



S.A.Nos.716 and 720 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.10.2023

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.Nos.716 and 720 of 2023

and

C.M.P.No.22557 of 2023

S.A.No.716 of 2023

Madheswaran

... Appellant/2nd Defendant

Vs

1.Indhumathi

2.Mathumathi

3.Sundaramoorthy

... Respondents / Plaintiffs

. .. 3rd Respondent / 1st Defendant

Prayer: Second Appeal is filed under Section 100 of C.P.C against the Judgement and Decree dated 06.12.2022 made in A.S.No.25 of 2022 on the file of the IV Additional District Court, Erode District at Bhavani confirming the judgment and decree dated 30.09.2021 made in O.S.No.67 of 2005 on the file of Sub-Judge, Bhavani.



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Madheswaran

... Appellant/Plaintiff

Vs

1.Sundaramoorthy

2.Indhumathi

3.Mathumathi

... Respondents / Defendants

Prayer : Second Appeal is filed under Section 100 of C.P.C against the Judgement and Decree dated 06.12.2022 made in A.S.No.17 of 2022 on the file of the IV Additional District Court, Erode District at Bhavani confirming the judgment and decree dated 30.09.2021 made in O.S.No.217 of 2013 on the file of Sub-Judge, Bhavani.

For Appellant : Mt.T.Murugamanickam
Senior Counsel,
for M/s.Zeenath Begum

JUDGMENT

Since the pleadings in both the suits overlap a common judgment is being pronounced and the facts and the parties are referred to in the



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same array as in the suit O.S.No.67 of 2005 which is the earlier suit and the comprehensive suit for partition. The plaintiffs therein are defendants 2 and 3 in the suit O.S.No.217 of 2013 filed by the second defendant for specific performance. The first defendant in both the suits are the same.

2.The suit O.S.No.67 of 2005 was filed by the plaintiffs who were then minors for partition. The first item of the suit property was an ancestral property and the second item was purchased from out of the income from the first item of the suit property. The ancestral property belonged to the first defendant's father, Nachimuthu. Nachimuthu had two sons, Chinnusamy and the first defendant who had constituted a Hindu undivided family. On 20.04.1990, they have partitioned the joint family properties by metes and bounds and "C" schedule property in the said partition was allotted to the share of the first defendant and it is this "C"schedule property that is described as

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first item in the suit schedule. It is the contention of the plaintiffs that on their birth, they became entitled to an equal share in the said property.

3. It is the further case of the plaintiffs that the first defendant had received a sum of Rs.50,000/- form out of the joint family funds. Out of this amount and the income from the first item of the suit property, the first defendant had purchased the second item of the property under two sale deeds dated 05.07.1993 and 15.02.1996. After his purchase, he had constructed a terraced house in the second item of the suit property. Hence, the second item of the property also acquires the character of an ancestral property.

4. Pending the suit, the first defendant's father Nachimuthu, had died intestate on 12.11.2010 leaving behind the plaintiffs and the first defendant as his legal representatives and the properties that had been



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allotted to the share of Nachimuthu Gounder in the Partition Deed dated 20.04.1990 devolved on the surviving legal heirs of the said Nachimuthu. Therefore, in this property also, the plaintiffs had a 2/3rd share. It is their further case that the first defendant had declined to effect a partition. Therefore, the suit for partition.

5.The plaintiffs had impleaded the second defendant as a party since they had come to learn that the first defendant had entered into an agreement with the second defendant to alienate the second item of the suit property which stands in the name of the first defendant. Therefore, the second defendant was also impleaded as a party to the suit.

6.The first defendant had filed a written statement stating that the suit is not maintainable as the mother could not represent the minors since the father was maintaining the children and he was their natural



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guardian Further, the first defendant's wife and the mother of the plaintiffs, Vasuki was still living under the same roof. The first defendant had denied the allegations that he was living a wayward life and that he was of immoral character. He would submit that all of this nothing but a concocted story woven by his relatives. He would submit that he never driven away the mother of the plaintiffs from the matrimonial home and that she continued to live with him. He would admit that the first item of the suit property was an ancestral property, but denied the fact that the suit second item of the property has been purchased from out of the joint family funds. It is the contention of the first defendant that the suit property was purchased from out of the housing loan availed by the first defendant from the Erode District Central Cooperative Bank, Ammapettai Branch for the construction of the residential building and commercial complex. The first defendant would further contend that he is running a electrical and grocery shop at Chittar and for the business purposes, he has borrowed a loan of



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Rs.7,50,000/- at an exorbitant rate of interest from several persons. In order to discharge the housing loan, he had entered into an agreement with the second defendant and under the agreement, the second defendant was to pay a sum of Rs.5,00,000/- as sale consideration, out of which a sum of Rs.4,00,000/- was already paid as advance. The first defendant would submit that the second item of the property, being his property, he is entitled to be dealt with as he wishes. He would submit that the entire suit was instigated by his sister-in-law, Sumathi, who is the sister of plaintiffs' mother Vasuki.

