



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 18.12.2017

CORAM

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THE HONOURABLE MRS.JUSTICE PUSHPA SATHYANARAYANA

S.A.(MD)No.180 of 2014

1.C.Thiraviyaraj
2.C.Selvam
3.C.Antonysamy
4.C.Yesuraj
5.C.Silvestor

...Appellants/Appellants/Plaintiffs

..VS..

1. Arulayee Ammal
2. Mickeal Samy
3. Rejinamary
4. Arokkiaraj
5. Kattithangammal
6. Rajammal

...Respondents/Respondents/Defendants

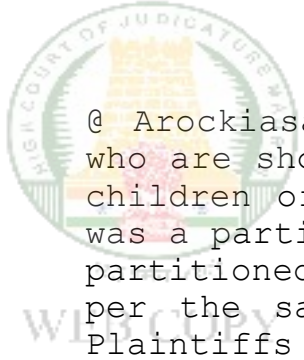
Second Appeal filed under Section 100 C.P.C. against the Judgment and decree dated 17.01.2005 passed in A.S.No.15 of 2004 on the file of the Subordinate Court, Kovilpatti confirming the judgment and decree dated 10.11.2003 in O.S.No.63 of 2001 on the file of the District Munsif Court, Kovilpatti.

For Appellant	: Mr.M.R.Sreenivasan
For Respondents	
R1 to R4	: Mr.V.Meenakshisundaram
For R5 and R6	: No Appearance

J U D G M E N T

The Plaintiffs 1 and 5 are the appellants. The suit is filed for declaration that item No.1 of the suit property belongs to the plaintiffs 1 to 5 and for consequential injunction, for declaration that the item No.2 belongs to the Plaintiffs 6 and 7 and for injunction and mandatory injunction and removal of gate and wall as stated in the Plaint.

2. The case of the Plaintiffs is that the suit property originally belonged to one Subbu Rowther who sold the suit properties to Michael Nadar on 11.02.1963. The said Michael Nadar is the paternal uncle of the Plaintiffs. One Devasahaya Nadar had six sons viz., Michael Nadar, Sornam @ Anthonimuthu, Gnanasamy @ Savarimuthu, Duraisamy @ Arockiasamy Nadar, Selladurai @ Viyagappa Nadar and Ayyadurai @ Sevasahayam. Of all the above sons Duraisamy



@ Arockiasamy Nadar died leaving behind his wife and two children who are shown as Plaintiffs 6 and 7. The Plaintiffs 1 to 5 are the children of Selladurai @ Viyagappa Nadar. It is stated that there was a partition on 13.09.1967, by which the sons of Devasagaya Nagar partitioned the property and the partition list was prepared. As per the said partition, the fourth schedule was allotted to the Plaintiffs 6 and 7 and the 6th schedule was allotted to the Plaintiffs 1 to 5. After the partition, the respective sharers were in enjoyment of the suit property. The first schedule of the suit property was settled in favour of the Plaintiffs 1 to 5. After the partition, the respective sharers were in enjoyment of the suit property. The first schedule of the suit property was settled in favour of the Plaintiffs 2 to 5 by their father Selladurai @ Yagappa on 07.12.2000 and the Plaintiffs claimed to be in possession of the suit property from the said date and also obtained patta. The second schedule property which belongs to Duraisamy @ Arockiasamy Nadar had settled the property on the same date i.e. on 07.12.2000, in favour of the sixth and seventh Plaintiffs. It is also stated that as the Plaintiffs, while dealing with the property in their original right, there was a mortgage deed on 27.12.1973, in favour of the mother of the Plaintiffs 6 and 7. The defendants who have got no right in the suit properties were trying to interfere with the peaceful possession of the Plaintiffs. Hence, the Plaintiffs have filed a suit for declaration and injunction.

3. Resisting the suit, the defendants have filed their written statement contending that the Plaintiffs never had any right in the suit properties. The suit properties were purchased by Michael Nadar on 11.02.1963 and the same was purchased by said Michael Nadar out of his own income for the benefit of his wife and children. The other brothers of the said Michael Nadar had partitioned the properties long back and there was no question of joint family purchase. The partition alleged to have entered on 13.09.1967 is denied by the defendants. It is further contended by the defendants that the alleged partition deed was created only for the purpose of suit and the settlement deeds dated 07.12.2000 under Exs.A3 and A14 are also denied by the defendants. The mortgage deed dated 27.12.1973 is also disputed as a sham and nominal document, which is also created for the purpose of the case. As the defendants are the owners of the property by virtue of the Sale Deed dated 11.02.1963, the Plaintiffs cannot claim any right over the suit property and prayed for dismissal of the suit.

