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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON :27.08.2018

PRONOUNCED ON: 28.09.2018

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

S.A.No.149 of 2015

Smt.Faritha Ammal

[Cause title amended vide
Court order dated 14.08.2018
made in C.M.P.No.14260 of 2018
in S.A.No.149 of 2015]

... Appellant/Respondent/
Defendant

Vs.

K.M.Ahamad Shah

... Respondent/Appellant/
Plaintiff

Prayer: Second Appeal filed under Section 100 of C.P.C., against the judgment and Decree passed by the Subordinate Judge, Mannargudi in A.S.No.36 of 2013 dated 20.11.2014 reversing the judgment and decree passed by the District Munsif Court, Thiruthuraipoondi in O.S.No.96 of 2010 dated 30.09.2013.

For Appellant : Mr.S.Sadasivan
for M/s.S.Raghupathi

For Respondent : Mr.M.Bala Subramanian

J U D G M E N T

In this Second Appeal, challenge is made to the judgment and decree dated 20.11.2014 passed in A.S.No.36 of 2013 on the file of the Subordinate Court, Manargudi, reversing the judgment and decree dated 30.09.2013 passed in O.S.No.96 of 2010 on the file of the District Munsif Court, Thiruthuraipoondi.

2.The parties are referred to as per rankings in the trial court.



3.Suit for possession and mense profits. The case of the plaintiff in brief is that his wife Jainam bugani died on 18.07.2005 and the plaintiff is the only heir of the deceased wife and the defendant is the elder sister of the plaintiff's wife and on 31.05.2002, the plaintiff's wife, the defendant and their two sisters and one brother effected partition in respect of the properties belonging to them by way of a deed of partition and in the said partition, the "D" schedule properties of the partition deed had been allotted to the share of the plaintiff's wife and the defendant was allotted the "B" schedule properties described therein and other sharers were allotted the other properties as described in the deed and thereafter, the sharers had been in possession and enjoyment of the respective shares allotted to them and accordingly the plaintiff's wife was in possession of the "D" schedule properties and she died intestate and accordingly, following the death of his wife, it is only the plaintiff, who has been in the possession and enjoyment of her properties namely the suit properties and while so, when the plaintiff went to Malaysia in connection with his work, the defendant without any authority had encroached into the plaint schedule properties and after the return of the plaintiff from Malaysia, despite the demand of the plaintiff to hand over the possession of the plaint schedule properties, the defendant refused to accede to the same and accordingly, the plaintiff had issued a legal notice on 06.10.2010, demanding the entrustment of the plaint schedule properties and the defendant did not respond to the said notice and accordingly, inasmuch as the plaintiff is entitled to claim half share in the suit properties as the legal heir of his wife under the Mohamadian Law, accordingly, it is stated that the plaintiff has been necessitated to lay the suit for appropriate reliefs.

4.The case of the defendant in brief is that the suit laid by the plaintiff is not maintainable either in law or on facts and it is true that the plaintiff's wife died on 18.07.2005 and it is true that the plaintiff's wife, the defendant and their sisters and brother effected the partition of their properties by a deed of partition on 31.05.2002 and it is true that the "D" schedule properties and the "B" schedule properties described in partition deed were allotted to the share of the plaintiff's wife and the defendant respectively and the other properties had been allotted to the other sisters and brother as described in the partition deed and it is false to state that the plaintiff on the demise of his wife, had been enjoying the plaint schedule properties as the legal heir of his wife and it is further false to state that the defendant encroached into the plaint schedule properties, when the plaintiff went to Malaysia in connection with his work and it is false to state that the defendant refused to hand over the same



to the plaintiff on his return from Malaysia, despite the demands made by the plaintiff and it is false to state that the plaintiff sent a notice through his lawyer, demanding the possession of the suit properties. No such notice had been sent by the plaintiff to the defendant. The plaintiff's wife was suffering from cancer and it is only the defendant, who had been attending on her and accordingly, she had borrowed a sum of Rs.8,00,000/- for meeting the medical expenses and in consideration of the same, the plaintiff's wife had executed a sale agreement dated 14.06.2005, agreeing to sell the suit properties in favour of the defendant for the amount advanced by the defendant to the plaintiff's wife, in connection with her medical expenses as abovestated and since the date of sale agreement, it is only the defendant, who has been in the possession and enjoyment of the suit properties and even after the death of the plaintiff's wife, the defendant continued to be in the possession and enjoyment of the suit properties and hence, the plaintiff is not entitled to claim half share in the suit properties as prayed for and there is no time limit for the enforcement of the sale agreement dated 14.06.2005 executed by the plaintiff's wife and the plaintiff is not entitled to maintain the suit after his wife had executed the sale agreement in favour of the defendant, agreeing to convey the suit properties in favour of the defendant and only after the plaintiff establishing his claim to the suit properties, he would be entitled to seek the possession of the same and furthermore, the plaintiff for seeking his claim of share in the suit properties should have instituted a suit for partition and separate possession and on the other hand, the suit laid by the plaintiff for recovery of possession of his share in the suit properties is not maintainable and on that basis alone, the suit is liable to be dismissed. There is no cause of action for the suit and hence the suit is liable to be dismissed.

