

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 05.11.2019
PRONOUNCED ON : 27.11.2019

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

A.S.No.88 of 2013
and
M.P.No.1 of 2013

1. R.Shankarlal

2. Panibai ...Appellants/Defendants

Vs.

1. R.Kushalraj

2. K.Narangi Devi ...Respondents/Plaintiffs

Prayer:First Appeal filed under Section 96 of C.P.C., against the judgment and Decree dated 02.07.2012 made in O.S.No.27 of 2010 on the file of the Principal District Judge, Erode.

For Appellant : Mr.K.S.Jeya Ganeshan

For Respondent: Mr.N.Manokaran

J U D G M E N T

Aggrieved over the judgment and decree dated 02.07.2012 passed in O.S.No.27 of 2010 on the file of the Principal District Court, Erode, the defendants have preferred this First Appeal.

2. For the sake of convenience, the parties are referred to as per their rankings in the trial court.

3.Suit for partition and permanent injunction.

4. The case of the plaintiffs in brief is that first plaintiff is the husband of the second plaintiff. The first defendant is the husband of the second defendant and the first plaintiff and the first defendant are brothers. The plaintiffs and the defendants migrated to Erode from Rajasthan in order to start the business of photo frames and glasses and jointly

started the business in the name and style of " Shivsankar Glass House" at Sathy Road, Erode. The plaintiffs and the defendants have jointly purchased the first item of the suit properties by way of four registered sale deeds dated 21.01.1994. The front portion was taken in the name of the first plaintiff and the first defendant and the rear portion was taken in the name of the second plaintiff and the second defendant under the abovesaid registered sale deeds. Subsequently, the plaintiffs and the defendants jointly purchased the second item of the suit properties by way of a registered sale deed dated 02.01.2004 and as the suit property had been undervalued, the said document is kept pending in the office of the District Registrar, Erode. In any event, the first defendant had admitted that the second item had been purchased in the name of the plaintiffs and the defendants under the sale deed dated 02.01.2004. In the reply notice dated 11.11.2009 it has been mentioned that the plaintiffs and the defendants are each together entitled to a common half share in the plaint schedule properties and no partition had been effected between the plaintiffs and the defendants qua the suit properties and for convenience, the plaintiffs are enjoying the first item and the defendants are enjoying the second item of the suit properties. The first defendant had sent the notice dated 11.11.2009 to the first plaintiff and falsely contended that there was a family arrangement during the second week of August 2005 in which the first item of the suit properties were given to the plaintiffs and the second item of the suit properties were given to the defendants and in accordance with the said arrangement, the defendants have to pay a sum of Rs.7,25,000/- to the plaintiffs and the plaintiffs have to pay Rs.3,76,500/- to the defendants by way of a calculation and the defendants had sent a cheque for Rs.1,97,900/-, however no such partition had been effected by way of panchayath and the first plaintiff sent a reply notice dated 16.11.2009 denying the contents of the abovesaid notice sent by the first defendant and also returned the cheque sent by the first defendant. To the same, the first defendant sent a rejoinder on 16.12.2009 containing false allegations. The allegation that a Muchalika prepared on 24.08.2005 had been signed by all the parties is false and the partition had been effected by way of the said Muchalika is also false. The abovesaid Muchalika document projected by the defendants is not true and genuine and created by the defendants and the same would not affect or bind the rights of the plaintiffs. Inasmuch as, the defendants had not come forward to effect the partition amicably, according to the plaintiffs, they had been necessitated to lay the suit against the defendants for appropriate reliefs.