7.The second defendant who is the appellant herein had filed a written statement *inter-alia* contending that he had entered into an agreement dated 28.12.2004 with the first defendant, who is the absolute owner of the second item of the property as the same been purchased by the second defendant in his name under the Sale Deeds dated 05.07.1993 and 15.02.1996. The second defendant would



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contend that the suit for partition is a collusive one. The first defendant had agreed to sell the property to the second defendant for a total consideration of Rs.5,00,000/- out of which the second defendant had already deposited a sum of Rs.4,00,000/- and the first defendant had agreed to receive the balance consideration after a period of 3 years since the suit for partition is pending. In fact, the first defendant had decided to sell the second item of the suit property only to discharge the loan availed by him from the Erode District Central Cooperative Bank.

8.The suit O.S.No.217 of 2013 was filed by the second defendant seeking specific performance of the agreement dated 28.12.2004 executed by the first defendant in his favour and for an alternate relief of refund of the advance amount with interest.



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9.The defense of the first defendant to the suit O.S.No.217 of 2013 filed by the plaintiff for specific performance is that he never entered into a sale agreement with the intention of selling the property. On the contrary on 28.12.2004, the first defendant had borrowed a sum of Rs.2,00,000/- from the plaintiff agreeing to repay the same with 12% interest and as a security, the sale agreement was executed. When this sale agreement was executed, a dispute arose between the first defendant and his wife, which resulted in the filing of the suit in O.S.No.67 of 2005. The first defendant would submit that he has been paying the interest upto November 2008 to one Chinnaru Gounder. On the advise of Chinnaru Gounder, the second defendant had agreed to receive the principal amount and cancel the sale agreement. For this purpose, the first defendant had executed a Power of Attorney in favour of Chinnaru Gounder. This Power of Attorney has been misused and the second defendant and the said Chinnaru Gounder colluded together and executed a sale agreement on 26.12.2008 in



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favour of one Gopal. On coming to know about the same, the first defendant had cancelled the Power of Attorney. The first defendant would submit that he is willing to repay the said advance amount of Rs.2,00,000/- with interest. The second item of suit property is worth Rs.11,07,000/-. Therefore, by no stretch of imagination, would they have agreed to sell the properties for a pittance for a sum of Rs.5,00,000/-. Therefore, he sought for dismissal of the suit.

10.The plaintiffs had filed a written statement reiterating the contents of the plaint contending that the agreement is a collusive one with the intent to usurp the property.

11.Both the suits were comprehensively tried and separate judgments and decrees were pronounced by the learned Sub Judge, Bhavani.

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12. In suit O.S.No.67 of 2005, the learned Subordinate Judge, Bhavani had framed the following issues.

- 1. Whether the item No.2 of the suit properties are the self acquired property of the first defendant?*
- 2. Whether the plaintiffs 1 and 2 are entitled to the relief of preliminary decree for partition of their 2/3rd share in the suit properties I and II as prayed for?*
- 3. Whether the plaintiffs 1 and 2 are entitled to the relief of final decree as prayed for?*
- 4. To what other relief the plaintiffs are entitled?*

Additional Issues:

- 1. Whether the plaintiffs are entitled to 2/3rd share in item 3 of the suit property as prayed for?*
- 2. Whether the plaintiffs are entitled to a permanent injunction as prayed for?*



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13. In O.S.No.67 of 2005, the plaintiffs had examined their mother Vasuki as P.W1 and one Palaniammal and Veeraiah as P.Ws.2 and 3. Exs.A1 to A11 were marked. On the side of the defendants, the first defendant had entered the box as D.W1, R.Balakrishnan as D.W2, Dhavamani as D.W3 and S.Madheswaran as D.W4. They had marked Exs.P1 to P7.

14.In suit O.S.No.217 of 2013, the learned Subordinate Judge, Bhavani had framed the following issues:

1. 28.12.2004-ம் தேதியிட்ட கிரய உடன்படிக்கையின் படி வாதியிடம் பிரதிவாதி ரூ.1,00,000/- பெற்றுக்கொண்டு தாவா சொத்தை கிரையம் செய்து கொடுக்க ஏற்றதை ஆற்றுதல் பரிகாரம் பிறப்பிக்கத்தக்கதா?

2.தாவா தொகை ரூ.8,14,000/- 12% வட்டி சேர்த்து வாதிக்கு பிரதிவாதி செலுத்தும்படி மாற்று பரிகாரம் பிறப்பிக்கத்தக்கதா?



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3. 1ம் பிரதிவாதி, கூதியிடம் பெற்ற அசல் தொகை ரூ.2,00,000/-ஐ செலுத்த தயாராகவே இருப்பதாக கூறவது ஏற்றுக் கொள்ளத்தக்கதா ?

4. வழக்கானது காலவரையறை சட்டத்தால் பாதிக்கப்பட்டுள்ளதா ?

5. வாதிக்கு கிடைக்கத்தக்க இதர பரிகாரங்கள் என்ன ?

Subsequently, it has been recast as follows:

1. வாதி கோரியவாறு ஏற்றதை ஆற்றுதல் பரிகாரம் வாதிக்கு கிடைக்கத்தக்கதா ?

