THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Delivered on
15~07~2020	22~07~2020

CORAM:

THE HONOURABLE MR.JUSTICE **N. SATHISH KUMAR**

Civil Suit No.843 of 2009

1. Mr.C.Ananda Acharyulu (Deceased)
2. Mr.C.Ravi Prasad ... Plaintiff

.Vs.

1. Mr.C.Sridhar Prasad
2. Mr.Mr.C.Nirmal Prasad
   [2nd plaintiff, 1st and 2nd defendants are already on recorded, recorded as Lrs of deceased 1st plaintiff as per Order dated 13.03.2017 on memo and Order dated 19.06.2017 in C.S.No.843 of 2009]
3. Mr.V.Subba Rayalu ... defendants

Prayer: To pass a preliminary decree for partitioning 1/3rd share in the properties more fully described in the schedule hereunder between the plaintiff and the defendants 1 and 2.

To pass a final decree to partition the properties by metes bounds of the properties more fully described in the schedule hereunder between the 2nd plaintiff and the defendants 1 and 2.

To pay the costs of this suit.

For plaintiff : Mr. Mr.G.RM.Palaniappan

For defendants : Mr.V.Manohar – D2

JUDGMENT

This suit has been filed for partition and passing of preliminary decree allotting 1/3 share in the suit properties to the plaintiff and the defendants 1 and 2.

2. The brief facts leading to the filing of the suit is as follows :

The first and second defendants are brothers of second plaintiff and sons of the first plaintiff. The third defendant is the brother-in-law of the second defendant. The second plaintiff and the defendants 1 and 2 along with their father were in the goldsmith business. After the first plaintiff retired from the business due to his old age, he has handed over the entire business to his sons, the second plaintiff and the defendants 1 and 2. The second defendant was handling family business and its finance. Some properties were purchased in the name of the second plaintiff and also in the name of the defendants 1 and 2. The second defendant was incharge of the family financial activities including monies of his mother. After the death of their mother, he has not brought the finance handled by his mother to the family fund and siphoned off the same. The first item of the property came to the first defendant in a partition between him and his brother. Originally, the father of the parties has executed a settlement deed in favour of his sons. Thereafter, he has cancelled the settlement deed and executed a settlement deed in favour of the second plaintiff. The second item of the property has been purchased in the name of the defendants 1 and 2 from and out of the joint family business. Similarly, the third item of the property was also purchased in the name of the second defendant out of the funds generated from the joint family business. The fourth item of the property has been purchased from the joint family business. Though it stands in the name of the second defendant, the same was handed over to the first defendant for promotion of flats. Third item of the property has also been purchased out of the joint family business. The second defendant now stage managed to show as if his brother-in-law has contributed money for purchase of the third item of the property. The first item of the property being a mansion was managed by the plaintiff and the second defendant. The second defendant tried to prevent, the second plaintiff to enter into the property. As there was a dispute, plaintiff issued notice dated 17.09.2009 to the defendants 1to 3 for partition. Hence, the suit.

3. The first and third defendants have not contested the matter. Only the second defendant filed a written statement admitting the relationship between the parties, it is the contention of the second defendant that the plaintiff and the first and second defendants are co-owners and not otherwise. It is his contention that except two properties acquired in the joint ownership along with the second plaintiff, the other properties cannot be partitioned. It is the contention of the second defendant that only Item Nos.1 and 2 alone can be partitioned. It is his further contention that two of their sisters have also not been impleaded for partition. It is further contended that with regard to the first item of the property, there is no joint fmaily business as alleged by the plaintiff. The jewelry business was carried on by the first plaintiff and after the retirement of their father, the same is also apportioned and given to each sons. There was no joint business as contended by the plaintiff and there is only a partnership agreement entered between the second plaintiff and the defendants 1 and 2. Even there is any such business it could be only partnership action. Therefore, there cannot be any partition. It is his further contention that Item No.4 is not available for partition. Item No.3 of the property is purchased by the second defendant using his own

funds without any contribution from any joint family property or business. It is his further contention that he has no objection for partition of the properties in Item Nos.1, 2 and 5 and divided as stated by the plaintiff. In the second item of the property, the second plaintiff is in enjoyment of the ground floor and the first defendant is in enjoyment of the first floor and the second defendant is in enjoyment of the second floor and only when the second defendant wanted to lease out his portion, the second plaintiff has created problem. It is his further contention that the second defendant himself disposed many properties but for the second defendant administration and management of the first item of the property and the jewelery business could not have yielded any income to enjoy every one. As long as the second defendant managed the first item of the property, there was no issue. Only on the intervention of the second plaintiff, mismanagement and maladministration has been witnessed by the family. Further, it is his contention that the second defendant has paid a sum of Rs.26,86,390/- towards the loan availed on the second item of the property and others refused to contribute to discharge of the loan. Accordingly, it is his contention that he is also entitled to 1/3rd share in item nos.1, 2 and 5 and the counter claim of a sum of Rs.26,80,390/- towards reimbursement to clear the loan on the second item of the property.

4. The plaintiff disputing the counter claim in the written statement, filed reply statement reiterating the allegations in the plaint and submitted that the properties were purchased out of the joint family business funds.