4. Before the Trial Court, on the side of the Plaintiff, two witnesses were examined as P.W.1 and P.W.2 and Exhibits A1 to A16 were marked. On the side of the defendants, the first defendant himself was examined as D.W.1 and another witness was examined as D.W.2 and Exs.B1 to B11 were marked on his side. After considering the facts and evidence available, the trial Court had dismissed the suit. On appeal by the Plaintiffs, the Lower Appellate Court also confirmed the same. Aggrieved by the said concurrent findings of the Court below, the above Second Appeal is filed.



5. At the time of admission, the following substantial questions of law were framed:

"i. Whether the Courts below have not construed Ex.A2 in it's proper perspective on the aspect of need or no need of registration?

ii. Whether the Courts below erred in recording a finding that Ex.A1 Sale deed is not valid and operative?"

6. The relationship between the parties are admitted. The fact that the suit property is lying in Survey No.417 and is an extent of 1 acre 63 cents are also not in dispute. The suit property has been purchased by Michel Nadar who is the senior parternal uncle of the plaintiffs under Ex.A1 dated 11.02.1963. It is alleged by the Plaintiffs that the Michael Nadar being the senior member of the family and being the eldest son, the suit property was purchased in his name. Hence, the others have also got right over the same. It is specifically pointed out by the counsel appearing for the appellants that in Ex.A1, it is stated that "gphptpidahfhj FLk;g nknd\$h; kpf;nfy; ehlhh; mth;fSf;F" and on the strength on the above phrase, it is contended that the property was purchased in the name of Michael Nadar only on behalf of the other members of the family. Hence, the property is available for partition. It is also pointed out by the learned counsel for the respondents that admittedly the parties are christians and the concept of the joint family or undivided family or karta are not applicable to the Christians. It is not the case of the plaintiffs that the property was purchased by the joint efforts of the brothers by contributing money to the purchase of the property. When the concept of joint family or undivided family or karta is not known to christians, unless it is specifically stated that the property was purchased in the name of Michael Nadar on behalf of other brothers with the help of the contributions made by them, the Plaintiffs cannot have any right over the same. It is the consistent case of the Plaintiffs that the said property was purchased in the year 1963, later it was divided as East and West and eastern side of 80 cents was allotted to the Plaintiffs father Selladurai @ Viyagappa Nadar and the western side of 83 cents was allotted to the mother of the Plaintiffs 6 and 7. The Plaintiffs also filed Ex.A2, which is the partition list. The same was objected to by the learned counsel for the respondents contending that it is an unregistered partition deed and the same cannot be admitted in the evidence. Now it has to be determined whether the said Ex.A2- Partition deed can be received as evidence. A partition deed operates as a document severing the joint relationship. It is an adjustment of the rights of the various members of the family. A partition implies interest of different persons in the property to be divided. Thus, a partition means any partition made by the execution of the deed of partition duly registered under the registration Act. So far as the partition is not registered, it become inadmissible in evidence, as per decision of the Hon'ble Supreme Court in *ROSHAN SINGH & ORS Vs. ZILE SINGH & ORS.* reported in 1988 SC 881.

"9. It is well-settled that while an instrument of partition which operates or is

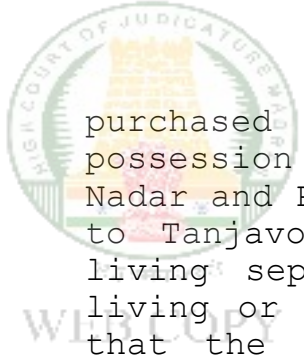


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intended to operate as a declared volition constituting or severing ownership and causes a change of legal relation to the property divided amongst the parties to it, requires registration under Section 17(1)(b) of the Act, a writing which merely recites that there has in time past been a partition, is not a declaration of will, but a mere statement of fact, and it does not require registration. The essence of the matter is whether the deed is a part of the partition transaction or contains merely an incidental recital of a previously completed transaction. The use of the past tense does not necessarily indicate that it is merely a recital of a past transaction. It is equally well-settled that a mere list of properties allotted at a partition is not an instrument of partition and does not require registration. Sec. 17(1)(b) lays down that a document for which registration is compulsory should, by its own force, operate or purport to operate to create or declare some right in immovable property. Therefore, a mere recital of what has already taken place cannot be held to declare any right and there would be no necessity of registering such a document. Two propositions must therefore flow: (1) A partition may be effected orally; but if it is subsequently reduced into a form of a document and that document purports by itself to effect a division and embodies all the terms of bargain, it will be necessary to register it. If it be not registered, s. 49 of the Act will prevent its being admitted in evidence. Secondary evidence of the factum of partition will not be admissible by reason of s. 91 of the Evidence Act, 1872. (2) Partition lists which are mere records of a previously completed partition between the parties, will be admitted in evidence even though they are unregistered, to prove the fact of partition."

