



S.A.(MD) No.179 of 2017

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 28.06.2024

CORAM:

THE HON'BLE MRS.JUSTICE.N.MALA

S.A.(MD) No.179 of 2017

and

CMP (MD) No.3223 of 2017

1.P.Rajalakshmi Ammal

2.M.Mohanasundari

... Appellants

/Vs./

G.Thiyagarajan

... Respondent

PRAYER: Second Appeal is filed under Section 100 of the Code of Civil Procedure, to allow the Second Appeal and set aside the Judgment and Decree dated 05.03.2013 in A.S.No.58 of 2012 on the file of the Principal Sub Court, Madurai, reversing the Judgment and Decree dated 07.03.2012 made in O.S.No.2049 of 2004 on the file of the Principal District Munisf Court, Madurai Town.

For Appellants : Mr.PT.S.Narendravan

For Respondent : Mr.V.Janakiramulu

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J U D G M E N T

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This Second Appeal is filed to allow the Second Appeal and set aside the Judgment and Decree in A.S.No.58 of 2012 dated 05.03.2013 on the file of the Principal Sub Court, Madurai, reversing the Judgment and Decree dated 07.03.2012 made in O.S.No.2049 of 2004 on the file of the Principal District Munisf Court, Madurai Town.

2.The defendants in the suit are the appellants in the second appeal. The parties will be referred to as per the ranking in the trial Court.

3.The plaintiff filed the suit claiming exclusive right to the suit property by virtue of a registered sale deed dated 30.10.2003 from L.Nagarathinam Ammal and three others. The plaintiff in pursuance of the same constructed a temporary structure for his book binding business in the suit property. The plaintiff claimed to have paid taxes in his name for the suit property. The plaintiff was in peaceful enjoyment and possession of the suit property and as the defendants tried to interfere with the plaintiff's peaceful enjoyment of the property, the plaintiff was constrained to file the suit for the aforesaid relief. The plaintiff along with the plaint filed a rough sketch giving the details of the suit property, the plaintiff's property as also the properties belonging to defendants and two others.



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4. The defendant filed the written statement denying all the plaintiff's averments and further stated that the suit property was a part of "H" Schedule property earmarked for common enjoyment in the partition deed of the year 19.07.1971. According to the defendants on 19.07.1971, there was a registered partition deed entered into between 7 sharers namely Lakshmana Pillai, Dhiraviyam, Ponnusamy, Sudhandhiram, Chellaiah, Balasubramaniyan, and Raja. It was agreed by the 7 sharers that the "H" schedule property would be left for common enjoyment. According to the defendants, the plaintiff's vendor Nagarathinam Ammal had no right to the properties covered by the partition deed. The said Nagarathinam Ammal as the wife of Lakshmana Pillai was given maintenance right in "A" schedule property. According to the defendants as the "H" schedule property was a common property to be enjoyed by all the co-sharers, the plaintiff's vendor viz., Nagarathinam Ammal and three others had no right to sell the suit property to the plaintiff under Sale Deed dated 30.10.2003. As the suit property was a common property a purchaser from the co-sharers could not enter into the possession without seeking partition. The defendants further stated that "H" schedule property was a common property, hence the suit for permanent injunction against the co-sharers was not maintainable. The defendants were the purchasers of the "F" and "C" schedule property in the partition deed dated 19.07.1971, having purchased the same under



Sale deeds dated 21.04.1999 and 10.07.2002. In the said sale deeds of the defendants there was a specific recitals that the “H” Schedule Property was common property. It was therefore stated that the plaintiff's had no exclusive right to the suit property and hence the suit for permanent injunction was not maintainable.

5.The plaintiff filed the additional plaint stating that the “H” schedule property in the partition deed belonged in common to Nagarathinam ammal, Dhiraviyam, Ponnusamy, Sudhandhiram, Chellaiah, Balasubramaniyan and Raja and that even before the sale in favour of the plaintiff and the defendants, the said sharers had orally partitioned the suit schedule property between themselves. Nagarathinam Ammal, Sudhandhiram, Chellaiah and Raja sold their shares of the suit schedule property to the plaintiff vide the sale deed dated 30.10.2003. In the oral partition, Dhiraviyam who was one of the sharer was allotted to “H” Schedule property and constructed a house and sold to one Amirthammal, so also Ponnusamy in the share allotted to him constructed a Vinayagar Temple and enjoyed the same. Balasubramanian in his share constructed a stone pillar and sold his share to the first defendant.

6.The defendant filed an additional written statement denying all the contentions raised in the additional plaint and prayed for the dismissal of the suit.