2. 28..12.2004 ல் வாதிக்கும், 1ம் பிரதிவாதிக்கும் இடையே ஏற்பட்ட கிரைய ஒப்பந்தம், 1ம் பிரதிவாதி வாங்கிய கடனுக்காக ஏற்படுத்தப்பட்டதா ?

3. வாதி கோரிவாறு மாற்றுப் பரிகாரமாக, கிரைய ஒப்பந்தத்தில் குறிப்பிடப்பட்டுள்ள முன் தொகையை வட்டியுடன் பிரதிவாதிகள் செலுத்த தீர்ப்பாணை பிறப்பிக்கத்தக்கதா?



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4. வாதி கோரியவாறு மேற்படி முன் தொகையை திரும்ப செலுத்தும் வரை, தாவா சொத்தைப் பொருத்து பொறுப்புறுதிப் பாத்தியம் ஏற்படுத்த தீர்ப்பாணை பிறப்பிக்கத்தக்கதா?

5. வாதி கோரியவாறு நிரந்தர உறுத்துக்கட்டளை பரிகாரம் வாதிக்கு கிடைக்கத்தக்கதா?

6. வாதிக்கு கிடைக்கக்கூடிய இதர பரிகாரங்கள் யாவை ?

15. The plaintiff had examined himself as P.W1 and one Chinnaru Gounder as P.W2 and marked Exs.A1 to A8. The first defendant had examined himself as D.W.1. One Balakrishnan and Subramaniam were examined as D.W2 and D.W3 respectively and the second defendant, Indumathi (since they had attained majority) had entered the box as D.W4. Exs.P1 to P5 were marked.



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16. The learned Subordinate Judge, Bhavani had partly decreed the suit O.S.No.67 of 2005. The learned Judge declared that the first and third items of the suit property were joint family property and the plaintiffs were entitled to a $\frac{2}{3}$ rd share. As regards the second item of the suit property, the suit was dismissed stating that the plaintiffs did not have any right over the second item of the suit property as it was the absolute property of the first defendant.

17. The suit O.S.No.217 of 2013 was dismissed only with reference to the grant of relief of specific performance and decreed for alternate relief of refund of the advance amount with interest. The first defendant was directed to repay the sum of Rs.8,14,000/- together with interest on Rs.4,00,000/- from the date of the plaint till the date of the realization.



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18. Challenging the said judgment and decree in O.S.No.67 of 2005 in as much as it related to the second item of the suit schedule property, the plaintiffs had filed A.S.No.25 of 2022 on the file of IV Additional District Judge, Erode District at Bhavani. As regards as the judgment and decree in O.S.No.217 of 2013, the plaintiff had filed A.S.No.17 of 2022 challenging the decree only for the alternate prayer.

19.Both the appeals were considered by the IV Additional District Judge, Erode at Bhavani and the appeals came to be dismissed, against which, the above second appeals are filed

20.S.A.No.716 of 2023 emanates from the judgment and decree in O.S.No.67 of 2005 and S.A.No.720 of 2023 is against the judgment and decree in O.S.No.217 of 2013. The plaintiffs have not challenged the judgment and decree in A.S.No.25 of 2002 and it is the second defendant who has challenged the said decree.



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21.The judgment and decree in A.S.No.25 of 2002 is sought to be challenged by the second defendant on the ground that the suit O.S.No.67 of 2005 is a vexatiously instituted litigation. This Court is at a loss to understand as to why the judgement and decree is challenged particularly when both the Courts below have concurrently held that the second item of the suit property is the absolute property of the first defendant with whom the second defendant had entered into an agreement of sale. Considering the fact that the second defendant is not an aggrieved party more, particularly when he has not challenged the judgment and decree in O.S.No.67 of 2022, **S.A.No.716 of 2023 is dismissed.**

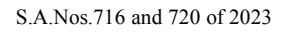
22. As regards as S.A.No.720 of 2023 both the Courts below have concurrently held that the property in question is valued at a sum of Rs.11,07,000/- even in the year 2003, as evidenced by the Ex.P1- Valuation report and by no stretch of imagination would the plaintiffs



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have entered into an agreement for a sum of Rs.5,00,000/-. Therefore, the Courts below have held that the defense of the first defendant that the agreement has been executed only for a security has to necessarily be believed. As regards the contention of the first defendant that only a sum of Rs.2,00,000/- was received, the same was disbelieved by the Court since P.W2 had deposed that the first defendant had received a sum of Rs.4,00,000/- from the second defendant, which amount he has immediately paid to the Erode Central Cooperative Bank, Ammapettai Branch to discharge his loan. P.W2 is none else than the Power holder of the first defendant. Therefore, the Courts below have proceeded to believe his evidence since there is no contra evidence on the side of the first defendant. Further, Ex.A3-Sale Agreement would indicate that a sum of Rs.4,00,000/- had been paid as advance. Since the Courts have come to the conclusion that the transaction is one of a loan, they have granted the alternate relief of recovery of money. I see no reason to disagree with the concurrent findings of the Courts below. Further, no



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P.T.ASHA, J.,

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To

1. The IV Additional District Judge,
Erode District at Bhavani.
2. The Sub-Judge, Bhavani.
3. The Section Officer,
V.R.Section,
High Court, Madras.

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