IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 08.04.2019

DELIVERED ON: 24. 04.2019

CORAM:

THE HON'BLE MR.JUSTICE N.SATHISH KUMAR

CRP PD No.4591 of 2013 and
MP No.1 of 2013

1. Narayana Naicker
2. Senthamarai
3. P.T.Mannan
4. Shanmugam chettiar ... Petitioners

Vs.

Kannusamy Naicker (died)
1. Sournam
2. K.Vijayalakshmi
3. K.Shanmugam
4. Bhuvaneswari
5. Snthilkumar
6. Natarajan Naicker
7. Pulendhiran
8. Shanthi
6. Rasunainar
10. Kandasamy Naicker
11. Govindasamy
12. Ramasamy
13/ Chelaperumal
14. Ayyakkannu
15. Karuppiah
16. Narayanasamy Konar
17. Renga Padayatchi
18. Palaniammal

19. P.Kandasamy Naicker
20. Pandurangan
21. Venugopal Reddiar
22. Jegathambal ... Respondents

Prayer Civil Revision petition filed under Article 227 of the Constitution of India against the orders dated 14.03.2013 passed in O.S.No.6 of 2004 by the Additional District District and Sessions Judge, Cuddalore at Virudachalam.

For Revision Petitioners : Mr.D.Shivakumaran

For respondent No.1 to 5 : Mr.Venkatasubban for M/s Sarvahauman Associates

Respondent No.6, 7, 16 and 22 : No appearance

Respondents No.8 to 12, 14, 15, 18 to 21 : Exparte

ORDER

This revision petition has been filed against the order passed in O.S.No.6 of 2004 by the Additional District District and Sessions Judge, Cuddalore at Virudachalam, fixing the stamp duty and penalty for an unregistered partition deed.

2. The revision petitioners are the defendants 2, 13, 15 and 16 in the original suit and the suit in O.S.No.6 of 2004 had been filed by the plaintiffs for partition of the suit properties. The trial court had decreed the suit on 30.11.2009 and determined the share of the plaintiffs as 1/3. Against which, A.S.No.513 of 2006 had been filed by the plaintiffs before this court. This court by its order dated 27.08.2012, set aside the decree and judgment passed by the trial court and remitted back the matter to the trial court for fresh consideration, by giving the following decisions in points.

> Point No.1 is decided to the effect that the lower court was not justified in holding that there was partition among th family members in the absence of any clinching evidence and the lower court also was wrong in ordering partial partition.
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> Point No.2 is decided to the effect that the finding of the lower court concerning oral sale is not tenable.

Point No.3 is decided to the effect that the lower court was not justified in placing reliance on the pattas in favour of defendants 1 and 2 in holding that they acquire title to those properties concerned.

Point No.4 is decided to the effect that the lower ourt was not justified in rejecting the request of the defendants to get marked the note books two in number purported to contain the facts relating to the partition and allotment of shares.

Point No.5 & 6 are decided to the effect that the judgement and decree of the lower court are liable to be set aside and accordingly set aside.

It is for the court either to give a finding whether there was any partition in the year 1969 or not. If it is so, then by way of enforcing that partition, all the shares of the three parties should clearly be spelt out item wise and if it is found that there is any over stepping of such shares by any one of the parties in enjoyment or in alienating them, then that would not be binding on the other sharers. The respective purchasers have to work out their remedies accordingly during the final decree proceedings. On the other hand, if the court finds that there was no partition at all during the year 1969, then the partition decree simplicitor in respect of the suit properties should be passed and during the final decree proceedings, the respective purchasers have to work out their remedies based on enquiry.

