IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 12.07.2019
PRONOUNCED ON : 14.08.2019

CORAM:

THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN

S.A.No.634 of 2000

1.Poongavanam
2.Ranganathan .. Appellants/Defendants

.. Vs ..

1.Rajagopal Naicker (died)
2.Ramesh @ Raja Ganapathy
3.Nandagopal ..Respondents/Plaintiffs

[Respondents 2 and 3 brought on record as legal representatives of the deceased sole respondent vide order of this Court dated 02.03.2018 made in CMP.No.2064 of 2018 in S.A.No. 634 of 2000)

PRAYER: This appeal is filed under Section 100 of the Code of Civil Procedure, 1908, against the judgment and decree passed in A.S.No.97 of 1988, dated 30.06.1999, on the file of the Principal Subordinate Judge, Chengalpattu, in confirming the judgment and decree passed in O.S.No. 53 of 1987 on the file of the District Munsif, Chengalpattu, dated 16.07.1998.

For Appellants : Ms.V.Srimathi

For R2 & R3 : Mr.J.Srinivasa Mohan

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JUDGMENT

The defendants are the appellants herein. The respondent/ plaintiff has filed a suit for declaration of the title over the suit property and for permanent injunction and for a mandatory injunction to remove some portion of roof on his side. The suit in O.S.No.53 of 1987 on the file of the learned District Munsif, Chengalpattu was decreed and the appeal preferred by the defendant was dismissed and hence, the Second Appeal is filed by the defendant.

2 The respondent/plaintiff filed this suit, on the ground that originally this property was purchased by Ganapathy Gounder in his individual name and he along with his

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brother Natesa Naicker has effected partition among themselves along with the other ancestral property and the partition has been reduced into writing, by way of koor chit dated 31.08.1963 (Ex.A9) whereby, the northern portion was allotted to the Natesa Naicker and the southern portion was allotted to Ganapathy Naicker. Thereafter, the said Ganapathy Naicker has sold the property under Ex.B2 to Alamelu Ammal in the year 1964 and it is further case of the plaintiff that the another 50% was belonged to her father Natesa Naicker and on his death, Alamelu Ammal has released the koor chit under Ex.A11 in her favour and the said Alamelu Ammal has executed a settlement in favour of Visalakshi Ammal under Ex.A12 and thereby, the plaintiff traced the title suit property.

3 The appellants/defendants have filed a written statement alleging that Ganapathy Naicker is the predecessor in title, had purchased a property in his individual property and it is a separate property of the said Ganapathy Naicker and alleged partitions of the suit property along with in other family properties are all denied and alleged koorchit Ex.A9, dated 31.08.1963, cannot be received in an evidence for want of Registration as per the 17(1)(b) of the Registration Act and also denied the execution of the alleged release deed Ex.A4 on 26.08.1985 in favour for the Alamelu Ammal, by the mother of the defendants and contended that they have the title over the entire property has sold by the Ganapathy Naicker under Ex.B2.

4 The learned District Munsif had decreed, the suit by holding that it is a joint family property and decreed the prayer in respect of the declaration of title and permanent injunction and in respect of Mandatory Injunction to get the thatched roof removed has been rejected.

5 The Lower Appellant Court on consideration of the re-appreciation of the evidence and the submission made by the rival parties has held that house site purchased by the Ganapathy Naicker by a Sale Deed dated 12.08.1942 was not a joint family property and the Release Deed Ex.A11 has been duly corroborated by the oral evidence by PW2 who has conducted the mediation talks, has also held that the property purchased by the Ganapathy Naicker was voluntarily included by him in the partition, between himself and his brother and the said Koorchit documents can be received in evidence and accordingly held that the plaintiff has prescribed the title by the prescription and enjoyment initially by the plaintiff and also held that the transaction entered into between the legal heirs of the Ganapathy Naicker and Alamelu Ammal and subsequent transaction by Alamelu Ammal as well as the transaction by Nataraja Naicker are legally valid so far as the rights are connected and has upheld Ex.A11 Release Deed and the same is under challenge the Second Appeal.

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6 The defeated defendant has filed the above Second

Appeal and the same was admitted on the following substantial questions of law:

"1.Whether the court below had not erred in decreeing the suit for title when admittedly the defendants have purchased half share?

2.Whether the courts below had not erred in decreeing the suit when rightly finding that the property did not have any joint family nucleus?

3.Whether the courts below were right in presuming blending when there was not plea or evidence to that effect?

4.Whether there can be a presumption against the defendant especially when the documentary evidence is in their favour?

