

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 30.09.2019

PRONOUNCED ON : 16.10.2019

CORAM

THE HONOURABLE Mr.JUSTICE P.RAJAMANICKAM

S.A.No.2018 Of 2002

1. Piaree Khatoon

2. Zohera Khatoon

3. Pasha Khatoon

4. Azeezullah Khan

5. Dilwarullah Khan

... Appellants/Appellants/
Plaintiffs 3, 5 to 8

Vs.

1. Nawazullah Khan

2. Daleelullah Khan

3. Mazharullah Khan

4. Mujibullah Khan

5. K.P.Kurameed

6. V.Ramiah, Partner

Bharath Building Constructions.

... Respondents/Respondents/Defendants

PRAYER :

Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 05.12.1996 made in A.S.No.47 of 1996 on the file of the IV Additional Judge, City Civil Court, Chennai confirming the Judgment and decree dated 20.04.1995 made in O.S.No.7832 of 1985 on the file of X Assistant Judge in - charge of XV Assistant Judge, City Civil Court, Chennai.

For Appellants : Mr.V.Narayanasamy

For Respondents : Set Ex-parte

JUDGMENT

This Second Appeal has been filed by the plaintiffs 3 and 5 to 8 against the judgment and decree passed by the IV Additional Judge, City Civil Court, Chennai in A.S.No.47 of 1996 dated 05.12.1996 confirming the judgment and decree passed by the XV Assistant Judge, City Civil Court, Chennai in O.S.No.7832 of 1985 dated 20.04.1995.

2. The first plaintiff viz., Kalimullah Khan had filed a suit in O.S.No.7832 of 1985 on the file of the XV Assistant Judge, City Civil Court, Chennai, to divide the suit 'A' and 'B' schedule properties into five equal shares and allot one such share to him and also for mesne profits from 'A' schedule properties. During pendency of the said suit, the original plaintiff Kalimullah Khan died and hence his legal representatives had been impleaded as plaintiffs 2 to 8. The learned XV Assistant Judge, City Civil court, Chennai, by the judgment dated 20.04.1995 had dismissed the said suit with costs. Aggrieved by the same, the plaintiffs had filed an appeal in A.S.No. 47 of 1996 on the file of the IV Additional Judge, City Civil Court, Chennai. The learned IV Additional Judge, City Civil Court, Chennai, by the judgment dated 05.12.1996 had dismissed the said appeal with costs and thereby confirmed the judgment and decree passed by the Trial Court. Feeling aggrieved, the plaintiffs 3 and 5 to 8 had filed the present Second Appeal.

3. For the sake of convenience, the parties are referred to as described before the Trial Court.

4. The averments made in the amended plaint are in brief as follows:-

The first plaintiff is the son of one Abdullah Khan Sahib born through the second wife Mrs.Sorah Bi. The defendants are the sons of the said Abdullah Khan Sahib born through the third wife Mrs.Mallika Bi. The said Abdullah Khan Sahib died in the year 1949 leaving behind several properties. Even after his death, the plaintiffs, the defendants, the defendants' mother were living jointly. The first plaintiff and defendants' mother Mrs. Mallika Bi sold some of the small properties to bring up the defendants and to educate them well. As the defendants grew up, misunderstanding arose between the first plaintiff and the defendants and their mother Mrs. Mallika Bi. No partition was effected when the first plaintiff started his separate family in one of his father's properties known as No.6, Tippu Sahib Street, Rayapettah, Madras - 14. The plaintiff has been getting a rental income of Rs.150/- per month, out of which, he is managing both the properties and paying all taxes for the same.

The plaintiff requested the defendants to come forward for amicable partition but they did not come forward for partition and hence the plaintiff was constrained to send lawyer's notice dated 19.07.1972. Thereafter also, the defendants did not come forward for amicable partition and hence the plaintiff was constrained to file the suit for partition.

5. During pendency of the said suit, the original plaintiff died and hence his legal representatives were brought on record as plaintiffs 2 to 8.

6. The averments made in the written statement filed by the second defendant and adopted by the defendants 1, 3 and 4 are in brief as follows:-

