

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 12.12.2019

CORAM:

The Honourable Mr.Justice M.M.SUNDRESH
and
The Honourable Mr.Justice KRISHNAN RAMASAMY

Appeal Suit No.787 and 1071 of 2012
& M.P.No.1 of 2012

Appeal Suit No.787 of 2012

Ameenullah ... Appellant/1st respondent
Vs.
1.Ubayathullah ..1st respondent/Plaintiff
2.Southagani
3.Rathenam .. Respondents2&3/Defendants2&3

Appeal Suit No.1071 of 2012

Southagani ... Appellant/2nd defendant
Vs.
1.Ubayathullah ..1st respondent/Plaintiff
2.Ameenullah
3.Rathenam .. Respondents2&3/Defendants2&3

Appeal suits are preferred under Section 96 C.P.C., against the judgment and decree dated 12.03.2012 in O.S.No.6 of 2008 passed by the District Judge, Nagapattinam.

For Appellant .. Mr N.A.Nissar Ahmed
in AS.787/2012 &
for R2 in AS.1071 of 2012

For appellant in .. Mr.S.Sounthar
AS.1071/2012 and
R2 in AS.No.787/2012

For 1st Respondent .. Mr.A.Mohamed Ismail
in both appeals

.. Batta with petition due - R3
in AS.787/12
and Notice Served and No Appearance
for R3 in in AS.1071/12

COMMON JUDGMENT

(Judgment of the Court was made by M.M.SUNDRESH, J.)

Suit has been laid for partition and separate possession by the plaintiff against the defendants. The plaintiff is the ***younger** brother of defendants 1 and 2. The first defendant is the ***elder** brother of the plaintiff. The second defendant is the sister. The third defendant is the subsequent purchaser of some of the suit properties.

2. In the plaint, the plaintiff has contended that though there were two earlier attempts made, resulting in some documents being created, no actual partition has taken place and legally no reliance has been made on the same.

3. The first defendant being the ***elder** brother of the plaintiff has contended that the family partition arrangement dated 21.01.2003 and thereafter, on 17.09.2006 would bind the parties. The first defendant has complied with his part of the arrangement by making due payments. Accordingly, the second defendant paid a sum of Rs.25 lakhs. Insofar as the payment due to the plaintiff is concerned, the first defendant is always ready and willing to pay a sum of Rs.7 lakhs as agreed upon. The subsequent agreement came into being in view of the dissatisfaction expressed by the second defendant over the earlier arrangement made on 21.01.2003. The parties are in enjoyment of the respective shares after the aforesaid two documents, though not registered.

4. The second defendant, who is the sister of the plaintiff and the first defendant, filed the written statement contending that she has received only a sum of Rs.12 lakhs, while executing the documents, which was shown as if, she received Rs.25 lakhs. Accordingly, she also prayed for 1/5th share of the suit property.

5. A counter claim also has been made by her with respect to the movable properties viz., Holy Quran and the furniture. Alternatively, she has also asked for directing the plaintiff and the first defendant to pay interest from 03.02.2006.

6. Before the trial Court, the plaintiff examined himself as P.W.1 and marked Exs.A1 to A5. A4 and A5 are the sale deeds executed on 10.01.2007 by all the parties in favour of the third ***Party**. On behalf of the defendants, D.Ws.1 to 3 were examined and Exs.B1 to B27 were marked. Most of these documents have been marked by the first defendant. Ex.B27 is the copy of CrI.O.P.No.15985 of 2008 on the file of High Court, Madras

wherein the second defendant made an averment that she had received Rs.18 lakhs from the first defendant. The remaining Rs.7 lakhs has been adjusted towards payment of the pagadi to the tenants for vacating the premises in their possession. She paid a sum of Rs.7 lakhs out of Rs.18 lakhs to the ***1st defendant**, which the first defendant is liable to pay. The unregistered documents have been marked as Exs.B2 and B5 by the first defendant.

7. The trial Court framed the following issues for consideration.

1. Whether the plaintiff is entitled to partition of 2/5 shares in the suit properties?
2. Whether the plaintiff is entitled for future profits?
3. Whether the partition was effected between the plaintiff and defendants 1 and 2 on 21.01.2003?
4. Whether the third defendant is a bona fide purchaser for value?
5. To what relief?