5.Whether the judgments of the courts below are not contrary to the judgment of the Hon'ble Supreme Court as reported in 1992 (2) S.C.C 717?

6.Whether the courts below were right in placing reliance on unregistered koor chit in the light of Section 49 of the Registration Act read with Section 35 of the Stamp Act?

7.Whether the judgment and decree of the courts below are not liable to be set aside on such other substantial questions of law as this Hon'ble Court may deem fit and proper."

7 Before going into the substantial questions of law, the brief facts, necessary for disposal of the above Second Appeal are thus:-

a) Ganapathy Naicker and Natesan Naicker constituted Hindu Joint Family owning properties. The suit property purchased in the year 1942 by Ganapathy Naicker.

b) In 1963, brothers divided all the properties, including the suit property. A koorchit was written, which is an acknowledgment of earlier oral division. The plaintiff's father got the Northern 16ft (suit property) in the oral division with his brother Ganapathy Naicker.

c) The Release Letter by first defendant's mother, in 1965, was in the presence of panchayatdars. The first defendant Poongavanam was present in the Panchayat and he attested the same. The sub division stones were put up to demarcate the entire site into 2 equal halves, northern and southern halves of equal measurements of 16 ft each.

d) Plaintiff's father executed a settlement deed in favour of his wife Visalakshi, in the year 1966. The same was filed to show possession and also the partition.

8 The appellants/defendants resisted the suit by disputing joint family nucleus and also disputing the alleged

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koor chit and also alleged that Ex.A11/Release Deed of Alamelu Ammal dated 26.08.1965 is a concocted document. It is a specific case of the appellants/defendants that the first defendant did not attest the Panchayat Nama. When the first defendant was returning from his office, Krishtappa Naicker and some others along with the plaintiff/respondent herein got the signature in a written matter, stating that the signature is required for the purpose of having the hut put up by the respondent/plaintiff herein registered in his name in the panchayat. Believing the representation so made by the respondent/plaintiff herein, first appellant/first defendant herein signed the same in the year 1980. This defendant is not aware of the execution of Release Letter by Alamelu Ammal. The respondent herein/Plaintiff sought the permission of the mother of the appellants herein/defendants, to occupy the northern front portion and hence the possession of the plaintiff in this suit property is only permissive possession and hostile to their title.

9 Before the Trial Court, on the side of the plaintiff, PW1 to PW4 were examined and Exs.A1 to A12 were marked. On the side of the defendants, first defendant viz., Poongavanam himself was examined as DW1 and his father viz., Munusamy was examined as DW2 and Exs.B.1 to B.34 were examined.

10 Before the Trial court, the respondent herein/plaintiff examined himself as PW1 and deposed regarding the joint family property and spoken about family being joint, it is devided in the year 1963, which was recorded in koor chit and regarding possession thereof. PW2/Kettappa Naicker, who is one of the attester of Ex.A.11/Release letter by Alamelu Ammal (viz., the mother of the appellants herein/defendants), which is also attested by the first appellant herein/first defendant, though he denies the same in the written statement. PW3/Subramani is another person, who identified his father signature, who is the attester of Ex.A.9/ koor chit which was written on 02.09.1963 evidencing the oral partition of the family property happened on 31.08.1963 and DW1/first appellant herein has denied everything and also denied his own signature in Ex.A11.

11 Substantial Questions of Law: 2, 3, 4 and 6:

On consideration of both oral and documentary evidence, it is saw that both the Courts below have concurrently held that Ex.A3 and Ex.B.23 clearly shows that Nataraja Naicker and Ganapathy Naicker were enjoying the property separately. Ex.A.3 is the Demand Notice for House Tax Assessment in the name of the respondent herein/plaintiff which bears the number 3160/86-87. Ex.B.23 is a House Tax Assessment Notice in the name of the first appellant/first defendant which bears the number 3161/86-87. This shows that the parties had intention for severance. This can be construed from the Ex.A9 koor chit which implies their intention to have severance to joint enjoyment. Had it been

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purchased by Ganapathy Naicker alone, there wouldn't have been necessity for koor chit.

12 Further as discussed earlier, intention of parties is evident from Exs.A.3 and B.23 and from the Settlement Deed by Natesan Naicker in favour of his wife Visalakshi Ammal, which is marked as Ex.A.12. But, the Release Letter was written in favour of Ganapathy Naicker's wife Alamelu Ammal. It is not clear as to what necessitated them to execute that the letter in her name. It shows that the first appellant/first defendant and Alamelu Ammal had knowledge that Natesan Naicker had share in the property.