5. The defendants resisted the plaintiffs' suit contending that the relationship between the parties as pleaded in the plaint is true and denied that the first plaintiff and the first defendant came to Erode and jointly started the photo frame and glass business in the name and style of "Shivsankar Glass House" at Erode. The defendants admitted the purchase of the first item of the suit properties in the names of the plaintiffs and the defendants by way of four registered sale deeds dated 21.01.1994. It is put forth that the first item of the suit properties consists of an area of 2050 sq.ft with very old building. It is the case of the defendants that the abovesaid old building has been demolished and the new structure with the ground floor, first floor and top floor were constructed at a cost of Rs.20,00,000/- and the ground floor was retained for the business purpose and the first floor occupied by the defendants' family and the second floor was occupied by the plaintiffs' family till 2003-2004. It is only the first defendant who has spent money for the acquisition of the first item of the suit properties out of the business income of the first defendant through "Shivshankar Glass House", a proprietary concern and according to the defendants, the plaintiffs had no separate income or avocation at any point of time to acquire any portion of the suit properties. The defendants had admitted that the second item of the suit properties had been jointly purchased in the name of the plaintiffs and the defendants and contended that the entire sale consideration for the same had been paid by the first defendant from the income of his proprietary business. According to the defendants, as on 2004, the value of the first item was more than Rs.25,00,000/- [with the value of the new building] and the value of the second item was only Rs.23,00,000/-. After the purchase of the second item, the defendants changed the dwelling house/place from the first item to the second item in the year 2005. However, the business of "Shivshankar Glass House" was being run in the first item. The plaintiff was only working in the said glass house and the said business was started by the first defendant out of the investments made by his father-in-law. However, subsequently the first defendant had allowed his brother namely the first plaintiff to work under him in the abovesaid glass house for a decent salary. The first defendant improved the business and wanted to purchase the first item and out of the affection and faith and as per the advice of his auditor and parents, according to the defendants, the first item was purchased jointly in the names of the plaintiffs and the defendants. However put forth the case that the sale consideration for the same was paid only by the first defendant out of the income earned from the business run by him. The defendants contended that it is false to state that the business through "Shivshankar Glass House", was started and run in the name of the plaintiffs and the defendants. Furthermore, according to the

defendants, the second item had also been purchased only out of the income derived from the abovesaid business run by the first defendant. The plaintiffs have not contributed any amount for the acquisition of the suit properties. Out of love and affection, the plaintiffs are permitted to occupy the first item. By notice dated 11.11.2009, the defendants had stated that the suit properties had been purchased by the plaintiffs and the defendants and that the first plaintiff and the first defendant were carrying on photo frame and glass business in the name and style of " Shivsankar Glass House" and that the constructions were made on the suit properties purchased out of the joint income and the same had been putforth in the said notice only as per the instructions and the advice of the father. The father expressed his desire during the second week of August 2005 to divide the business and give the first item to the first plaintiff with goods worth Rs.7,00,000/- and suggested that the second item should be retained by the first defendant and he should run the business in the name and style of "Shivsankar Glass House". The first plaintiff was given a new business in the name of " Shivasankar Glasses " in the year 2005 and the same was also started by the contribution of the first defendant. Accordingly, it is putforth that the panchayath was convened and a family arrangement was effected. Pursuant to the same, the first item of the suit properties was given to the first plaintiff and the second item was given to the first defendant and the panchayath also determined the amounts to be paid to the respective parties and also the place in which the business should be run by the first plaintiff and the first defendant. Subsequently, on 24.08.2005 a Muchalika in Hindi was prepared reducing the terms of the panchayath as a memorandum of the past transaction. It was singed by the plaintiffs and the defendants, the parents and duly attested by the witnesses and written by Lal Ram at Erode. The first plaintiff did not pay the amount as assured in the panchayath within the agreed period and separate undertaking letters had been written on 11.01.2006 by the first plaintiff and the first defendant promising to pay the respective sums within three years by the first defendant and within six months by the first plaintiff and the said letter of undertaking was attested by Deva Raj and Hari Singh. The abovesaid family arrangement had been accepted and acted upon by the plaintiffs and the defendants. Accordingly, the first defendant had sent the amount payable by him by way of cheque to the first plaintiff vide notice dated 11.11.2009 and however the same had been returned by the first plaintiff without any basis. The business of "Shivsankar Glass House" had been run solely by the first defendant and the properties had been acquired only out of the income derived from the said business and invested by the first defendant. If the plaintiffs are really seeking the partition on the ground of joint purchase, they ought to have shown and included the business of "

Shivasankar Glasses" and its income as liable for partition in this suit. Hence on that ground alone, the plaintiffs' suit is liable to be dismissed. Absolutely there is no cause of action for the suit. Therefore, the suit is liable to be dismissed.

6. On the basis of the above pleas set out by the respective parties, the following issues were framed by the trial court for consideration:-

i. Whether the plaintiffs are entitled to partition and separate possession and injunction as claimed in the plaint?

ii. Whether the entire sale consideration for the sale deed was paid by the 1st defendant?

iii. Whether any panchayat Muchalika in Hindu was prepared as alleged?

iv. To what relief is any the plaintiffs are entitled to?