3. In pursuant to the above direction, the trial court sent the partition note book which was sought to be valued, to the Sub Registrar, Thittagudi in this regard. The Sub Registrar replied to the court that no guideline value was available for the year 1969. Therefore, the trial court took 10% of the present guideline value of the properties as the market value for the year 1969 and fixed the same as Rs.6,93,770/-. The trial court arrived stamp duty for the unregistered partition note book at 4.5% of the said amount i.e. Rs.31,220 (6,93,770 x 4.5%=Rs.31,220) and arrived penalty with 10 times of Rs.31,220/- as Rs.3,12,220/-. The total stamp duty and penalty was fixed at Rs.3,43,420/- and the trial court directed the

parties to pay that amount. Against which, the present revision petition has been filed by the petitioners.

4. The revision petitioners, in their revision petition stated that the unregistered document, where stamp duty has been valued can be looked into for collateral purpose and relied upon various judgments.

5. Mr.Venkatasubban, learned counsel appearing for the contested respondents would contend that the Stamp Act deals with the impounding of the document and collection of the same and that mere collection of deficit stamp duty will not cure the registration and hence, the unregistered document cannot be used for any purpose, except as provided under proviso to Section 49 of the Tamil Nadu Registration Act. He would further contend that the Proviso to Section 49 of the Registration Act cannot override the Section and in fact, it is only enable the Section, wherein there is a specific bar under Section 49 of the Registration Act, with regard to the admissibility of the document affecting the immovable property. Such being the position, it is his contention that the Proviso to Section 49 cannot be enlarged to

contend that mere deficit stamp duty is paid, the document is admissible one to prove any fact in respect of the immovable property and he has also placed reliance of the various judgments.

6. Mr.D.Shivakumar, learned counsel appearing for the revision petitioners would submit that the trial court itself can determine the stamp duty on the document, since the document sought to be marked is a partition note book, which in fact created right in presenti and registration is mandatory and hence, it will certainly fall within the ambit of Section 49 of the Registration Act.

7. Inview of the above submissions, the point to be decided is whether the trial court order fixing the stamp duty on the partition note book is valid under law. No doubt, in the above suit in O.S.No.6 of 2004, originally, preliminary decree was passed, against which an appeal was filed before this court and this court set aside the preliminary decree and remitted back the matter to the trial court for fresh consideration and also there were some directions as referred above. In pursuant to the such directions, the trial court has fixed

10% of the present guide line value of the property as the market value for the year 1969.

8. No doubt, the document sought to be marked and stamp duty with penalty directed to be collected on the document is a partition note book. The above note book has been produced before this court. On perusal, this court seen that, the note book is nothing but a partition in presenti, which is clearly admitted by both side.

9. Section 17(b) of the Registration Act makes it clear that " *(b) other non-testamentary instruments which purport operate to create, declare, assign, limit or extinguish,whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property*". Such documents are required compulsory registration.

10. Section 49 of the Registration Act deals with " *Effect of non-registration of documents required to be registered*". No document required by Section 17 to be registered shall

(a) affect any immovable property comprised therein, or

(b) confer any power to adopt, or

(c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered.

11. Section 49(a) and (c) makes it very clear that documents required to be registered under Section 17 if not registered shall not be used as evidence of any transaction affecting such a property. Only two exception are given in Proviso to Section 49 that (i) an unregistered document can be received in evidence of a contract in a suit for specific performance (ii) or can be received in evidence of any collateral transaction, not required to be effected by registered instrument. Except the above two exceptions, no document, which required to be registered under Section 17 of the Registration Act, can be received in evidence of any transaction affecting such immovable property. The second exception provided in Proviso to Section 49 that such document can be used for collateral transaction, cannot be construed to mean that the collateral transaction affecting the immovable property can also be used as evidence in respect of the immovable property.

12. A conjoined reading of Section 17(a) and 17(b) and Section 49 the Registration Act makes it clear that any instrument, which purport operate to create, declare, assign, limit or extinguish, whether vested in present or in future, any right, title or interest whether vested or contingent, of the value of one hundred rupees and upwards to or in immovable property is required to be registered and such unregistered document, which create any right in respect of the immovable property cannot be used as evidence in any transaction affecting such property or conferring such power, as per Section 49 of the Registration Act. The proviso to Section 49 of the Registration Act cannot override the Section. In fact, it is only enabling the section.