After the death of Abdulla Khan Sahib, immediately, a pucca partition was effected in the year 1950 in the presence of elders of the locality, friends and relations of the said Abdullah Khan Sahib. Thereafter, all the parties were in possession and enjoyment of their respective shares. The said Abdullah Khan left behind him a vast estate. With a view to safeguard the interest of the said property, the elders of the locality, the deceased's relations and friends gathered at his residence on 20.11.1949 and formed a committee to divide the properties of the said Abdullah Khan Sahib and arrangements were made to protect the interest of the minor children. At that time, the first plaintiff was a major aged about 21 years and being a step son, he started giving troubles to the widow Mallika Bi and often differed in opinion. He expressed his desire to the said Committee to separate or divide the properties and wanted his share. Again, finally the elders constituted a committee on 21.05.1950 and resolved themselves dividing the properties of the late Abdulla Khan Sahib. In the said oral partition, the plaintiff was allotted immovable property and also cash. Likewise, other members also were allotted their shares and document was executed on 13.07.1950, in which, the plaintiff also signed acknowledging that he had received Rs.6,825/- from Mallika Bi being his share from his father's property in addition to the houses worth Rs.35,000/- as per Panchayat/ Committee award based on Muslim Law or Mohamedan Law towards full settlement of his claim in his father's property. He also declared in the same document that he has no further claim and has nothing to do whatsoever with the remaining property. The plaintiff had sold his property which was allotted to him in the oral partition. So, the allegation that the plaintiff is entitled to get share in the suit property is false. Therefore, the defendants 1 to 4 prayed to dismiss the suit.

7. The averments made in the written statement filed by the sixth defendant are in brief as follows:-

The sixth defendant is a bonafide purchaser of the suit property for full valuable consideration without notice of any of the proceedings. After purchase, the 6th defendant is in possession of the property situated in old Door No.13 and New door No. 18, South Boag Road, T.Nagar, Madras -17 and therefore, the 6th defendant prayed to dismiss the suit.

8. The learned XV Assistant Judge, based on the aforesaid pleadings, had framed necessary issues and tried the suit. During trial, on the side of the plaintiffs, the 5th plaintiff was examined as P.W.1 and Ex.A1 to Ex.A11 were marked. On the side of the defendants, the second defendant was examined as D.W.1 and one more witness was examined as D.W.2. They have marked Ex.B1 and B2 as Exhibits.

9. The learned Assistant Judge, after considering the materials placed before him, found that in the year 1950 itself, there was an oral partition with regard to the properties of the first plaintiff's father and subsequently, the first plaintiff had sold the property which was obtained by him in the oral partition to the third parties on 16.02.1994 vide Ex.B2 and hence he held that suit for partition is not maintainable. Accordingly, he dismissed the suit with costs. Aggrieved by the same, the plaintiffs had filed an appeal in A.S.No.47 of 1996 on the file of the IV Additional Judge, City Civil Court, Chennai. The learned IV Additional Judge, City Civil Court, Chennai, had dismissed the said appeal confirming the judgment and decree passed by the Trial Court. Feeling aggrieved, the plaintiffs 3 and 5 to 8 had filed the present Second Appeal.

10. This Court at the time of admitting the Second Appeal has formulated the following substantial questions of law:

"1. Whether the lower appellate Court erred in mis-construing Ex.B1 which was admittedly a written unregistered partition deed as if it is a family arrangement or oral partition, which was not the case of the defendants?

2. Whether the lower appellate Court erred in treating Ex.B2 as the conclusive admission against the first plaintiff without adverting to the other material evidence on record to the contrary?."

11. For 6th Respondent, Court notice was served but he has not appeared either in person or through counsel. For R1 to R5, since regular notice could not be served, substituted service by paper publication was ordered and produced and even thereafter, they did not appear and hence R1 to R6 called absent and set ex-parte. Thereafter, the arguments of the learned counsel for the appellants heard. The learned counsel for the appellants has filed written arguments also. After considering the oral and written arguments of the learned counsel for the appellants, and perusing the records, Judgment is being passed in this Second Appeal.

12. Substantial Question of law Nos.1 and 2:-

The learned counsel for the appellants has submitted that the Courts below erred in relying upon an unregistered and unstamped partition deed (Ex.B1) and the same is inadmissible in evidence. He further submitted that a perusal of Ex.B1 would show that the partition had taken place only through the said document and in such a case, the said document should have been compulsorily registered, but it was not registered and hence the said document is not admissible in evidence. He further submitted that the Courts below erred in coming to the conclusion that the first plaintiff had admitted the oral partition in Ex.B2. He further submitted that the Courts below failed to consider that the alleged admission made by the first plaintiff is not conclusive proof and that other evidence produced by the plaintiffs would clearly establish that there was no oral partition as alleged by the defendants and therefore, he prayed to allow the Second Appeal and set aside the judgments and decrees passed by the Courts below and decree the suit as prayed for.

13. In support of the above said contentions, the learned counsel for the appellants, relied upon the decision in Thirumathi Maira Arokkia Ammal & Another Versus S.Singarayar Pillai CDJ 1977 MHC 391: Madras 1977 (1) MLJ 42.

14. There is no dispute with regard to the relationship between the parties and also there is no dispute with regard to the fact that the suit properties originally belonged to late Abdullah Khan Sahib and he died in the year 1949 leaving behind the first plaintiff, the defendants 1 to 4 and their mother Mallika Bi as his legal heirs.