7. In support of the plaintiffs' case P.Ws.1 and 2 were examined. Exs.A1 to A21 were marked. On the side of the defendants, D.W.1 was examined. Exs.B1 to B10 were marked.

8. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial court was pleased to grant the reliefs in favour of the plaintiffs as prayed for. Impugning the same, the defendants have preferred the First Appeal.

9. The following points arises for determination in the First Appeal:

i. Whether the partition effected by panchayath Muchalika dated 24.08.2005 putforth by the defendants is true, valid and binding on the plaintiffs?

ii. Whether the suit laid by the plaintiffs is bad for partial partition?

iii. Whether the plaintiffs are entitled to partition and separate possession of the suit properties as putforth in the plaint?

iv. Whether the plaintiffs are entitled to obtain the relief of permanent injunction against the defendants as prayed for?

v. To what relief the plaintiffs are entitled to?

vi. To what relief the defendants/appellants are entitled to?

Point Nos.1 to 4:

10. The relationship between the parties is not in dispute. The first plaintiff and the first defendant are brothers. The second plaintiff is the wife of the first plaintiff. The second defendant is the wife of the first defendant. It is the case of the plaintiffs that both the plaintiffs and the defendants had migrated from Rajasthan to Erode and started the business of photo frame and glass in the name and style of "Shivsankar Glass House" at Erode. It is the further case of the plaintiffs that the first item of the suit properties had been purchased jointly in the names of the plaintiffs and the defendants by way of the registered sale deeds dated 21.01.1994 marked as Exs.A1 to A4. It is further putforth that the second item of the suit properties was also purchased jointly in the names of the plaintiffs and the defendants by way of a registered sale deed dated 02.01.2004. On account of under valuation, it is found that the abovesaid sale deed is pending for adjudication on the file of the District Registrar, Erode. The abovesaid fact is not in dispute. The copy of the abovesaid sale deed dated 02.01.2004 has been marked as Ex.A21. Thus, according to the plaintiffs, the suit properties are jointly belonging to them and the defendants and they have equal share in the same and despite repeated demands and notice, as the defendants have not come forward to effect the partition of the suit properties as claimed, according to them, they had been necessitated to institute the suit against the defendants for appropriate reliefs.

11. Per contra, according to the defendants, the business in photo frame and glass was run exclusively by the first defendant alone in the name and style of "Shivsankar Glass House" at Erode and the first plaintiff was permitted to work in the same under the first defendant and further according to the defendants, the first item of the suit properties though purchased jointly in the names of the plaintiffs and the defendants by way of the sale deeds dated 02.01.1994, according to the defendants, the sale consideration for the abovesaid sale transactions had been met out only by the first defendant out of the business income exclusively run by him in the name and style of "Shivsankar Glass House" and the plaintiffs have not contributed any amount for the same and further according to the defendants at the insistence of the elders particularly the father and by way of panchayath, the parties had agreed to divide the properties and also putforth that in connection with the same, a written Muchalika was also entered into between the parties on 24.08.2005 whereunder the plaintiffs were allotted the first item of the suit properties and the second item had been allotted to the defendants and the first plaintiff and the first defendant were also permitted to pay certain amounts to each other under the abovesaid Muchallika and thereafter

pursuant to the same, the plaintiff had started the new business in the name and style of " Shivasankar Glasses" and the business in the name of "Shivsankar Glass House" was exclusively run by the first defendant and hence according to the defendants, the claim of another partition of the suit properties as putforth by the plaintiffs is not legally sustainable and also putforth that on account of the failure of the plaintiffs to include the business run in the name and style of " Shivasankar Glasses" for partition as the subject matter of the suit, the plaintiffs' suit is bad for partial partition and the hence suit laid by the plaintiffs is liable to be dismissed.

12. As above pointed out, the acquisition of the suit properties in the joint names of the plaintiffs and the defendants is not controverted by the defendants. According to the defendants, the business of photo frames and glasses run in the name and style of " Shivsankar Glass House" had been exclusively run only by the first defendant and not jointly run by the first plaintiff and the first defendant and further according to them, out of the income derived from the said business, it is only the first defendant who had paid the sale consideration for the acquisition of the suit properties. However, as rightly held by the trial court, absolutely there is no material worth acceptance forthcoming on the part of the defendants to evidence that the sale consideration was parted by the first defendant out of the income earned from "Shivsankar Glass House" and that the business run in the name and style of " Shivsankar Glass House" was exclusively run by him. The sale deeds pertaining to the suit properties are marked as Exs.A1 to A4 and A21. On a perusal of the same, nothing is contained therein to indicate the sale consideration for the acquisition of the suit properties had been made and paid only by the first defendant and also paid by the first defendant out of the income derived from the business said to be run by him exclusively in the name and style of " Shivsankar Glass House". When the sale deeds abovestated are found to be jointly standing in the names of the plaintiffs and the defendants, in such view of the matter, in the absence of any material pointing otherwise to sustain the case of the defendants that it is only the first defendant who had paid the sale consideration for the sale transactions, the abovesaid defence version cannot be believed and rightly discountenanced by the trial court.

