IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26.02.2019

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THE HONOURABLE **Ms.JUSTICE P.T.ASHA**

CRP(PD).Nos.1318 & 1199 of 2018
and
C.M.P.No.6217 of 2018

1.Kothandapani
2.Sivasubramaniyan .. Petitioners/Plaintiffs 1 & 2 in both petitions

Vs

1.Veeravalli
2.Kumaravel
3.Sivaji
4.Genga Prasath
5.Latha ..Respondents/Defendants1 to 5 in both petitions

6.Arivazhagan
7.Annapoorani .. Respondents/Plaintiffs 3 & 4 in both petitions

COMMON PRAYER: Civil Revision Petitions filed under Article 227 of the Indian Constitution against the fair and final order dated 10.11.2017 passed in I.A.Nos.40, 70 of 2016 in O.S.No.60 of 2015 on the file of the learned Additional Subordinate Judge, Tindivanam.

For Petitioners in both petitions : Ms.J.Prithivi

For R1 to R5 in both petitions : Mr.P.Dinesh Kumar

For R6 & R7 in both petitions : No appearance

COMMON ORDER

The above Civil Revision Petitions are filed challenging the order passed by the learned Additional Subordinate Judge, Tindivanam in allowing I.A.No.40 of 2016 in O.S.No.60 of 2015, filed by the defendants for eschewing Ex.A4 and dismissing I.A.No.70 of 2016, filed by the plaintiffs seeking for the relief of impounding the Koorchit document / Ex.A4 under the Stamp Act.

2 With a view to brevity and clarity the facts necessary for disposing of the above Civil Revision Petition is given herein below:

The plaintiffs had filed a suit seeking partition of their 1/3rd share in the suit property and for an injunction restraining the defendants from interfering with the plaintiffs' possession and enjoyment of the suit A,B,C schedule properties, besides asking for other reliefs. The sum and substance of the plaint was that, the property originally belonged to one Muthusami Kounder and on his demise, the defendants and the plaintiffs as his legal heirs were entitled to jointly enjoy the said suit property and that despite demanding for partition, the same has not been effected.

3 The defendants on the other hand have filed a written statement, inter alia contending that the said Muthusami

Kounder had as early as on 20.05.1948, settled the suit properties in favour of his grandson and the father of defendants and therefore, the plaintiffs had no right or title to the property in question.

4 During chief examination of PW1, a partition dated 17.11.1995 was marked as Ex.A4 and thereafter, the impugned petition came to be filed by the defendants to eschew Ex.A4, since the said document was compulsorily registrable. The defence to this petition was that the said document had already been marked and having permitted the document to be marked, the petitioner cannot be now allowed to seek to eschew the said document. The plaintiffs have also filed I.A.No.70 of 2016 in O.S.No. 60 of 2013 to impound Ex.A4 and to send the same for ascertaining the proper stamp fees and for cost and other reliefs.

5 After hearing either parties, the learned Additional Subordinate Judge, Tindivanam was pleased to allow I.A.No.40 of 2016, filed by the plaintiffs and dismissed the I.A.No.70 of 2016.

6 Challenging the order passed in I.A.No.40 of 2016, C.R.P.No.1199 of 2018 was filed and challenging the order passed in I.A.No.70 of 2016, C.R.P.No.1318 of 2018 was filed.

7 Ms.J.Prithivi, learned counsel appearing on behalf of the revision petitioners would contend that the respondents/plaintiffs having permitted the marking of the document earlier cannot be now permitted to raise the plea that the said document was not admissible in evidence. She would further argue that under Section 35 of the Indian Stamp Act, the document could be impounded and the petitioners permitted to pay the relevant duty and the said document could definitely be relied upon in evidence.

8 She would also argue that the issue with reference to the admissibility or otherwise of the document is an issue which can be dealt with at the time of arguments. She relied upon the following Judgment reported in ***2012 (1) MWN (Civil) 46 [S.Sundari and others Vs. S.Periyasamy]***, in support of her argument.

9 The issue involved therein was whether the memorandum of family arrangement recording an earlier partition required registration. The Court observed that where the partition was effected under the document, it required registration and where it evidenced an earlier arrangement it did not require registration or Stamp Duty. She had also relied upon another Judgment of this Court, reported in ***2017 (1) CTC 400 [Rukmani and others Vs.***

G.Natarajan (Died) – Smt. Bagyam], where this Court had held that Section 49 of the Registration Act permitted admission of unregistered documents for a collateral purpose. Section 36 restricts the questioning of an unregistered documents, which was permitted to be admitted in evidence. The Courts below could have impounded the document and directed the revision petitioners to pay the necessary Stamp Duty. This was challenged on the Second Appeal. This Court had further held that the two unregistered, unstamped documents were admitted in evidence only for collateral purpose and when the defendants had not objected to the marking of the document, they cannot subsequently challenge the marking on the ground that the same was not properly stamped. Another Judgment relied upon by her is one reported in ***AIR 1970 MADHYA PRADESH 74 [Balkrisha Bihari Lal Vs. Board of Revenue M.P. and other]***, which once again is in support of the argument that where a document has been admitted without objection then the validity of the same cannot be questioned under Section 36 at any stage of the same suit or proceedings on the ground that it is not duly stamped.

10 The last of the Judgments relied upon by her is in the case of ***N.Ethiraj Chettiar and others Vs. Samundeeswari Ammal and others reported in [2017 (3) CTC 30]***, where this Court has observed, in a case where the Koor Chit was marked as an

exhibit, subject to the objection placed by the plaintiff and the learned Trial Judge had at the time of delivering the Judgment held that the said document was inadmissible in evidence. This Court had remitted the matter back to the Court below to impound the said document and direct the party to requisite Stamp Duty.