8. Apart from the documents marked, Exs.C1 and C2 have also been marked on behalf of the Court.

9. Upon considering the evidence available, the trial Court decreed the suit granting a preliminary decree for 2/5th share while granting 1/5th share to the second defendant. The remaining 2/5th share has been granted in favour of the first defendant. Insofar as the counter claim made by the second defendant in respect of Holy Quran and immovable properties, the same was dismissed. Though the trial Court has given a finding that the second defendant had received a sum of Rs.18 lakhs, no decree has been granted to that effect. Challenging the judgment and decree rendered by the trial Court, A.S. No.787 of 2012 has been filed by the ***1st defendant**, whereas A.S.No.1071 of 2012 has been filed by the second defendant.

10. For the sake of convenience and brevity, the parties as shown before the trial Court are dealt with by us in these appeals in the same manner.

11. The learned counsel appearing for the appellant first defendant submits that partition has been given effect to. Once they have been acted upon, then the issue of non registration of Exs.B2 and B5 would not arise for consideration. The subsequent mutation effected will have to be seen. Before this Court, the second defendant has categorically admitted the payment and receipt of Rs.18 lakhs.

Apart from the said Rs.18 lakhs, as stated, Rs.7 lakhs has been utilised as pagadi for vacating the tenants. Therefore, even according to all the parties, the documents have been given effect to and respective possession has been taken. Insofar as the movable properties are concerned, the valuation has not been arrived at by the second defendant. Similarly, there is no evidence with respect to the furniture. The trial Court, after having given a finding that the second defendant has indeed received a sum of Rs.18 lakhs, ought to have granted a decree for the same. To buttress his submission, the learned counsel has made reliance on the following decisions:

- (1)Roshan Singh & Others Vs. Zile Singh & Others (CDJ 1988 Sc 437); and
- (2)K.G.Shivalingappa (dead) by Lrs. And others Vs. G.S.Eswarappa and others (CDJ 2004 SC 807).

12. The learned counsel appearing for the second defendant, who is the appellant in A.S.No.1071 of 2012, has submitted that the payment received has to be seen contextually. The fact that the first defendant has admitted the circumstances under which the second document has been entered into would clearly show that there is no finality attained as per Ex.B2. The trial Court has committed an error in declining the relief with respect to the Holy Quran and the ***movables**. The valuation of the Holy Quran is immaterial. There was no reply statement filed to the effect that the Holy Quran is owned by the entire family. The alleged gift has not been proved by the first defendant. Therefore, the appeal will have to be allowed.

13. The learned counsel appearing for the plaintiff has submitted that the trial Court was pleased to hold that in lieu of Exs.A4 and A5, the contention sought to be raised with respect to the partition among the parties cannot be countenanced. There is no material to hold that either the first defendant or the second defendant paid a sum of Rs.7 lakhs to the plaintiff. Therefore, while confirming the judgment and decree of the trial Court, this Court can consider the prayer sought for by the second defendant.

14. Though it is a fight between two brothers and sister, the documents are not in dispute. Admittedly, Exs.B2 and B5 have been signed by the parties. These two documents are not the registered documents. To that extent, we do not find any error in the conclusion arrived at by the trial Court. Exs.A4 and A5, which are registered documents, would clearly show that the suit properties were treated as joint family properties. These two documents have been executed on 10.01.2007 after the execution of Ex.B5. Therefore, the rigour of Sections 91 and 92 of the Indian Evidence Act, 1872, would certainly come into

play. The documents relied upon by the first defendant to show that the parties are enjoying the properties separately have been correctly rejected by the trial Court. It is also his own case that the second defendant was not satisfied with the earlier partition and thereafter, subsequent one was arrived at. Therefore, it is not correct to state that partition was actually done on 21.01.2003 under Ex.B2.