13. The defendants would putforth the plea that the business in photo frames and glass in the name and style of "Shivsankar Glass House" was run by the first defendant as his proprietary concern and the first plaintiff was permitted to work in the said concern. However when with reference to the same, there is absolutely no positive and reliable material putforth on the part of the defendants. Hence, the abovesaid plea cannot be

accepted. From the evidence of the witness examined on the side of the plaintiffs namely Hari Singh as P.W.2 who also belong to the same community of the parties, it is found that the first plaintiff and the first defendant had started the business jointly in photo frames and glasses and accordingly jointly purchased the suit properties. It is now found that the business in photo frames and glasses are run by the first plaintiff and the first defendant separately. Despite the cross examination of P.W.2, as held by the trial court, nothing has been culled out from him to disbelieve his version to the abovesaid factors. In this connection, the defendants mainly focused on the certificate of registration marked as Exs.B1 and B2 for the contention that the business in the name and style of " Shivsankar Glass House" had been exclusively run only in the name of the first defendant. No doubt, Exs.B1 and B2 stand in the name of the first defendant, however as correctly held by the trial court, when the business had been jointly run by the brothers, it is naturally that the certificate of registration has been taken in the name of one of the brothers and on that account, it cannot be concluded that the said business was run exclusively only by the first defendant as his proprietary concern. If really, the abovesaid business had been run exclusively as the proprietary concern of the first defendant, as to why he should endeavor to acquire the suit properties in the names of the plaintiffs and the defendants has not been explained. Other than giving the cause that the suit properties had been acquired in the joint names out of love and affection, however, when with reference to the abovesaid contention, the sale transactions pertaining to the suit properties do not lend assistance, the abovesaid contention does not merit acceptance. In otherwords, the defendants would only take the plea of benami for the acquisition of the suit properties jointly in the names of the plaintiffs and the defendants. However, when the defendants are not entitled to take the said plea after the enactment of the Prohibition of the Benami Transaction Act, it is seen that the case of the defendants that the suit properties had been acquired jointly in the names of the plaintiffs and the defendants out of love and affection cannot be countenanced either factually or legally. In such view of the matter, as rightly determined by the trial court, Exs.B1 and B2, as such, cannot be pressed into service on the part of the defendants for contending that the business in photo frames and glasses run in the name and style of " Shivsankar Glass House" had been exclusively run by the first defendant. Furthermore, on a perusal of the income tax returns projected in the matter marked as Exs.A19 and A20, when it is found that both the brothers have paid the income tax under the head of Hindu undivided Family for the year 2004-2005, the same would also indicate that both the brothers had been jointly running the business and they chosen to pay the income tax under the head of Hindu undivided

Family . As above pointed out, nothing has been whispered or mentioned in Exs.A1 to A4 and A21 about the sale consideration for the same been parted only by the first defendant. Furthermore, the first defendant examined as D.W.1 during the course of his evidence, has clearly admitted that the suit properties had been jointly acquired in the names of the plaintiffs and the defendants and that the suit properties had not been divided so far and also admitted that in Ex.A12 letter sent to the postal authorities, he has admitted about the business being jointly run by the brothers and furthermore in the notice sent by the defendants dated 11.11.2009 marked as Ex.A5, the first defendant had categorically admitted that the suit properties had been jointly purchased and that the brothers had been jointly carrying on the business and the facts being the above, the defendants cannot be allowed to take the contrary view subsequently as if the abovesaid notice Ex.A5 has been issued as per the instructions given by the father. When during the course of cross examination, P.W.1 has admitted that it was he who had given the instructions to the lawyer to issue the notice marked as Ex.A5 and having admitted the truth of the contents of the same, in all, as held by the trial court, the defendants cannot be allowed to turn around and putforth a new case as if the suit properties had been purchased only by the first defendant out of his own funds, however jointly in the names of the plaintiffs and the defendants out of love and affection. When with reference to the abovesaid case of the defendants, there is absolutely no material worth acceptance, the trial court is justified in rejecting the said case of the defendants.