11 Per Contra, Mr.Dinesh Kumar appearing on behalf of the respondents 1 to 5 would contend that the Koor Chit is a document, which by itself creates division of the joint family status, the properties had been taken possession by the respective shares as per the deed. Therefore, it was a document, which was compulsory registrable under Section 17 of the Registration Act, 1908 and therefore, by paying penalty, the fact that document had not been registered will not be cured. He would further argue that even in cases where the documents have been marked, in such cases, if the document requires to be compulsory registrable, then the marking of the document would not stand in the way of the Court eschewing the said evidence. He would rely on the Judgment reported in ***AIR 1950 MADRAS 433 [K.Mahammad Ghouse Sahib Vs. Jamila Bi and others]***, where the Division Bench of this Court in paragraph 4 has held that where a document itself creates an interest in immovable property, the mere fact that the document contains a clause that a property document could later be executed and registered will not

take it away, from the mischief of Sections 17 and 49 of the Registration Act, 1908.

12 He would argue that a reading of the Koor Chit document would show that as on the date of the execution of the Koor Chit, itself the severance of a joint family status is said to have taken place and therefore, it was a document, which was compulsorily registrable.

13 He would also rely on the Judgment reported in ***(2003)8 SCC 752 [R.V.E.Venkatachala Gounder Vs. Arulmigu Viswesaraswami and V.P.Temple and another]***, where once again there was an objection to the admissibility of the document, where the document, which required compulsory registration was permitted to be marked as an exhibit, without objection by the defendants. The Hon'ble Supreme Court of India observed that the objection as to admissibility of the documents can be classified into two classes:

1) where the objection was with reference to the document sought to be proved is itself inadmissible

2) Where there was no objection with reference to admissibility of the document, but only to the mode of proof of the said documents.

14 The Hon'ble Apex Court had held that in the first case of objection, the objection could be taken at any point of time, even when the matter was posted for arguments. As far as the second class, the objection had to be taken at an appropriate point of time. He argued that the instant case would lie with in the first class and therefore, the Court below has rightly eschewed the document though there was no objection when the same was marked.

15 He has also relied on the Judgment reported in ***2008 (5) CTC 260 [K.B.Saha & Sons Pvt. Ltd. Vs. Development Consultant Ltd],*** wherein the Hon'ble Supreme Court has laid down certain principles to be followed citing various decisions of the Hon'ble Supreme Court as well as the various High Courts, while considering the admissibility of documents, which required to be compulsorily registered under the Registration Act, 1908. The Hon'ble Supreme Court held that where the document was inadmissible in evidence for want of registration, then none of the terms of the said document can be admitted in evidence.

16 He has lastly relied upon the Judgment of this Court reported in ***2019 (1) LW 555 – The Canara Bank Premises and Estate Section Vs. G.Meerabai***, where after the marking of the documents, an application was moved to eschew the same on the

ground that it was compulsorily registrable. This Court had held that where an instrument chargeable with duty is not charged then it is inadmissible in evidence for any purpose whatsoever, unless the first proviso to Section 35 has been complied with.

17 Heard both parties and perused the documents.

18 From a reading of the Koor Chit, as rightly pointed out by the counsel for the defendants/respondents, it is evident that the division of the properties had taken place under the document, the latter clause with reference to registration and reducing the terms in writing in a stamp paper was an option that was given to the parties. Therefore, it was a document, which created a right in presaenti which was compulsorily registrable under Section 17(1)(b) of the Registration Act, 1908, as observed by the Division Bench of this Court in detail in ***K.Mahammad Ghouse Sahib's*** **case** *(supra).* When a document itself creates an interest in immovable property, the fact that the deed contained a clause with reference to obtaining a proper partition deed written on stamp paper and registration would not take away the document out of the mischief of Sections 17 and 49 of the Registration Act, 1908. Therefore, it can be concluded that the document in question is one which requires compulsory registration and is therefore inadmissible in evidence as per the

provisions of Sections 17 and 49 of the Registration Act, 1908 and also following the dicta laid by the Hon'ble Supreme Court in ***R.V.E.Venkatachala Gounder's* case** *(supra),* objection as to the admissibility of the document, which has been marked in evidence can be taken at any stage, since it is an objection with reference to a document, which by itself is inadmissible in evidence. The respondents have rightly taken the defence though there was no objection when the same was marked as an exhibit.

19 That apart, the document is sought to be marked to prove the main object namely, the severance and allotment of the shares and possession of the various sharers, this being the primary purpose the same cannot be permitted to be marked as it requires to be compulsorily registered and proper Stamp Duty to be affixed. In the Judgment reported in ***2019 (1) LW 555***, this Court has clearly held that Section 35 of the Indian Stamp Act, 1899 places a fetter on the admissibility of an instrument chargeable with duty in evidence for any purpose including a collateral purpose unless the first proviso thereto is followed. Section 35 of Indian Stamp Act should be read conjointly with Section 49 of the Registration Act, 1908, where the proviso to Section 49 states that an unregistered document affecting immovable property which is required to be compulsorily registered can be received in evidence for proving a collateral transaction which

need not to be effected by a registered instrument.

In the light of the above, this Court finds no infirmity in the order passed by the learned Additional Subordinate Judge, Tindivanam. In the result, these Civil Revision Petitions stands dismissed. No costs. Consequently, connected miscellaneous petition is also closed.

26.02.2019

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Index: Yes/No
Internet: Yes/No
Speaking order / Non-speaking order

To

The learned Additional Subordinate Judge,
Tindivanam.

P.T.ASHA, J.

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CRP(PD).No.1318 of 2018

26.02.2019