ex.A.5 does not require registration, I



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can look into the documents for the purpose of finding it whether the properties agreed to be divided under Ex.A.5 are joint family assessts or not.

14. I have also to point out here that Ex.A.5 states that in case the properties had not been divided or or before 19.06.1984, the parties are entitled to approach the regularly constituted court to get a relief which has been granted by panchayatars. The relevant portion of the document are as under:-

“பஞ்சாயத்தார்கள் பைசல்படிக்கு ஒருவரால் அடுத்த நபர்கள் மேல்கண்ட விபரப்படிக்கு கொடுக்க வேண்டிய தொகையில் இன்று அடவான்சாக செலுத்திய துகை போக நிகர துகைகளை இன்று வருகிற ருத்ரோத்காரி வருடம் ஆனி மாதம் 5ம் தேதிக்குள் செலுத்தி நாம் பாகப்பிரிவினைப் பத்திரம் எழுதி பதிவு செய்து கொள்ளவேண்டியது.”

This is an other indication to show that Ex.A.5 was only an agreement to enter into a further document and even on that ground, does not require any registration.

15. Insofar as the argument that it requires registration, the learned counsel for the appellants would rely upon a very recent judgement of this court in **Jagadeesan v. Jayalakshmi** reported in (2020) 1 MLJ 504. According to him, this court has held that a document which divides the property *in praesenti* is incapable of being looked into and therefore, Ex.A.5 should be rejected and the substantial question of law should be answered in favour of the appellants. I am not persuaded by the submission of the learned senior counsel for the appellant for the simple reason that in the document



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which under issue before my brother Justice D.Bharatha Chakravarthy, the property was divided *in praesenti*. This is clear from the following terms (extracted by him in paragraph 8.1 of the judgement):-

“அவர்கள் பாகசொத்தை அவர் அவர்களே சர்வதந்திர
பாத்தியமாய் புத்திர பவுத்திர பாரம் பரியமாய் தானாதி விளிமய
விக்கிரையங்களுக்கு யோக்கியமாய் அவர் அவர்கள் இட்டம் போல்
ஆண்டு அனுபவித்துக் கொள்ள வேண்டியது.”

Here, I would rely on a classic judgement of Justice V.R.Krishna Iyer in **Kale v. Deputy director of Consolidation** reported in (1976) 3 SCC 119. The relevant portions are paragraphs 9 & 10 and in particular, sub-paragraph 10(5) & 10(6). The undisputed agreement under Ex.A.5 shows that the brothers had issue amongst themselves, with respect to the joint family properties, and in order to avoid any further squabbles and quarrels, they entered into the agreement. That is in the *bonafide* interest of putting the family affairs into a proper arrangement, so that one sibling is not at another's throat. This is the purport of Ex.A.5. Having entered into, the appellants cannot resile from the same. I do not find any difficulty in giving assent to the said document.

16. Now coming to the aspect on the decree, trial court had erred in decreeing the suit as prayed for which has been correctly modified by the first appellate court under Order 41, Rule 33 of CPC in exercise of its discretion by the first appellate court which cannot be said to be either perverse or illegal.



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17. In the light of the above discussion, I answer the substantial question of law against the appellants and hold that Ex.A.5 does not require registration.

Thus, the Second Appeal fails and the same is liable to be dismissed. However considering the fact that the parties are relatives, I am not inclined to impose costs in this appeal.

In the result, this Second Appeal is dismissed and the judgement and decree of the first appellate court are confirmed. Both parties shall bear their respective costs in this appeal.

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Index : yes / no
Neutral Citation : yes / no
Speaking / Non Speaking Order
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To

- 1.The I Additional District Judge, Salem, Salem District.
- 2.The Subordinate Judge, Attur, Salem District.



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V.LAKSHMINARAYANAN, J.

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