13 On the above factual possession, it is seen that though the first defendant as DW1 has not deposed as to how, the properties including the suit properties were partitioned either orally or by the said koor chit. In the absence of any positive evidence to support the case of the appellants/defendants, this Court is of the considered view that the documents speak for themselves and in fact Ex.A.9/Partition Deed by way of koor chit was admitted without their being any objection on behalf of the defendants during trial also assumes significance. It remains to be stated that Ganapathy Naicker had voluntarily included the property purchased in his name in the year 1942 in the oral partition. It finds place in the koor chit, written two days later. Thus, the trial Court had rightly held that it is not a suit for partition to establish joint family nucleus. Moreover, the intention of the parties are very clear from recitals of the document. Furthermore, it is to be stated that if Ganapathy Naicker wanted to use it alone, there is no need for koor chit.

14 On similar applications of the above referred documentary evidence the Appellate Court has held that the stated circumstances could show that Ganapathy Naicker voluntarily included the property in the koor chit. Besides the mother of Defendants, also executed a release Letter Ex.A.11 admitting that Gnapathy Naicker sold the entire house site by mistake also found to have acceptance. In fact Ex.A.11 was attested by none other than the first appellant/first defendant himself. PW2/Kettappa Naicker, who held the mediation talks between Natesan Naicker and Alamelu Ammal having been examined as PW2.

15 Furthermore, it is to be seen that both the Courts below have concurrently held that there was an intention to include the suit property in the oral partition and the documents and circumstances as spoken to by the witnesses, clearly demonstrated the Ganapathy Naicker has voluntary included the suit property for the oral partition.

16 In the decision reported in AIR 1965 SC 1494 - [Commissioner of Income Tax, Madras Vs. M.K.Stremann, Madras]

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(para 11) the Hon'ble Supreme Court has held that

> "...Whether the averment in relation to the past was supported by evidence or not, it certainly was unequivocal that the properties dealt with at the partition were treated by the volition of assessee as the properties available for partition between the members of the joint family. It was certainly an unequvocal declaration that all the properties dealt with under that partition had been impressed with the character of joint family properties, belonging to the joint family or the assessee and his sons... atleast on December 19, 1952 antecedent to the partition, the properties became impressed with the character of joint family property."

17 It remains to be stated that on the factual position, on observance of the documentary evidence, which was clearly spoken to by PW1/Rajagopal coupled with the evidence of PW3/Subramani, regarding Ex.A.9, it is seen that the suit property was included in the koor chit and the northern portion was allotted to the plaintiff's father. The subsequent Release Letter and the settlement, along with the koor chit, reveal the intention of the parties. The northern and southern portions in which the respondent herein/plaintiff and appellants herein/defendants are residing separately have been independently assessed to property tax in their respective names. This is evident from Assessment Notice in Exs.A3 and B.23. The claim of permissive occupation set up by the defendants has not been proved. The possession of the plaintiff has been held to be by their own right. This is traceable to the oral division followed by koor chit. Thus, no presumption has been drawn against the appellants herein/defendants and there is no documentary evidence in their favour. Therefore, the substantial questions of law 2, 3 and 4 are answered against the appellants.

18 On the question of law relating to admissibility of unregistered koor chit Vis-a-Vis provisions of Section 49 of the Registration Act read with Section 35 of the Indian Stamp Act, it has to be stated that the law is settled that an unstamped document cannot be relied upon for any purpose. The question was probably framed under the impression that the koor chit was not stamped. But the koor chit is sufficiently stamped by paying stamp duty and penalty before marking the document. The receipt for such payment has been marked as Ex.A10. Therefore, Section 25 of Stamp Act read with Section 49 of the Registration Act does not arise at all.

19 With the above provisions of law on both the application of law and on the factual matrix of the present case, it is to be stated that if the koor chit does not require registration, then Section 49 does not apply at all. Factually, the koor chit is only a record of past event. The

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oral partition took place on 31.08.1963. The koor chit was written two days later i.e., on 02.09.1963. The date and endorsement is available in the last page of the koor chit. Therefore, on the face of the document itself, having been written two days later, the same does not require registration. In this regard, it is relevant to rely upon the decision reported in AIR 1988 SC 881 - [Roshan Singh Vs. Zile Singh], wherein, at paragraph No.11, the Hon'ble Supreme Court has held as follows:-

> 11. Even otherwise, the document Exh. P-12 can be looked into under the proviso to s. 49 which allows documents which would otherwise be excluded, to be used as evidence of 'any collateral transaction not required to be effected by a registered instrument'.