14. According to the defendants, the suit properties had been partitioned amongst the parties by way of a muchalika dated 24.08.2005 whereunder the first item was given to the plaintiffs and the second item was given to the defendants and the muchallika also stipulates that the both should pay certain amounts to each other. The plaintiffs have totally denied the abovesaid family arrangement by way of the Muchalika putforth by the defendants. The defendants would also putforth that the undertaking letter had been given by the plaintiffs pursuant to the Muchalika dated 11.11.2006 and the same would also establish their plea. The plaintiffs had also disputed the giving of such an undertaking letter as alleged by the defendants. It is stated that the undertaking letter marked as Ex.B4 had been attested by P.W.2 Hari Singh. The P.W.2 Hari Singh has clearly spoken that no panchayath has been effected between the brothers and no undertaking letter has been given by the first plaintiff pursuant to the same. Despite cross examination nothing has been secured by him to disbelieve his version with reference to the same. According to the defendants, the Panchayath Muchalika had been effected on 24.08.2005 and the xerox copy of the same has been marked as Ex.B3. With reference to the non-production

of the original Muchalika, there is no explanation on the part of the defendants. Furthermore, on a perusal of the translation copy of the Muchalika projected by the defendants, it points out that the properties had been divided on the date of the said arrangement, therefore, when by way of the said instrument, the parties had, according to the defendants, chosen to declare and create the rights in the immovable properties as allotted to them and when such an instrument require the registration as per law and on the other hand, when the Panchayath Muchalika projected by the defendants has not been registered in accordance with law and the original document having also not been filed and none has been examined to substantiate the truth and validity of the same and the defendants having also failed to establish the letter Ex.B4 said to have been given by the first plaintiff pursuant to Panchayath Muchalika, all put together, only leads to the conclusion that the plea of Panchayath Muchalika for the division of the properties amongst the brothers as putforth by the defendants is not true and accordingly the defendants are unable to substantiate their said case with acceptable and reliable materials. Therefore the case of the defendants that the suit properties had already been divided under the Panchayath Muchalika dated 24.08.2005 is found to be a false case and not binding on the plaintiffs.

15. The defendants have also taken the plea of partial partition. However, as held by the trial court and as per the materials placed on record, the parties are now found to be doing separate business in their individual names and the business originally started by them had been jointly run by them. Therefore merely because the parties are now engaged in separate business that cannot be the basis for holding that there has been severance of the status amongst the parties even as regards the properties belonging to them jointly. As held by the trial court, the parties are entitled to run their separate business for their convenience and interest, however remaining joint in other aspects and therefore in the background of the said facts, the contentions of the defendants that the plaintiffs' suit is bad for non-inclusion of the business now run by the first plaintiff as the subject matter of the suit cannot be accepted in any manner and the said case of the defendants had been rightly rejected by the trial court.

16. In the light of the abovesaid discussions, it is found that the trial court has rightly analysed the materials on record both factualwise as well as legalwise and applying the principles of law pertaining to the same in the correct perspective, accordingly granted the reliefs in favour of the plaintiffs as prayed for. In such view of the matter, I do not find any reason to interfere with the reasonings and conclusions of the trial court for upholding the plaintiffs' case.

17. In the light of the above discussions, I hold that the partition projected by the defendants effected by way of a Panchayth Muchalika dated 24.08.2005 is not true, valid and binding on the plaintiffs. I hold that that the plaintiffs' suit is not bad for partial partition as putforth by the defendants and I therefore held that the plaintiffs are entitled to partition and separate possession of their share in the suit properties as determined by the trial court. I therefore hold that the plaintiffs are also entitled to obtain the relief of permanent injunction as determined by the trial court. Accordingly, the Point Nos.1 to 4 are answered in favour of the plaintiffs and against the defendants.
Point Nos.5 and 6:

18. For the reasons aforesated, the judgment and decree dated 02.07.2012 passed in O.S.No.27 of 2010 on the file of the Principal District Court, Erode are confirmed and resultantly, the First Appeal is dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

-s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

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To

The Principal District Judge,
Principal District Court,
Erode.

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A.S.No.88 of 2013
and
M.P.No.1 of 2013

BR(CO)
SP(19/12/2020)