5.In support of the plaintiff's case, P.W.1 was examined. Exs.A1 to A4 were marked. On the side of the defendant, D.W.1 was marked. Exs.B1 to B4 were marked. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial court was pleased to dismiss the suit. The first appellate court on an appreciation of the materials placed on record was pleased to set aside the judgment and decree of the trial court and by way of allowing the appeal preferred by the plaintiff, decreed the suit as prayed for. Impugning the same, the present second appeal has been laid.

6.At the time of admission of the Second Appeal, the following substantial questions of law were formulated for consideration.



(a) Whether the lower appellate court was right in decreeing the suit granting half share in the property, when the suit is not for partition?

(b) Whether the plaintiff has pleaded that he is the absolute owner of the entire property allotted to his wife in respect of the " D " schedule property in the partition?

(c) Whether the lower appellate court was right in holding that the plaintiff is entitled for half share in the property?

(d) Whether the lower appellate court was right in granting half share in the suit property and also for recovery of possession when the said half share has not been defined in the plaint and identifiable?

(e) Is it not the lower appellate court is wrong in not considering the fact that the defendant is entitled for protection under Section 53 A of the Transfer of the Property Act?

7. The plaintiff's wife and the defendant are sisters. The plaintiff's wife and the defendant have two other sisters and a brother. It is not in dispute that the plaintiff, the defendant and the other sisters and brother had effected partition of the properties belonging to them by a deed of partition dated 31.05.2002 marked as Ex.B2/A1 where under, the plaint schedule properties described as "D" schedule properties in the deed of partition had been allotted to the plaintiff's wife. Now, according to the plaintiff, his wife died on 18.07.2005 and he is the only legal heir of the deceased wife and accordingly entitled to the plaint schedule properties and the plaintiff has projected the case that when he left to Malaysia in connection with his work, the defendant had unlawfully encroached into the suit properties and enjoying the same and despite the demand of possession of the same by the plaintiff thereafter and also the issuance of notice with reference to the same, according to him, the defendant had refused to hand over the possession of the suit properties and inasmuch as the plaintiff as the legal heir of his deceased wife is entitled to half share in the suit properties, according to the plaintiff, he has been necessitated to lay the suit for appropriate reliefs.

8. The defence version is that the plaintiff's wife was suffering from cancer and it is only the defendant, who had been looking after her and in connection with the medical expenses, the plaintiff's wife had borrowed a sum of Rs.8,00,000/- from the defendant and accordingly in consideration thereof, executed a sale agreement in favour of the defendant in respect of the



plaint schedule properties on 14.06.2005 marked as Ex.B3 and it is stated that pursuant to the abovesaid sale agreement, it is only the defendant, who has been in the possession and enjoyment of the plaint schedule properties and therefore, the plea of encroachment alleged by the plaintiff is false and inasmuch as the defendant is in the possession and enjoyment of the suit properties pursuant to the sale agreement, the plaintiff is not entitled to claim the suit properties and the plaintiff is not entitled to claim the suit properties or the half share in respect of the same, as the legal heir of the deceased wife and furthermore, it is also contended by the defendant that in case, the plaintiff established his claim of recovery of possession of half share in the suit properties, his only remedy is to file a suit for partition of his share by metes and bounds and hence, according to the defendant, the plaintiff has no cause of action to lay the present suit and the suit is liable to be dismissed.

9.As abovenoted, it is not in dispute that the plaint schedule properties had been allotted to the share of the plaintiff's wife under Ex.B2/A1 partition deed and it is also not in dispute that the plaintiff's wife died on 18.07.2005. As per Mohamadian Law, it is seen that the plaintiff is one of the legal heirs of the deceased wife. Further, as per the Mohamadian law, it is also noted that the defendant as well as the other two sisters and brother of the plaintiff's wife are also entitled to claim a share in the properties belonging to the plaintiff's wife and such being the position, according to the defendant, the plaintiff, if at all is entitled to claim half share in the suit properties, is only entitled to lay the suit for partition and recover the possession of the same and hence the present suit laid by the plaintiff for recovery of possession of his half share is not maintainable legally and hence the suit is liable to be dismissed. Furthermore, according to the defendant, inasmuch as, she is enjoying the suit properties pursuant to the sale agreement dated 14.06.2005, which had been executed in her favour by the plaintiff's wife for a consideration of the sum of Rs.8,00,000/- borrowed by her from the defendant for meeting the medical expenses, it is stated by the defendant that the plaintiff is not entitled to obtain the relief sought for.