20 It is seen from Ex.A.9/Partition Deed by way of Koorchit, the Stamp Duty and penalty had been paid and the same is marked on the receipt of the said Stamp Duty & penalty charges, as could be seen from Ex.A.10/Receipt for payment of Rs.231/-. Therefore, this Court is of the considered view that Ex.A.9/Koor chit can be received in evidence, as it is stamped for the limited extent of collateral purpose. At this juncture, it is relevant to refer to Proviso 2 Section 49 of the Registration Act, which is to the effect that an unregistered document, which requires registration can be received in evidence for any collateral transaction, which does not require to be effected by a registered instrument. It is trite in law, the nature and character of the possession and that possession was referable to division of properties between the rival parties concerned are all for collateral purpose.

21 In the instant case in hand Ex.A.9/Koor chit can be relied upon to show that nature and character of possession of the suit property is that of plaintiff's father and such possession is referable to the division of properties between Ganapathy Naicker and Natesan Naicker (father of the plaintiff) and in this regard, a similar view has been expressed by this Court in the following judgments:

i) (1978) 91 LW 156 [Boorawami Vs.Rajakannu and others.]

ii) MANU/TN/4415/2011 [S.Sundari & Others Vs.Periyasamy.] and

iii) 2012 (1) LW 469 [S.Lakshmanan Vs.S.Palani.]. The above three judgments are also on the same point.

iv) AIR 2001 Mad 135 [A.C.Lakshmipathy & another Vs. A.M. Chakrapani Reddiar and others], wherein, at paragraph No.42, this Court has held as follows:

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"42. To sum up the legal position (I) A family arrangement can be made orally.

(II) If made orally, there being no document, no question of registration arises.

(III) If the family arrangement is reduced to writing and it purports to create, declare, assign, limit or extinguish any right, title or interest of any immovable property, it must be properly stamped and duly registered as per the Indian Stamp Act and Indian Registration Act.

(IV) Whether the terms have been reduced to the form of a document is a question of fact in each case to be determined upon a consideration of the nature of phraseology of the writing and the circumstances in which and the purpose with which it was written.

(V) However, a document in the nature of a Memorandum, evidencing a family arrangement already entered into and had been prepared as a record of what had been agreed upon, in order that there are no hazy notions in future, it need not be stamped or registered.

(VI) Only when the parties reduce the family arrangement in writing with the purpose of using that writing as proof of what they had arranged and, where the arrangement is brought about by the document as such, that the document would require registration as it is then that it would be a document of title declaring for future what rights in what properties the parties possess.

(VII) If the family arrangement is stamped but not registered, it can be looked into for collateral purposes.

(VIII) Whether the purpose is a collateral purpose, is a question of fact depends upon facts and circumstances of each case. A person can not claim a right or title to a property under the said document, which is being looked into only for collateral purposes.

(IX) A family arrangement which is not stamped and not registered cannot be looked into for any purpose in view of the specific bar in Section 35 of the Indian Stamp Act."

22 Thus, in view of the above observation, this Court is of the considered view that both the Courts below have not committed any error in decreeing the suit and both the Courts have rightly come to the conclusion that there was a blending by Ganapathy Naicker while effecting the partition between him and his brother Natesan Naicker, as evidenced under Ex.A.9. In view of the discussions with regard to the said koor chit as cited above, Ex.A.9/Koor chit and Ex.A.10/Receipt of

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payment can be received in evidence for the limited extent to show the nature and character of the possession of the respondent herein/plaintiff's father and also taking note of the fact that the “words and phrases” used in Ex.A.9/Koor chit clearly indicates recording of facts of past events (oral partition taken place on 31.08.1963 and koor chit was returned on 02.09.1963), this Court is of the considered view that Ex.A9/Koor chit does not require registration. However, in view of the Proviso to Section 49 of the Registration Act, as discussed supra, the same can be received in evidence to show the possession, which is a collateral purpose and in view of the payment of Stamp Duty, penalty as evidenced under Ex.A.10/Receipt for Payment, the same can be received in evidence and can be looked into a limited extent of showing the possession of the plaintiff's father. In pursuance of oral partition, which was reduced into writing under Ex.A.9/Koor chit and the revenue records also evidencing such possession and severance of the joint family property, Ex.A.9/Koor chit does not require registration. Therefore, substantial question of law No.6 is answered in negation and against the appellants herein.

23 Substantial question of law No.5 is “Whether the judgment of the courts below are not contrary to the judgment of the Hon'ble Supreme Court as reported in 1992 (2) SCC 717?”