13. Therefore, as per Section 49 of the Registration Act, the document, which create any right in respect of the immovable property cannot be received in evidence and as per the exception provided in Proviso to Section 49, the collateral transaction, in my opinion, is not in respect of the immovable property, which is something other than creation of any right, title or interest in immovable property and it is independent from the main transaction, in respect of which the document sought to be relied upon.

14. In this revision, challenge is made against the impugned order, fixing the stamp duty and penalty collecting the same in respect of the document namely partition note book. As already indicated, the partition note book is nothing but division of the property in presenti, which in fact required compulsory registration.

15. Section 33 of the Stamp Act makes it very clear that it is mandatory for any public office or any person having by law or consent of parties authority to receive evidence, when the same is produced and in his opinion, such instrument is not duly stamped, such authority should impound the same.

16. As per Section 35 of the Indian Stamp Act, it is mandatory that no instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped.

17. The proviso to Section 35 provides for admitted documents in evidence on payment of stamp duty with penalty, except the four categories mentioned therein. When the document was impounded by the public authority and the stamp duty is collected, such public authority shall send the authenticated copy of such document together with certified copy of the document to the collector.

18. Therefore, on careful perusal of Section 35 of the Stamp Act makes it clear that the public authority, who impound the document can also levy the stamp duty and penalty and collect the same and after such collection, the amount with certificate shall be sent to the Collector, as per Section 38 of the Stamp Act. After receipt of such certificate, the Collector may, if he thinks fit, refund any portion of the penalty in excess of five rupees, which has been paid in respect of such instrument, as per Section 39 of the Stamp Act.

19. The trial court, in a case on hand, has not referred the document to the Collector. Only on the basis of the letter sent by the Sub Registrar that there was no guide line value fixed in the year 1969 on the property, the trial court itself exercised the power of the

Collector and calculated 10% of the present guideline value of the property as the guideline value of the property in the year 1969. It is to be noted that, the suit property is only an agricultural land and there is no evidence that as to how and on what basis, the trial court arrived the guideline value of the property. Such being the position, the procedure adopted by the trial court in fixing the stamp duty by its own, without referring the same to the Registrar/Sub Registrar, who was declared as Collector under Stamp Act, as per G.O.Ms.No.736, Revenue, dated 15.03.1971, is not correct. Therefore, the order of the trial court to recover the huge stamp duty is liable to be set aside.

20. Be that as it may, now the point to be decided is whether the partition note book can be looked into for any other purpose. As already indicated, it is only a partition in presenti, dividing the properties, which requires compulsory registration. Merely the deficit stamp duty made good, will not cure the document from registration, under Section 17 of the Registration Act.

21. Further, Section 33(2) of the Stamp Act makes it very clear that the documents for impounding itself is to ascertain whether it is stamped with a stamp of value in force in India when such

document was executed or first executed and to collect and for collection of revenue. The instrument as defined in Section 2(14) of the Stamp Act includes every document by which any right or liability or purports to be created, transferred, limited, extended, extinguished or recorded.

22. In a judgment in ***Avinashkumar Chauhan Vs. Vijay Krishna Mishra reported in (2009) 2 Supreme Court Cases 532***, it has been held thus.

> " 17. Parliament has in Section 35 of the Act, advisedly used the words "for any purpose whatsoever". Thus, the purpose for which a document is sought to be admitted in evidence or the extent thereof would not be a relevant factor for not invoking the aforementioned provisions.
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> 23. The contention of the learned counsel for the appellant that the document was admissible for collateral purpose, in our opinion, is not correct. In Bondur Singh Vs. Nihal Singh reported (2003) 4 SCC 161, this court was not was not concerned with

the provisions of the Act. Only interpretation of the provisions of the Registration Act was in question. It was opined (para 5)