10.The defendant has resisted the plaintiff's suit on the basis of the sale agreement dated 14.06.2005. The genuineness of the abovesaid sale agreement is being contested by the plaintiff. Now according to the defendant, she had been handed over the possession of the suit properties by the plaintiff's wife, pursuant to Ex.B3 sale agreement and in such view of the matter, no time limit had been fixed for enforcing the sale agreement and the defendant is entitled to the suit properties following the same and enjoying the same accordingly



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and hence the plaintiff's suit is liable to be dismissed. In other words, the defendant is seeking to resist the plaintiff's suit based on section 53(A) of the Transfer of Property Act. However, no specific plea has been taken by the defendant in the written statement that she is entitled to the protection of Section 53(A) of the Transfer of Property Act. Though under the Ex.B3 sale agreement, there is a recital that the suit properties had been left to the possession of the defendant, but there is no material placed by the defendant that following Ex.B3 sale agreement, she has been in the possession and enjoyment of the suit properties as the full owner thereof. Admittedly, by way of Ex.B3 sale agreement, the defendant cannot seek any claim of title to the suit properties as such. If really, Ex.B3 sale agreement had been executed in favour of the defendant by the plaintiff's wife and if really, the said sale agreement had come to be executed in consideration of the payment of Rs.8,00,000/- by the defendant to the plaintiff's wife for meeting the medical expenses, nothing prevented the defendant from obtaining a pucca sale deed from the plaintiff's wife with reference to the same, particularly, when according to the defendant, the entire sale consideration had been paid under the sale agreement. It is found that nearly one year after the execution of Ex.B3 sale agreement, the plaintiff's wife had died. If really, the Ex.B3 sale agreement had been executed by the plaintiff's wife in favour of the defendant, as a prudent person, and moreover if really the defendant had paid a sum of Rs.8,00,000/- to the plaintiff's wife for meeting the medical expenses, the said amount not being a meagre amount, but a substantial sum, the defendant would not have been a silent spectator without endeavoring to obtain a pucca sale deed from the plaintiff's wife, pursuant to Ex.B3 sale agreement. However, the conduct of the defendant in not evincing interest to take any follow up action in obtaining a sale deed from the plaintiff's wife pursuant to Ex.B3 sale agreement would itself go to show that inasmuch as the Ex.B3 sale agreement had not come into force or executed as such by the plaintiff's wife in favour of the defendant, it is found that the defendant had not endeavored to enforce the same as per law. Even after the death of the plaintiff's wife, till the institution of the suit by the plaintiff, the defendant had not endeavored to enforce the sale agreement Ex.B3 and obtain the sale deed, atleast from the plaintiff's husband as the case may be. As above noted, there is no material placed to evidence that the defendant had been put in the possession of the suit properties pursuant to Ex.B3 and that it is the defendant, who has been in the possession and enjoyment of the suit properties since then. In the light of the above position, when the defendant has failed to establish that she has done any such or other acts in furtherance of the sale agreement, with a view to obtain the sale deed from the plaintiff's wife or the plaintiff, as the case may be and that



she had performed or willing to perform her part of the contract, i.e., in endeavoring to obtain the sale deed as per law and on the otherhand, when as seen from the conduct of the defendant, she has not moved her little finger to act further in terms of the sale agreement Ex.B3 and furthermore, when there is no material to show that the defendant had effected the payment of a sum of Rs.8,00,000/- to the plaintiff's wife for meeting her medical expenses as such and accordingly, it is found that the defendant has not endeavored to take any follow up action pursuant to Ex.B3 sale agreement. In such view of the matter, and as above noted, when the defendant has also not pleaded in the written statement, she is seeking the protection of Section 53 (A) Transfer of Property Act, in all, it is found that when the ingredients outlined under section 53(A) of Transfer of Property Act are not found to be fulfilled by the defendant in any manner and furthermore, when the sale agreement Ex.B3 is found not to be a registered instrument, in such view of the matter, it is seen that the defendant would not be entitled to seek the benefits of Section 53(A) of the Transfer of Property Act and in such view of the matter, it is seen that the defendant having failed to adhere to the conditions stipulated under section 53(A) of the Transfer of Property Act for making out the defence of part performance of the sale agreement Ex.B3 and accordingly, it is found that, as outlined in the decision of the Apex Court reported in 1970 (2) SCR 854 [Nathuial Vs. Phoolchand], the defendant would not be entitled to resist the plaintiff's case by seeking the protection under section 53(A) of the Transfer of Property Act. In the decision reported in 2018 (4) LW 168 [T.Krishnan Vs. B.Shivarajan and others], it has been held that the defendant failing to adhere to the conditions stipulated under section 53(A) of the Transfer of Property Act is not entitled to seek the benefits of the said section and the position of law is outlined in the above decision in the following manner:

Transfer of property act, Section 53-A

Sale agreement - part- Performance - Benefit of - Transferee - Role of - scope - Case that entire sale consideration paid on date of agreement - whether correct

Held: genuineness of agreement not established

Defendant failed to establish that he has done further acts in terms of the recitals in sale agreement - conditions stipulated for seeking benefits of Section 53-A not satisfied

It has to be seen whether the defendant is entitled to retain the possession and enjoyment of the suit property in part performance of the sale agreement marked as Ex.B5 as against the true owners of the suit property i.e., the plaintiffs.

It is found that the defendant, as a transferee, should have performed and be willing to perform his part of the contract and should have done all the acts in furtherance of contract to



ensure that the contract is put into action. However, it is found that though it is the claim of the defendant that he has paid the entire sale consideration, if the abovesaid case of the defendant has an element of truth, as a prudent person, he would have taken further appropriate steps against J.Bhojan for completing the sale consideration. On the other hand, it is found that no step at all has been taken by the defendant for completing the sale transaction. It is the case of the defendant that on the date of the sale agreement itself, he has paid the entire sale transaction. If so, then what prevented him from acting further in terms of the contract entered into for completing the sale transaction has not been explained by the defendant. In such view of the matter, the case of the defendant that he had been put in possession and enjoyment of the suit property, pursuant to the sale agreement of the suit property, pursuant to the sale agreement by J.Bhojan as such cannot be believed and accepted.

When according to the defendant, the survey number itself is not correctly mentioned and only the common local name of the field has been given, merely from the same, it cannot be construed that the parties had been in consensus ad idem to enter into the sale agreement only in respect of the suit property as put forth by the defendant. It is found that the description of the property in the sale agreement Ex.B5 is not found to be correlated with the suit property as such, it is therefore highly doubtful whether the sale agreement is pertaining to the suit property as determined by the Courts below. This itself would go to show that even assuming for the sake of arguments that Ex.B5 sale agreement is a true document, when the defendant has failed to establish that he has done further acts in terms of the recitals contained in the sale agreement to ensure the completion of the sale transaction, it is found that the conditions stipulated by the Apex Court for seeking, the benefits of Section 53-A of the Transfer of Property Act, having not been satisfied by the defendant as above discussed, it is seen that the Courts below had rightly upheld the plaintiff's case.

11.As rightly put forth, when the conditions stipulated under section 53(A) of the Transfer of property Act are not satisfied by the defendant as above discussed and in particular, when Ex.B3 sale agreement is found to be not a registered document, in such a case, the question of invoking Section 53(A) of Transfer of Property Act by the defendant would not arise at all and the said position of law could also be gathered from the decision reported in 2011 (7) MLJ 264 [K.Mani Vs. M.D.Jayavel and others] and furthermore, on the basis of the sale agreement, the defendant cannot be allowed to contend that she has acquired



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the right in respect of the plaint schedule properties, particularly, when it is seen that the sale agreement by itself, does not create any interest or charge on the properties comprised therein, which position of law could also be gathered from the decision reported in 2009 (2) MLJ 73 (SC) [Kumar Gonsusab and others Vs. Mohammed Miyan Urf Baban and others].