15. However, in the contention of the learned counsel appearing for the first defendant insofar as the receipt of the payment by the second defendant deserves to be considered in his favour. Ex.B27 is the copy of the Criminal Original Petition filed before this Court in CrI.O.P.No.15985 of 2008 on the file of this Court. In the aforesaid petition, the second defendant has clearly stated that she did receive Rs.18 lakhs. Other than Rs.18 lakhs, she was given seven more lakhs, which has been used as pagadi for vacating the tenants. Therefore, as between the defendants 1 and 2, the payment of Rs.18 lakhs has been proved. The trial court has rightly observed that Rs.18 lakhs has been received by her. Though there is evidence to show that she did pay a sum of Rs.18 lakhs to the plaintiff, the trial Court was not correct in not taking note of the abovesaid fact to be factored into share of the second defendant. After all, in a suit for partition every party has the same status being that of the plaintiff. This is for the reason that all of them are co-owners. In such view of the matter, we are not inclined to hold that the receipt of Rs.18 lakhs having been proved on the statement by the second defendant herself as against her claim of Rs.12 lakhs, the same will have to be adjusted at the time of final decree proceedings by reducing her share and correspondingly increasing the same with that of the first defendant.

16. Coming to the other issues with respect to the ***movable** property is concerned, we do find considerable force in the submission of the learned counsel appearing for the second defendant. From the records available, it appears that the Holy Quran is of an antique value. The first defendant did not even file any statement contrary to the averment made by the second defendant. In fact, in his own averment, he has stated that the properties belonged to the grandmother. This evidence is not supported by any other evidence of the third party and even this evidence would show Holy Quran belongs to the family. A person claiming gift has to prove it in the manner known to law and the first defendant who failed to do so. The learned single Judge is also not correct in holding that the second defendant has not proved the valuation. It is a factor to be seen at the time of passing a final decree. Ex.B26 has also been accepted by the first defendant. Thus, while holding that there is no evidence with respect to the furniture available in the

partition, in respect of Holy Quran it has to be subjected to the partition. We are also informed that process of identifying the value of the Holy Quran would be at the instance of the first defendant.

17. In the light of the abovesaid discussions, the issues have been answered accordingly. We are also inclined to hold that the third defendant is the bona fide purchaser for the valuable purchase, though there is no specific issue with respect to the immovable properties, the same can be factored into issue No.1. Accordingly, these issues are answered in the light of the discussion made in tune with the judgment and decree of the trial Court except to the extent of the amount received by the second defendant from the first defendant and the Holy Quran.

18. The decisions relied upon by the learned counsel for the first defendant are not applicable to the case on hand. As discussed above, the the first unregistered deed has not been given effect to and there is no clear evidence with respect to the separations and status. Further more, Exs.A4 and A5 would clearly establish that there was no division as alleged by the first defendant.

19. Thus, the following decree is passed:

- (1) The plaintiff and the first defendant are entitled to partition of 2/5th shares each in the properties including the Holy Quran;
- (2) The second defendant is entitled to 1/5th share in the suit properties ***including "Holy Quran"**
- (3) The suit properties are liable for partition except the **immovable properties mentioned in Item No.7, *Survey Nos.R.S.NOs. 321/1, 323/1, 323/4B and 324/2** which are the subject matter of Exs.A4 and A5 sale deeds. The ***Third** defendant is at liberty to work out the remedy on equity in the final decree proceedings;
- (4) The counter claim filed by the second defendant stands allowed insofar as Holy Quran is concerned;
- (5) The first defendant is entitled to have the equal valuation of the money payable by the second defendant from and out of the shares to be allotted to her.
- (6) There shall not be any order as to costs considering the status and relationship of the parties.

7)"A Sum of Rs.18 lakhs will have to be adjusted with the second defendant by the first defendant during the final decree proceedings."

The appeal stands allowed to the extent indicated above.
Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

raa

***Corrected and substituted as per order of this Court for Being Mentioned dated 23.01.2020 made herein.**

To

The District Judge,
Nagapattinam.

Copy to:

The Section Officer, VR Section, High Court, Madras.

+2ccs to Mr.S.Sounthar , Advocate SR.No. 103876,103877

+2ccs to Mr.A.Mohamed Ismail , Advocate SR.No. 103843

+2ccs to Mr.N.A.Nissar Ahmed , Advocate SR.No. 104133

A.S.Nos.787 and 1071 of
2012

A.SK(02/09/2020)