5. The main question, as we have already noted, is the question of continuous possession of the plaintiffs over the suit lands. The sale deed dated 9.5.1931 by Fakir Chand, father of the defendants in favour of Tola Singh, the predecessor in interest of the plaintiffs, is an admitted document in the sense its execution is not in dispute. The only defence set up against the said document is that it is unstamped and unregistered and therefore, it cannot convey title to the land in favour of the plaintiffs. Under the law a sale deed is required to be properly stamped and registered before it can convey title to the vendee. However, legal position is clear law that a document like the sale deed in the present case, even though not admissible in evidence, can be looked into for collateral purposes. In the present case, the

collateral purpose to be seen is the nature of possession of the plaintiffs over the suit land. The sale deed in question at least shows that initial possession of the plaintiffs over the suit land was not illegal or unauthorised.".

25. Section 35 of the Act, however, rules out applicability of such provision as it is categorically provided therein that a document of this nature shall not be admitted for any purpose whatsoever. If all purposes for which the document is sought to be brought in evidence are excluded, we fail to see any reason as to how the document would be admissible for collateral purposes.

23. ***In Sanjeeva Reddi Vs. Johanputra Reddi reported in AIR 1972 AP 373*** it has been held thus.

9. While considering the scope of Section 35 of the Stamp Act, we cannot bring in the effect of non-registration of a document under

Section 49 of the Registration Act. Section 17 of the Registration Act deals with documents, the registration of which is compulsory and Section 49 is concerned only with the effect of such non-registration of the documents which require to be registered by Section 17 or by any provision of the Transfer of Property Act. The effect of non-registration is that such a document shall not affect any immovable property covered by it or confer any power to adopt and it cannot be received as evidence of any transaction affecting such property or conferring such power. But there is no prohibition under Section 49 to receive such a document which requires registration to be used for a collateral purpose i.e. for an entirely different and independent matter.

24. A Division Bench of this court in a judgment in ***A.C.Lakshmipathy and another Vs. A.M.Chakrapani Reddiar and five others reported in 2001(1) CTC 112*** held as follows.

24. The courts have in some rulings endeavored to explain what are collateral purposes. It has to be remembered that it is not possible to give an exhausive list as to what are all the collateral purposes.

This court in the ruling reported in Panchapagesa V. Kalyanasundaram reported in AIT 1957 Mad. 472 has observed thus.

To sum up it is well settled in a long series of decisions which have since received statutory recognition by the Amending Act of 1929 (vide the concluding words of the new proviso to S.49 of the Registration Act) that a compulsorily registrable but an unregistered document is admissible in evidence for a collateral purpose that is to say, for any purpose other than that of creating, declaring, assigning, limiting or extinguishing a right to immovable property.

The expression "collateral purpose" is no doubt a very vague one and the court must decide in each case whether the purpose for which it is sought to use the unregistered document is really a collateral one or is to establish directly title to the immovable property sought to be conveyed by the document. But by the simple device of calling it a "collateral purpose", a party cannot use the unregistered document in any legal proceedings to bring about indirectly the effect which it would have had if registered.

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 phraselogy 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 required 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 inview of the specific bar in Section 35 of the Indian Stamp Act.

25. ***In a judgment in E.Meganathan and another V. M.Samraj reported in 2016-2 L.W. 329,*** this court held as follows:

4 (ii)....

The second exception is mostly misunderstood by projecting the same to be one for the use of an unregistered document for any collateral purpose. The term "collateral purpose" is a nebulous term and the provision does not refer to collateral purpose. On the other hand, the provision refers to a "collateral transaction"which is not required by law to be registered.

26. In a ruling in ***K.Ramamoorthi V. C.Srendranatha Reddy reported in 2013 (121) AIC 316 (A.P. H.C.,)*** it has been held thus.