The judgment of the Supreme Court dealt with an issue as to whether mere use of property by family members, use of income to support his son and failure to maintain separate accounts, amounts to giving up his separate right and allow separate property to be treated as ancestral property. There was no document evidencing such intention in that case. However, in this Second Appeal, koor chit is available and marked without objection. The 1st appellant herein/1st defendant says that his mother and uncle might have known about partition but he is not aware of the same. Therefore, it is apparent that the judgment of the Supreme Court was on different facts and the same will not apply in the facts of present case.

24 After perusing the oral evidence of PW2/Kettappa Naicker, the attester of Ex.A.11/Release Deed executed by Alamelu Ammal and oral evidence of PW3/son of the attester of Ex.A.9/Koorchit and the Release Deed, coupled with Ex.A.3/Demand Notice, Ex.B.23/Notice of House Tax new Assessment, the properties are enjoyed separately while Ex.A.3/Demand Notice is to the effect that the house tax receipts are in the name of respondent herein/plaintiff bearing door No. 3160/86-87 and also Ex.B.23 is the House Tax Assessment Notice in the name of the first defendant with the door No.3161/86-87. Thus, this Court finds that there is a clear severance of the property and further more under Ex.A.11 /Release Deed of Alamelu Ammal, in the stamp paper executed by the appellants herein/defendants' mother has acknowledged the

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fact that Natesa Naicker had half share, further the said Natesa Naicker is in the said property, on his own right and he is in possession of the same and also she has received the acknowledgment of the receipt of Rs.400 representing 50% of the sale consideration, since the vendor has only 50% of the property to convey. Further more, it is a clear record showing past events being recorded and the same is attested by the first defendant/appellant, who says that the signature was obtained in some other documents for some other parties and the same is being used now. The statement of the first defendant that he never denied his signature in Ex.A.11/Release Deed of Alamelu Ammal, assumes significance in the background of the case.

25 It is to be stated that the first defendant in his cross-examination has stated that he does not have any other signature of the contemporary period for comparison. It is to be stated that when he denies the signature, it is for him to prove the said plea but he is not taken any step to substantiate the alleged plea that the signature was taken under some other pretext of document nor he has examined any one, in this regard also goes against the appellants herein/defendants. Further, it is to be stated that after Ex.A.11/Release Deed of Alamelu Ammal, the same is followed by the Registered Settlement Deed by plaintiff. Further, as early as in the year 1966, Ex.A.12 clearly demonstrated the fact that the suit property was obtained by Natesan Naicker upon the partition.

26 Therefore, this Court is of the considered view that the Release Letter under Ex.A.11 followed by the Settlement Deed under Ex.A.12 clearly demonstrated the fact that the first respondent herein/plaintiff father was in possession of the property and further averments as averred by the first respondent herein/plaintiff are duly substantiated by the documentary evidence.

27 Hence, this Court finds that Substantial questions of law 1, 5 and 7 are held against the appellants herein/defendants and both the Courts below have correctly come to the conclusion in accepting the plea of blending between the parties and subsequently oral partition on 31.08.1963 between Ganapathy Naicker and Natesa Naicker, which was reduced into writing by a koor chit under Ex.A.9 on 02.09.1963 and in and by which, the Southern portion of house was allotted to Ganapathy Naicker while Northern portion measuring 16 feets was allotted to Natesa Naicker, who has settled the property in favour of his wife Visalakshi by a Registered Settlement Deed in the year 1966, who in turn, allotted to the son of Natesa Naicker in the family partition, registered in the year 1980 and the validity of Ex.A.9/Partition Deed by way of Koor chit and A.11/Release Deed of Alamelu Ammal, were duly proved in the manner known to law.

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28 Hence, all the substantial questions law are held against the appellants herein/defendants. Both the Courts below have rightly came to the conclusion in accepting the case of the respondent/plaintiff and negating the case of the appellants/defendants and this Second appeal is devoid of merits and the same is liable to be dismissed. Accordingly, Second appeal is dismissed.

29 In the result,

(i) the Second Appeal is dismissed and the Judgment and Decree dated 30.06.1999 passed by the learned Principal Subordinate Judge, Chengalpattu, in A.S.No. 97 of 1988, confirming the Judgment and Decree dated 16.07.1998 passed by the learned

District Munsif, Chengalpattu, in O.S.No.53 of 1987, is hereby confirmed.

(ii) No costs.

Sd/-

Assistant Registrar (CS-V)

//True Copy//

Sub Assistant Registrar

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To

1.The Principal Subordinate Judge,
Chengalpattu.

2.The District Munsif,
Chengalpattu.

Copy TO

The Section Officer,
V.R. Section, High Court,
Madras.

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+1cc to Mr.V.Srimathi, Advocate, S.R.No. 69172
+1cc to Mr.J.Srinivasa Mohan, Advocate, S.R.No.69231

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