15. According to the plaintiffs, there was no partition between the parties with regard to the properties belonging to the late Abdullah Khan Sahib, but the case of the defendants is that after the death of the said Abdullah Khan Sahib, a Panchayat/Committee was convened on 20.11.1949 and a decision

was taken to protect the properties of the late Abdullah Khan Sahib and also safeguard his minor children. Their further case is that on 21.05.1950, again panchayat/committee was convened and in the said panchayat, all the movable and immovable properties were divided and the widow Mallika Bi was given 5/40 share in addition to her 'Mahar' and all the five sons were allotted 7/40 share each and the first plaintiff Kalimullah Khan Sahib was paid a sum of Rs.6,825/- towards his share of Rs.41,825/- apart from the houses which are situated in Door Nos. 7, 18, 22, 18 and 43 of Gaffoor Saheb Street and Door No.9 (A) situated in Mohammed Husain street worth about Rs.35,000/-. Their further case is that after accepting the said partition on 13.07.1950, the first plaintiff had signed in a stamped document acknowledging that he received a sum of Rs.6,825/- from Mallika Bi being her father's property in addition to his house. Their further case is that after getting shares in the said oral partition, the first plaintiff Kalimullah Khan Sahib had sold some of the properties under Ex.B2 sale deed on 08.10.1953 to the third party and hence he is estopped from denying the said oral partition.

16. The Panchayat decisions dated 20.11.1949 and 21.05.1950 and acknowledgment signed by the first plaintiff dated 13.07.1950 were marked as Ex.B1. A perusal of the said document would show that after the death of Abdullah Khan Sahib, on several days, panchayats were convened and several decisions were taken with regard to the properties of late Abdullah Khan Sahib. Further, it was decided to allot a sum of Rs.6,825/- and five houses to the first plaintiff viz., Kalimullah Khan Sahib. Further acknowledging the said partition, the first plaintiff Kalimullah Khan Sahib had signed the receipt on 13.07.1950 and received a sum of Rs.6,825/-

17. It is also to be pointed out that the first plaintiff Kalimullah Khan Sahib had sold one of the items of the properties under Ex.B2 sale deed dated 08.10.1953 to third party which was obtained by him through oral partition. In the said document, he has clearly admitted that there was a panchayat on 20.05.1950 and in the said panchayat, the property covered under Ex.B2 was allotted to him. He also stated that one R.Krishnadass had filed a suit in O.S.No. 430 of 1959 on the file of the City Civil Court, Chennai and in the said suit a consent decree was passed on 20.09.1953 directing him to pay a sum of Rs.64,250/- to the said R.Krishnadass and obtain a sale deed in respect of the land. So, it is clear that the first plaintiff had admitted under Ex.B2 that there was an oral partition in their family after the death of his father Abdullah Khan Sahib. Therefore, the plaintiffs are estopped from denying the oral partition.

18. In Thirumathi Maira Arokkia Ammal & another Versus S.Singarayar Pillai (cited supra), this Court has observed as follows:-

"In the present case also the respondent claims title to a certain specified item of the property on the strength of the title alleged to have been obtained by him under the partition deed (Exbit A-2) which is unregistered and inadmissible in evidence. The Full Bench of the Andhra Pradesh High Court has held that it is not open to a plaintiff placed in such circumstances to claim any particular item of property on the basis of a partition deed which is unregistered. Therefore, I agree with the learned counsel for the appellants and hold that Exbit A-2 being unregistered is inadmissible in evidence and that it is not open to the respondent to prove that there was a partition at that time and not on any subsequent date by the oral evidence of P.Ws.1 to 3. It would follow that the property was the joint property of the respondent and the first defendant's husband Anthonyamuthu and that the only remedy of the respondent is to sue for partition."

19. But in the present case, the trial court as well as the first appellate court had concurrently held that only after oral partition, Ex.B1 came into existence and hence the said document does not require registration. A perusal of Ex.B1 shows that it is only a memorandum prepared after the family arrangement had already been made, for the purpose of the record. So, Ex.B1 itself does not create or extinguish any rights in immovable properties and is, therefore, not compulsorily registrable.