12. Though the plaintiff by way of Ex.A2 legal notice, would claim the possession of the entire suit properties from the defendant, however in the plaint, the plaintiff would claim the recovery of possession of half share in the suit properties on the basis that he being one of the legal heirs of the deceased wife, is entitled to half share in the suit properties as per the Mohamadian Law. Thus, it is found that the plaintiff as the one of the legal heirs of his wife would be entitled to half share in the suit properties under the Mohamadian law. Equally, it is also noted that the sisters and brother of the plaintiff's wife would also be entitled to claim appropriate share in the plaint scheduled properties under the Mohamadian law. Accordingly, it is found that when the suit properties are given as a whole, particularly the first item being not described with the boundaries and the plaintiff at the most would be entitled to claim only half share in the suit properties and when it is noted that the sisters and brother of the deceased wife would also be entitled to claim shares in the suit properties under the Mohamadian law, in such view of the matter, as rightly determined by the trial court, for seeking his half share in the suit properties and separate possession of the same, the plaintiff should have levied the suit only for partition and separate possession by impleading all the legal heirs of his deceased wife as parties to the suit and on the other hand, the plaintiff having levied the suit for recovery of possession of his half share in the suit properties, particularly against the defendant solely without impleading the other sisters and brother of his deceased wife as parties to the suit, as rightly put forth by the defendant, the plaintiff's suit is found to be not maintainable as such. As rightly determined by the trial court, if in the event of upholding the plaintiff's suit, the plaintiff would be unable to enforce the decree without determining the share to which he would be entitled to in the suit properties, particularly, when the suit properties had been shown as a whole without any division as such, and in such view of the matter, it is found that the frame of the plaintiff's suit is not maintainable. However, the first appellate court, on the premise that inasmuch as the plaintiff would be entitled to claim half share in the suit properties as one of the legal heirs of his deceased wife under Mohamadian law and the said fact could not be challenged by the other sisters and brother of his deceased wife, accordingly, on the premise that the plaintiff would be put to irreparable loss and hardship, if he



were to be directed to lay a suit for partition, and also on the footing that the same would lead to multiplicity of proceedings, accordingly proceeded to uphold the plaintiff's case for recovery of possession of half share in the suit properties and disposed of the suit in favour of the plaintiff. However, as rightly contended by the defendant, when at the most, the plaintiff could claim only half share in the suit properties and equally, when the sisters and brother of the plaintiff's deceased wife including the defendant would be entitled to claim their respective shares in the suit properties as her legal heirs and when in particular, the first item of the suit properties has been given as a whole and in case of dispute between the parties, with reference to the division of the suit properties by metes and bounds and thereby even if the decree as such is granted in favour of the plaintiff, the same could not be enforced by the Court as such even by the plaintiff and accordingly, it is found that the plaintiff should have endeavored only to lay the suit for partition and separate possession of his share in the suit properties by impleading all the necessary parties to the proceeding and the plaintiff without resorting to the abovesaid procedure, having chosen to lay the suit for recovery of possession of his half share, it is seen that the plaintiff's suit as such is not maintainable. In all, it has to be held that the only remedy available to the parties to the suit who are found to be entitled to claim share in the suit properties as the legal heirs of his deceased wife is to lay a suit for partition and on the above score, it has to be held that the plaintiff's suit is not maintainable. For the reasons aforesaid, the first appellate court is not correct in decreeing the suit for recovery of possession of half share of the suit properties in favour of the plaintiff without the plaintiff, laying the suit for partition and separate possession of his share in the suit properties by impleading the proper and necessary parties to the same. When the plaintiff's half share in the plaint schedule properties has not been made clear and identifiable and when the plaintiff's entitlement to half share in the suit properties is also disputed by the defendant and when the plaintiff has failed to implead all the legal heirs of the deceased wife who would be entitled to claim share in the suit properties and their defence to the plaintiff's entitlement to half share remains unknown and the same could be known only after their impleadment, it is found that the first appellate court is not justified in upholding the plaintiff's suit and the substantial questions of law No.1 to 4 are accordingly answered against the plaintiff and in favour of the defendant.

13. Though, the first appellate court has not gone into the question of the entitlement of the defendant in seeking the protection under section 53(A) of the Transfer of Property Act, considering the above discussions, it is found that the



defendant would not be entitled to seek the protection under section 53(A) of the Transfer of Property Act based on Ex.B3 sale agreement. In such view of the matter, the mere failure of the first appellate court in not considering the above point by itself would not lead to the conclusion that the defendant is entitled to the protection of Section 53(A) of the Transfer of Property Act. The fifth substantial question of law is accordingly answered against the defendant.

14.For the reasons aforesaid, the judgement and decree dated 20.11.2014 passed in A.S.No.36 of 2013 on the file of the Subordinate Court, Mannargudi are set aside and the judgement and decree dated 30.09.2013 passed in O.S.No.96 of 2010 on the file of the District Munsif Court, Thiruthuraipoondi are confirmed. Accordingly, the second appeal is allowed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar(CO)

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Sub Assistant Registrar

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To

1. The Subordinate Judge,
Subordinate Court, Mannargudi.

2.The District Munsif,
District Munsif Court, Thiruthuraipoondi .
Copy to

The Section Officer,
VR Section,
High Court.

+1 cc to Mr.M.Balasubramanian, Advocate Sr.No.67485
+1 cc to Mr.S.Raghupathi, Advocate Sr.No.67172

Judgment made in
S.A.No.149 of 2015

SSP(CO)
CSL/11.01.2019