7. Accordingly the Courts below also rejected the admissibility of Ex.A2- Partition Deed.

8. It is also to be seen that it is admitted by the parties that there was a oral partition, even prior to the execution of Ex.A2. If that is true, there should be a mention about the said oral partition in Ex.A2. A perusal of ExA2 would go to show that there is no such mention about oral partition with respect to the house vacant sites or the garden. The suit properties were



purchased by Michal Nadar out of his income and he has been in possession of the same. It is also admitted that excepting Michal Nadar and Plaintiff's father the other brothers had already migrated to Tanjavore. If the brothers have already been separated and living separately in a different place, the questions of joint living or joint earning is not possible. Whiles, the allegation that the suit properties were purchased by the efforts of the brothers in the name of the eldest one is unacceptable. The Lower Appellate Court has found that P.W.2 though had stated that Michal Nadar had utilised the money given by each of the brothers for the purchase of the suit property, unable to substantiate the same. Hence, the case of the Plaintiffs that the Property was purchased in the name of the eldest member by pooling the money from the contributions made by other brothers is not substantiated as alleged.

9. Yet another aspect that has to be considered is the gift deeds executed under Exs.A3 and A14 dated 07.12.2000. The first schedule property was alleged to have been allotted to the father of the Plaintiffs 1 to 5 and the second schedule was allotted to the father of the Plaintiffs 6 and 7. As per Ex.A3, the father of the Plaintiffs 1 to 5 have executed the settlement deed in favour of the Plaintiffs 1 to 5. Whereas as per Ex.A14, the mother of the Plaintiffs 6 and 7 had executed the settlement deed in their favour. If really the father of the Plaintiffs had got their properties in the partition deed under Ex.A2 after their life time, by inheritance, their children would automatically get the same. Therefore, there is no necessity for execution of gift deed in their favour. To substantiate the same, the Plaintiffs also filed Exs.A4 and A5 which are mortgage deed executed by father of the Plaintiffs in favour of Pushpammal, who is the mother of Plaintiffs 6 and 7. Though, the said mortgage deed is registered one, the Plaintiffs could not establish the fact that the possession was given to the mortgagee and that it was in her enjoyment after the execution of mortgage deed. In the absence of enjoyment of suit properties by mortgagee, the Lower Appellate Court also found that the mortgage deed was also only sham and nominal document. A perusal of the documents filed and marked under Exhibits by Plaintiffs would go to show that Ex.A3 was executed on 07.12.2000 by the father of the Plaintiffs 1 to 5 as a settlement deed. Ex.A5 is a mortgage deed executed on the very same date in favour of the mother of the Plaintiffs 6 and 7. Ex.A14 is once again a settlement deed executed by mother of the Plaintiffs 6 and 7 in their favour. As they have stated earlier, if really the Plaintiff's father had got right over the suit property under partition i.e. under Ex.A2, by natural inheritance, his children would get after his death and there is no necessity to execute the settlement deed. Similarly the mother of the Plaintiffs 6 and 7, also executed the Sale deed without any reason and there is also no explanation coming forth from the Plaintiffs as to why on the same date, the properties were mortgaged in favour of their aunt. When the documents are found to be sham and nominal, no right would flow under the same. The Plaintiffs have also produced patta pass book under Exs.A6 and A15. As per the above said Patta Pass Book also, there is nothing brought out to show that the properties were standing in the name of the father of



the Plaintiffs. On the other hand, to substantiate the case of the defendants that the properties were standing in the name of their father, Michael Nadar Ex.B8 has been filed. Ex.B6, which is also Patta Pass Book is in the name of the husband of first defendant. The defendants also have produced documents to prove their possession viz., Ex.B7, which is an adangal receipt for Survey Nos. 417 and Ex.B8- an adangal receipt for Survey No.412/1 and Exs.B9, B10 and B11 which are also Adangal extracts. As per the Adangal extracts, it would go to prove the possession of the person. The said Adangals are in the name of the husband of the first defendant and father of the second defendant. As per the report of the Commissioner appointed, the defendants have also established that there is a well and pump set in the suit property and the defendants have obtained service connection in their name by paying the electricity charges which is also evidenced by Ex.B4. The defendants have established their title as per Ex.A2 and establish their possession over the same and the Plaintiffs failed to prove that they had title over the suit properties and they are not entitled for injunction and therefore the Courts below have rightly rejected the reliefs sought for by them.

10. In view of the same, there is no infirmity in the Judgments of the Courts below, warranting interference by this Court. Hence, this appeal is devoid of merits and the same stands dismissed. No costs.

Sd/-

Assistant Registrar(T&P)

/True Copy/

Sub-Assistant Registrar

To

1. The Subordinate Court, Kovilpatti
2. The District Munsif Court, Kovilpatti

Copy to: The Record Keeper, V.R.Section, (2 copies)
Madurai Bench of Madras High Court, Madurai

+One cc to Mr.R.Nandakumar, Advocate, SR.No.93665
+One cc to Mr.D.Nallathambi, Advocate, SR.No.93406

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Judgment made

in
S.A. (MD) No.180 of 2014
18.12.2017