7.Before the trial Court, the plaintiff examined himself as PW1 and examined



two other witnesses on his side. The plaintiff marked Ex.A1 to Ex.A14. The defendants examined themselves as DW2 and DW1 and marked Ex.B1 to Ex.B4 in support their case. The trial Court after framing the necessary issues dismissed the suit on the basis of its finding that the suit property was a common property. The Trial Court on the basis of the evidence returned a finding that the plaintiff had failed to establish the oral partition set up by him. The trial Court further held that the plaintiff was not entitled to the relief of injunction as he was co-owner. The trial Court therefore dismissed the suit. Aggrieved by the Judgment and Decree of the trial Court, the plaintiff filed an appeal before the Lower Appellate Court, the Lower Appellate Court on consideration of the entire evidence placed before it allowed the appeal by setting aside the Judgment and Decree of the trial Court. The Lower Appellate Court relying on the evidence of PW2 and PW3 and also the documentary evidence held that the oral partition set up by the plaintiff was proved and therefore decreed the suit. Aggrieved by the reversing Judgment of the Lower Appellate Court the defendants filed the present second appeal.

8.At the time of admission of the second appeal, the following substantial questions of law were framed.

“(i) Whether the plaintiff has discharged the burden of proving the oral partition, in the absence of any material



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evidence?

(ii) *In the absence of any proof for oral partition as between the co-sharers, had obtained his schedule under Ex.B1, plaintiff is entitled to any specific portion thereof?*

(iii) *Whether the plaintiff could file the suit without seeking partition?"*

9.The learned counsel for the appellant agitated only the first two substantial questions of law before me.

10.The learned counsel for the appellants submitted that the Lower Appellate Court erred in relying on the oral evidence of PW2 and PW3 to hold that the oral partition was established by the plaintiff. The learned counsel further submitted that the lower appellate Court failed to note that the trial Court had rightly found that PW3"s evidence on oral partition was belied by the documentary evidence Ex.A14. The learned counsel further submitted that the finding of the trial Court that the plaintiff had failed to prove the oral partition was based on proper appreciation of the evidence and therefore the Lower Appellate Court erred in interfering with the same.

11.The learned counsel for the respondent on the other hand submitted that PW2 and PW3 were parties to the original partition dated 19.07.1971 and they were



quite competent to speak about the oral partition. The learned counsel submitted that the reliance placed by the lower appellate Court on the evidence of PW2 and PW3 was sustainable as they were parties to the original partition dated 19.07.1971. The learned counsel therefore submitted that the appeal had no merits and deserved to be dismissed.

12.Heard the learned counsel for the appellants and the respondent and I have perused the materials placed on record.

13.The undisputed facts of the case are that the properties covered by the partition deed Ex.B1 dated 19.07.1971 were divided between 7 sharers viz., the husband of Nagarathinam Ammal i.e. Lakshmana Pillai, Dhiraviyam, Ponnusamy, Sudhandhiram, Chellaiah, Balasubramaniyan, and Raja. Under the said partition deed “H” schedule property which consisted of two items were left for common enjoyment. First time of “H” Schedule was land and building and 2nd item was common passage. The plaintiff claims to have purchased item 1 of the “H” schedule property vide the sale deed dated 30.10.2003 under Ex.A1 from Nagarathinam Ammal, Sudhandhiram, Chellaiah and Raja. The first defendant purchased “F” Schedule property along with the common passage in “H” schedule property i.e. the second item of the “H” schedule property under Ex.A14 on 10.07.2002. So also the second defendant



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purchased “C” schedule property along with common passage in item 2 of the “H” schedule property from the widow of Ponnusamy vide the sale deed dated 21.04.1999 under Ex.B3.

14.It is an admitted fact that the second item of “H” Schedule property i.e. common passage was left for common enjoyment. Whereas the plaintiff claims that the first item of “H” Schedule property in R.S.No.147/1A/A/1 consisting of well, toilet and vacant space was orally divided between sharers and a part of item 1 of “H” schedule property was purchased by the plaintiff from the 4 sharers under Ex.A1, the defendants claim that the entire “H” Schedule property consisting of 2 Items was never divided, but was kept for common enjoyment. It is to be seen if the plaintiff has proved the oral partition. The plaintiff relies on the evidence of PW2 and PW3 to support his plea of oral partition. PW2 and PW3 are sharers in the 1971 partition deed. PW2 is also the vendor of the 1st defendant. The trial Court rejected the evidence of PW2 and PW3 on the premise that PW2 and PW3 were interested witnesses, over looking that PW2 and PW3 were sharers in the original partition deed. The Lower Appellate Court placed reliance on the evidence of PW2, the Vendor of first defendant.

