

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 22.07.2019

Judgment Pronounced on : 01.11.2019

CORAM : THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

S.A.No.385 of 2006
and CMP.No.5083 of 2006

Parthiban ...Appellant/Appellant/3rd defendant

Vs

1.Sethuraman ...1st Respondent/1st Respondent/Plaintiff
2.Kasthuri Ammal
3.Nirmala
.... Respondents/Respondents/Defendants 1 & 2

Prayer :- Second Appeal filed under Section 100 of CPC, against the judgment and decree of the learned Sub Judge, Ponneri, made in A.S.No.5/2004 dated 26.04.2005 confirming the judgment and decree of the learned District Munsif, Ponneri, made in O.S.No.204/1989 dated 29.10.2003

For Appellant : Mr.M.Ganesan

For Respondents : Ms.T.Jayalakshmi
for M/s.Paul & Paul for R1
Mr.A.Adithya for R2
R3 - No appearance

JUDGMENT

The appellant before this Court is the third defendant in a suit for partition and a holder of an agreement from one of the sharers of the suit property. The suit was decreed by the trial court, and it was confirmed by the first appellate court. Parties would be referred to by their rank in the trial court.

2. The brief facts that are now necessary for the ongoing purpose is as follows :

- The suit property measures 2.97 acres, and it originally belonged to a certain Venkatesalu Naidu. He died in 1976 leaving behind him surviving his wife, the first defendant, and two children namely the plaintiff and the

second defendant. Venkatesalu Naidu died intestate and consequently his heirs came to succeed to his estate. Accordingly, the plaintiff, the first and second defendants acquired equal share in the suit property. Alleging further that the first defendant had executed a sale agreement in favour of the 3rd defendant, the plaintiff claims partition of his 1/3 share in the suit property.

- The first and second defendants have filed their written statement supporting the plaintiff.
- According to the appellant/3rd defendant, who alone contested the suit, on 07.11.1981, Vide Ext.B-3, the first defendant entered into a sale agreement with the third defendant/appellant for the sale of the suit property for a total consideration of Rs.13,500/-. Out of this, Rs.13,000/- had been paid and only Rs.500/- remained to be paid. The second defendant was one of the attesting witnesses to the said agreement. The agreement did not fix any time for performance. So far as the plaintiff's contention goes, he is entitled to claim partition. It is in this circumstances, the plaintiff laid the suit for partition of his share.

4. The trial Court decreed the suit, and in the process, found that Ext.B-3 sale agreement was genuine. This finding has been confirmed by the first appellate Court as well. This judgment of the trial court was confirmed totally by the first Appellate Court. This includes the confirmation of the trial court's finding that Ext.B-3 was genuine. However, there is no cross-objection regarding this finding either before the first appellate Court or before this Court.

5. This appeal was admitted to consider the following substantial questions of law:

1. When the appellant has been put in possession of the property in part performance of the agreement of sale between the appellant and the 2nd respondent, is not the appellant entitled to invoke Section 53A of the Transfer of Property Act?
2. When the courts below found that Ext.B3, the agreement of sale between the appellant and the second respondent is true, is the courts below correct in decreeing the suit filed by the 1st respondent, who is the son of the 2nd respondent herein?

6. Heard both sides. The appellant/claims possession of the entire suit property founded on Sec. 53A of the Transfer of

Property Act, 1882. According to the learned counsel for the appellant, both the Courts found possession in favour of the appellant and hence, he claims that he is entitled to hold possession under Section 53A of the Transfer of Property Act. The learned counsel placed reliance on an authority of the Hon'ble Supreme Court in D.S.Parvathamma V. A.Srinivasan [(2003) 4 SCC 705], for the proposition that there is no limitation for taking a defense under Section 53(A).

7.1 To start with, the appellant/third defendant has to be reminded that this a suit for partition, admittedly is laid by one of the co-sharers of the suit property, and that he is a stranger to their family. And, the third defendant wants to defend his title to be in possession of the entire suit property based on a sale agreement, executed not by the plaintiff, but by the first defendant. Here, the second defendant is only an attestor to Ext.B-3. Therefore, what is his right to challenge the plaintiff's title to seek partition? None.

7.2.Now, this 3rd defendant claims right to be in possession under Sec.53-A of the Transfer of Property Act. It cannot be disputed that the right to defend possession granted in part performance of a written agreement to sell can be defended by an agreement holder even beyond the period of limitation provided for a suit for specific performance, in view of the authoritative pronouncement of the Hon'ble Supreme Court. However, the fact remains it is available only against the one who had executed the sale agreement, and not available who is a stranger to it. This implies, even if Ext.B-3 were genuine, and that the 3rd defendant had entered possession based on it, yet it can be claimed only against the executant thereof, and not against the plaintiff. Stricto senso, the 3rd defendant cannot even enter possession as he, as a stranger, and not being a co-sharer of the suit property, does not have any right in law to enter possession. His right in law is to obtain a sale deed from the first defendant, and then to file a suit for partition of the shares he purchased. The only other possible plea available to him was adverse possession. This he has not pleaded.

8. Here is a case, where an agreement holder of one of the sharers of the suit property wants to assert his right in a suit for partition filed by another sharer. The very issue is alien to the cause of action. He cannot have his issues with the first defendant decided even collaterally in this suit, though it may have to said, that the findings of the Courts below on the genuiness of Ext.B-3 agreement is likely to bind the first defendant, but this has to be tested in a separate suit or proceedings, and this Court refrain from entering a pre-emptive finding on it.

9. In conclusion, this Court finds no merit in the appeal, and all the substantial questions of law too fails. The appeal is dismissed and the judgment and decree of the learned Sub Judge, Ponneri, dated 26.04.2005 made in A.S.No.5/2004 is hereby confirmed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar

//True Copy//
Sub Assistant Registrar

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To:

- 1.The Sub Judge, Ponneri.
- 2.The District Munsif, Ponneri.
- 3.The Section Officer,
VR Section, High Court, Madras.

+1cc to Mr.A.Muthuraman, Advocate SR.90613

S.A.No.385 of 2006

SVI (CO)
CB(11/09/2020)