15. A Larger Bench of the Madras High Court headed by Rajamannar C.J. considered the whole gamut of the subject on a copious reference of the case law on the subject. Two conflicting opinions were rendered by Satyanarayana Rao, J and Panchapagesa Sastry, J.Rajamannar, C.J., agreed with the opinion of Satyanarayana Rao, J. by a short separate opinion of his own. The document, which fell for consideration of the court was a purported agreement where under Acs.4-00 of property was leased out on an yearly rent of Rs.600/-. The two lower courts have declined to

admit the document into evidence as it was unregistered. Before the High Court, it was argued that even if the said document required registration and was not admissible in evidence, still it could be used for the collateral purpose of proving the anterior oral agreement which would nonetheless, be valid because of the agreement being oral. Satyanarayana Rao, J. who rendered leading opinion, referred to a slew of judgments notable among them being the judgment of a Five Judge Bench of Madras High Court in Rajah of Venkatagiri V. Narayana Reddi. In a Full Bench judgment of three judges in Narayanan Chetty V. Muthaiah Servai. His Lordship has noticed that conflict between these two judgments. While dealing with Section 49 of the Registration Act, the learned Judge observed that the prohibition against admissibility enacted by the said provision is not an absolute one, but the section renders the unregistered document inadmissible only for the two limited purposes specified in the section, i.e. Clauses (a) and (c) thereof and leaves it available to be used in evidence for other purposes; that under Clause(a) of Section 49, the document required to be registered, but unregistered, is wholly inoperative and ineffectual to create, declare, assign, limit or extinguish any right, title or interest in immovable property and that under sub clause (c), an unregistered document cannot be relied upon for proving a transaction affecting immovable property. While dealing with Clause (a), the learned judge relied on the following famous observation in Saraswathamma V. Paddayya.

"What is prohibited by the section is receiving a document as evidence of atransacton, not merely receiving it in evidence, i.e. as a piece of evidence having a bearing on the question to be ultimately decided".

16. In other words, the learned Judge held that the prohibition was to prevent a person from

establishing the use of the document in evidence "transaction affecting immovable property"and that a person should not be permitted to establish indirectly by use of the document what he is prevented from doing directly under Clause (). While dealing with Clause(c), the learned Judge held as under.

"What one has to see under the clause is to consider what is it that he is seeking to establish in evidence by using the document. Is he attempting to prove by the document a transaction affecting immovable property. In other words is he seeking to prove a present demise of the property, or a lease of the property?. That is not the object of the plaintiff in the present case. The object is to establish an agreement to lease the property, which was broken by the defendant. He is in no way attempting to show that an interest in immovable property is created by a present demise of the land. Proof of a mere agreement to lease, if one remembers the distinction drawn by the Privy Council in Hemantha Kumart's case, between agreements,which merely enable a person to obtain a lease in future, and agreements, which operate to create a present demise, or an immediate interest in land, is not prohibited. The former agreement is not a transaction affecting immovable property. The agreement, therefore, in such a case is not hit at by clause 9c) of Section 49, as a mere agreement to lease without more does not create any interest in immovable property ....". The learned Judge concluded by holding as under:

The restriction imposed by this section is confined to the use of the document to affect immovable property and to use the document as evidence of a transaction affecting immovable property and no more. If the object in putting the document in evidence does not fall within any of these two purposes, there is no reason for excluding the document from evidence altogether. The scope of the restriction or of the disability imposed cannot be extended beyond the limits imposed by the section".

27. In M/s.Sms Tea Estate P. Ltd., v. M/s. Chandmari Tea Co. P. Ltd., reported in AIR 2011 SCW 4484, the Honourable Supreme Court held as under:

"...Section 49 makes it clear that a document which is compulsorily registrable, if not registered, will not affect the immovable property comprised therein in any manner. It will also not be received as evidence of any transaction affecting such property, except for two limited purposes. First is as evidence of a contract in a suit for specific performance. Second is as evidence of any collateral transaction which by itself is not required to be effected by registered instrument. A collateral transaction is not the transaction affecting the immovable property, but a transaction which is incidentally connected with that transaction. The question is whether a provision for arbitration in an unregistered document (which is compulsorily registrable) is a collateral transaction, in respect of which such unregistered document can be received as evidence under the proviso to section 49 of the Registration Act." (Emphasis supplied)