15.With regard to the oral partition PW2 in his evidence stated as follows:

"பி.வா.சா.ஆ.1ல் ஹைசுச் செட்டியூலில் 2 அயிட்டங்கள்
காட்டப்பட்டுள்ளது. நான் சொல்லக்கூடிய இடம் ஹைசுச்



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செட்யூலில் 1வது செட்யூலாக சொல்லப்பட்டுள்ளது. நான் சொல்லக்கூடிய பொதுப்பாதையானது ஹைச் செட்யூலில் 2வது அயிட்டமாக காட்டப்பட்டுள்ளது. வீடுகள் ஒரே வரிசையில் அமைந்திருப்பதால் மேற்படி 2வது அயிட்டத்தை பொதுப்பாதையாக பி.வா.சா.ஆ.1ல் காட்டியுள்ளோம். பி.வா.சா.ஆ.1ல் ஹைச் செட்யூலில் 1வது அயிட்டச் சொத்தைப் பொறுத்து அதில் பாகப்பிரிவினை எதுவும் செய்து கொள்ள முடியாது என்று சொல்லவில்லை. வழக்கில் 1வது பிரதிவாதியை எனக்குத் தெரியும். என்னுடைய இடத்தை என்னுடைய மகன் படிப்புச் செலவுக்காக விற்கவேண்டும் என்று புரோக்கர் வசம் சொல்லியிருந்தேன். அதன் பேரில் புரோக்கர் மூலம் 1வது பிரதிவாதியை எனக்கு தெரியும். பி.வா.சா.ஆ.1ல் எப் செட்யூலில் உள்ள சொத்தை ராஜலட்சுமி அம்மாளுக்கு கிரையம் கொடுத்துள்ளேன். பி.வா.சா.ஆ.1ல் சொல்லப்பட்டுள்ள ஹைச் செட்யூலில் சொல்லியுள்ள 1வது அயிட்டச் சொத்தை நானும் என்னுடைய சகோதரர்களும் 1995ல் வாய்மொழியாக பாகப்பிரிவினை செய்துகொண்டோம். வழக்கின் வாதியை எனக்குத் தெரியும். வழக்கின் வாதி என்னுடைய அண்ணன் வீட்டினை வாங்கியுள்ளார். வாய்கறால் மூலம் எனக்கு கிடைத்த பாகத்தை நான் அப்படியே வைத்துள்ளேன். அதில் கல் ஊன்றி வைத்துள்ளேன். நாகரத்தினம் அம்மாள் செல்லையா சுதந்திரம் ஆகியோர்கள் வாய்மொழியாக தங்களுக்கு கிடைத்த பாகத்தை வாதிக்கு கிரையம் கொடுத்துள்ளார்கள். பொன்னுச்சாமி என்பவர் தனக்கு கிடைத்த பாகத்தை



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தன் வசம் வைத்துள்ளார். திரவியமும் வாய்மொழியாக
தனக்க கிடைத்த பாகத்தை விற்றுவிட்டார். 1ம்
பிரதிவாதிக்கு நான் கிரையம் கொடுத்த சொத்தின்
கிரையப் பத்திரத்தின் சான்றிட்ட நகல் வா.சா.ஆ.14
ஆகும்."

16.The trial Court without appreciating the evidence of PW2 and on a misconception that the oral partition which took place in the year 1995, was not whispered in Ex.A14 rejected the oral evidence of PW2. In my view, the trial Court failed to note that there was no occasion to speak of the oral partition of the first item of "H" Schedule property in Ex.A14. Further the trial Court failed to note that 'H' schedule consisted of 2 items are land one building and the other common passage under Ex.A14 Schedule "F" property and item 2 of the "H" Schedule property i.e. the common passage were alone sold. Had the trial Court closely scrutinised Ex.B1 Partition Deed then it would have found out that 'H' Schedule consisted of 2 items and the 1st item was amenable to partition and the 2nd item, common passage was not.

17.The Lower Appellate Court allowed the appeal relying mainly on the oral evidence of PW2 and PW3. I agree with the conclusion of the lower appellate Court for different reasons. Schedule 'H' consisted of 2 items is clear from Ex.B1. That



item 1 of 'H' Schedule was capable of partition is clear from the nature of property.

PW2 clearly spoke of 'H' Schedule and the oral partition of the same. I find no justifiable reasons for eschewing the evidence of PW2 because admittedly PW2 was one of the sharers in the original partition, Ex.B1 and hence was the best person to speak of the 'H' Schedule property. For the said reasons the findings of the lower appellate Court are confirmed.

18.The learned counsel for the appellant submitted that in the event this Court comes to the conclusion that the item 1 of “H” Schedule property was orally partitioned then the injunction should be restricted to item 1 of “H” Schedule only. I find justification in the said contention. Admittedly item 2 of the “H” Schedule property is a common passage and therefore in all fairness the relief of injunction prayed for by the plaintiff should be restricted to the 1st item of “H” Schedule property alone. It is made clear that item No.2 of “H” Schedule shall remain in common enjoyment. In view of the above discussions, the injunction granted by the lower appellate Court is restricted to item 1 of 'H' schedule property alone. With this modification, the Judgment and Decree in A.S.No.58 of 2012 on the file of the Principal Sub Court, Madurai is confirmed.

19.Accordingly, this Second Appeal is partly allowed. However, there shall be



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no order as to costs. Consequently, the connected miscellaneous petition stands closed.

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Index : Yes / No

Internet : Yes / No

Speaking Order/Non-speaking order
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To

- 1.The Principal Sub Court,
Madurai.
- 2.The Principal District Munisf Court,
Madurai Town.
- 3.The Record Keeper,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.

N.MALA, J.

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