20. At this juncture, it would be relevant to refer to the decision in Kale and others Vs. Deputy Director of Consolidation, AIR 1976 SC 807: 1976 SCR (2) 202 in paragraph No.44 has observed as follows:-

"44. In view of our finding that the family settlement did not contravene any provision of the law but was a legally valid and binding settlement in accordance with the law, the view of Respondent No. 1 that it was against the provisions of the law was clearly wrong on a point of law and could not be sustained. Similarly the view of the High Court that the compromise required registration was also wrong in view of the clear fact that the mutation petition filed before the Assistant Commissioner did not

embody the terms of the family arrangement but was merely in the nature of a memorandum meant for the information of the Court. The High Court further in law in not giving effect to the doctrine of estoppel which is always applied whenever any party to the valid family settlement tries to assail i The High Court further erred in not considering the fact that even if the family arrangement was not registered it could be used for a collateral purpose, namely, for the purpose of showing the nature and character o possession of the parties in pursuance of the family settlement and a o for the purpose of applying the rule of estoppel which followed from the conduct of the parties who having taken benefit under the settlement keep their mouths shut for full seven years and later try to resile from the settlement. In Shyam Sunder and others v. Siya Ram and another (1) it was clearly held by the Allahabad High Court that the compromise could have been taken into consideration as a piece of evidence even if it was not registered or for that matter as an evidence of an antecedent title. The High Court observed as follows:

"The decision in Ram Gopal v. Tulshi Ram, -AIR 1928 All. 641 (FB)-is clear that such a recital can be relied upon as a piece of evidence.

It is clear, therefore, that the compromise can be taken into consideration as a piece of evidence. x x x To sum up, therefore, we are of the view that the compromise could have been relied upon as an admission of antecedent title."

21. From the aforesaid decision, it is clear that even if the family arrangement is not registered, if it is shown that the said document was acted upon, the parties are estopped from denying the said partition.

22. In this case, Ex.B2 would show that the oral partition was acted upon and the original plaintiff has specifically admitted in the said document that there was an oral partition with regard to the properties of Abdulla Khan Sahib. Therefore, the plaintiffs are estopped from denying the said partition.

23. The Trial Court after taking into consideration of all the aforesaid facts, had rightly held that the properties were already partitioned orally and the same has been confirmed by the first Appellate Court. In view the said factual concurrent findings, this Court cannot interfere with the

judgment passed in A.S.No.47 of 1996 dated 05.12.1996. Accordingly, the substantial questions of law are answered against the appellants.

24. In the result, the Second Appeal is dismissed. No costs.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

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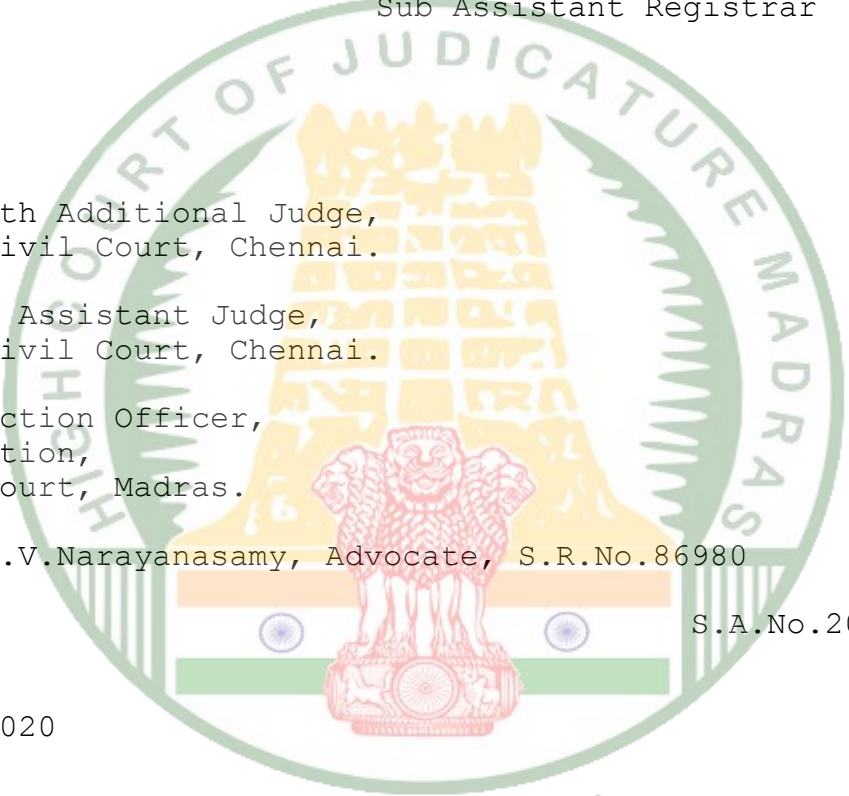
To

1. The IVth Additional Judge,
City Civil Court, Chennai.
2. The XV Assistant Judge,
City Civil Court, Chennai.
3. The Section Officer,
VR Section,
High Court, Madras.

+1cc to Mr.V.Narayanasamy, Advocate, S.R.No.86980

S.A.No.2018 of 2002

NRL (CO)
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