28. From the above judgement it is clear that the Proviso to Section 49 of the Registration Act makes the document admissible in evidence only in respect of collateral transaction, which is not required to be registered. The collateral transaction is not a transaction affecting the immovable property, but it is independent from the main transaction. Therefore, merely the payment of deficit stamp duty, in respect of an unregistered document, it cannot be stated that it can be used for any collateral purpose. The above unregistered document sought to be used in respect of immovable property is inadmissible, in view of the clear bar under Section 49 of the Registration Act.

29. The object and purpose of Registration Act is to give information to people regarding the legal rights and obligations arising or affecting a particular property and to perpetuate document which may afterwards be of legal importance, and also to prevent fraud. The object of registering document is to give notice to the world that such a document has been executed, to prevent fraud and forgery and to secure a reliable and complete account of all transactions effecting the title to the property (***Roy and Brothers Vs. Ramanath Doss, AIR 1945 Cal. 37.***

30. A Division Bench of this court in a judgment in ***A.C.Lakshmipathy and another V. A.M.Chakrapani Reddiar and fiver others reported in 2001(1) CTC 112*** held thus.

> 22. A Division Bench of this court in a ruling in *Panchapagesa Vs. Kalyanasundaram, reported in AIR 1957 Madras 472 ruled* thus,
>
> On account of the fact that though the registration isa very useful and beneficent enactment, as it is extremely stringent, the Act has got to be strictly construed..."

23. It is now fairly well settled that the co-owners can partition the immovable properties orally. But, however where a document is employed to effecuate a partition or any of the transactions specified in Section 17 of the Registration Act, such document must be registered, notwithstanding with the transaction is one which the law does not require to be put into writing. Such unregistered document cannot be looked into to prove the terms of the partition. But, however, the same if inadmissible in evidence for the purpose of creating, declaring, assigning, limiting or extinguishing a right to immovable property."

31. The Indian Stamp Act has been enacted to consolidate and amend the law relating to stamps. The said Act is a fiscal statute and strict construction is required to be given. The purpose of Indian Stamp Act is to make available certain dues and to collect revenue. It cannot override another statute operating in completely different sphere: "Hameed Joharan (D) V.Abdul Salem reported in 2001(3) CTC.

32. Similarly, this court in Re, official Liquidator, High Court, 2010(2) CTC 113 held that "the provisions of the Indian Stamp Act and the Registration Act are not in pari materia. The Indian Stamp Act is purely fiscal Act providing for the payment of Government revenue, while the Registration Act has, its objective, the conservation of evidence assurance of title, publicity of documents and prevention of fraud. Therefore, the Registration Act was enacted mainly to prevent fraud and also give public notice and assurance of title conservation of evidence, assurance of title.

33. In view of the above, this court is of the view that mere payment deficit of stamp duty will not cure registration to make the documents admissible in evidence under Section 49 of the Registration Act. Wheres, the only exception is collateral transaction, which is not required to be registered and not affecting the immovable property. Only in the above background, the unregistered documents can be looked into for collateral transaction. Whether the documents sought to be used for collateral transaction or not, has to be decided by the courts independently while assessing the evidence, depending upon the facts and circumstances of each case.

34. In the result,

(i) The Civil Revision Petition is allowed. No costs. The connected miscellaneous petition is closed.

(ii) The order of the trial court is set aside and the partition note book sought to be marked is rejected.

24.04.2019

Index : yes/no
Internet : yes/no
Speaking order/non-speaking order
mst

To

The Additional District District and Sessions Judge,

Cuddalore at Virudachalam.

N.SATHISH KUMAR. J.,

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CRP PD No.4591 of 2013 and
MP No.1 of 2013

24.04.2019