5. Based on the above pleadings, following issues were framed for consideration in the suit :

1. Whether the plaintiff is entitled to 1/3rd share in the suit schedule properties?

2. Whether the plaintiff is entitled to share in item Nos.1, 2 and 5 of the suit schedule properties?

3. Whether the plaintiff is liable to pay a sum of Rs.26,80,390/-towards claim of reimbursement for the payment made by the second defendant to clear the loan over the properties?

4. Whether the plaintiff is liable to pay interest at 24% p.a. On the above said sum of Rs.26,80,390/-?

5. Whether the cancellation deed dated 23.11.2009 said to be executed by the plaintiff's father is true and legally valid?

6. Whether the settlement deed dated 23.11.2009 said to be executed by the father of the plaintiff as Document No.2203/2009 is true and valid?

7. Whether the plaintiff entitled to mesne profits?

8. To what other reliefs the plaintiff is entitled?

Additional Issue :

1. Whether Item No.1 of plaint schedule property is available for partition in the light of settlement deed dated 23.11.2009 registered as document No.2203/2009 on the file of Sub Registrar, Thiyagaraya Nagar?

6. The learned counsel appearing for the plaintiff submitted that the first item of the property is originally owned by the father of the second plaintiff and the defendants 1 and 2, after partition between the first plaintiff and his brother. Thereafter, though the above properties have been settled in favour of the sons of the first plaintiff, the same was cancelled subsequently under Ex.P.8 dated 23.11.2009. Thereafter, the property has been settled in favour of the second plaintiff. Therefore, in view of such settlement and as the cancellation has not been challenged, the first plaintiff has become the absolute owner of the property.

As far as the other properties are concerned, it is his contention that the third and fourth item of the properties stand in the name of the second defendant and the same has been purchased out of the joint family income in the year 2003 or 2004 when the parties are manning the joint family business. It is his contention that the fifth item of the property has been purchased in the name of the 2nd defendant and it is also purchased from the joint family income. So, it is his contention that except Item No.1, in other items he is entitled to 1/3 share. As far as the first item of the property is concerned, he is entitled to entire property and others have no share in the first item of the property.

7. Whereas, the learned counsel appearing for the contesting second defendant vehemently contended that the first item of the property is owned by the father, who has settled the same in favour of the the second plaintiff and the first and second defendants in the year 2006 itself. Therefore, unilateral cancellation of the settlement deed in the year 2009 is not valid in the eye of law. Such cancellation will not confer title to the second plaintiff. Therefore, in the first item of the property, the plaintiff is not entitled to entire share. Therefore, it is his contention that the second item of the property is in the name of the second

defendant and the second defendant has cleared the loan for a sum of Rs.26,80,390 /- and he is entitled for that amount. As far as the third and fourth item of the properties are concerned, the third item of the property has been purchased out of the income of the second defendant and fourth item of the property is not available for partition. Hence, submitted that Item nos.1, 2 and 5 alone are available for partition. Therefore, prayed for passing of preliminary decree for partition in respect of items Nos.1, 2 and 5 and dismiss the suit in respect of item Nos.3 and 4, besides money decree for a sum of Rs.26,80,390/- which is claimed as a counter claim.

8. Though several issues have been framed, as the issues are overlapping, this Court has recasted the issues as follows :

1. Whether the plaintiff is entitled for 1/3rd share in the suit schedule properties?

2. Whether the cancellation deed dated 23.11.2009 executed by the father of the parties is true and legally valid?

3. Whether the third item of the property is the individual property of the second defendant?

4. Whether the second defendant is entitled to recover a sum of Rs.26,80,390/- towards the claim of reimbursement for the payment made by the second defendant to clear the loan on the property?

5. Whether the settlement deed dated 23.11.2009 on the file of the Sub Registrar is true and valid?

6. Whether the fourth item of the property is not available for partition?

9. On the side of the second plaintiff, the second plaintiff examined himself as P.W.1 and marked Ex.P.1 to Ex.P.9. On the side of the second defendant, the second defendant examined himself as D.W.1 and no document has been filed on the side of the second defendant.

List of witnesses on the side of the Plaintiff :

P.W.1 Mr.C.Ravi Prasad

S.No.	***Exhibits***	***Description***
1	Ex.P.1	Certified copy of the settlement deed executed by the first plaintiff in favour of the second plaintiff, 1st and second defendants dated 13.12.2000

S.No.	***Exhibits***	***Description***
2	Ex.P.2	Certified copy of the settlement deed executed by the 1st plaintiff in favour of 2nd plaintiff, 1st and 2nd defendants dated 19.01.2006.
3	Ex.P.3	Certified copy of the deed of absolute sale executed by M.V.Achuthan Nair to and in favour of 1st defendant dated 15.12.2006
4	Ex.P.4	Xerox copy of the building promotion agreement dated 11.04.2007
5	Ex.P.5	Copy of the legal notice issued by the plaintiffs dated 17.01.2009
6.	Ex.P.6	Acknowledgment cards by 1st, 2nd and 3rd defendants
7.	Ex.P.7	Certified copy of the cancellation deed registered as Doc.No.2201/09 executed by the 1st plaintiff dated 23.11.2009
8.	Ex.P.8	Certified copy of the cancellation deed registered as Doc.No.2202/009 executed by the 1st plaintiff dated 23.11.2009
9.	Ex.P.9	Certified copy of the settlement deed registered as Doc.No.2203/09 executed by the 1st plaintiff dated 23.11.2009.

<u>List of Witnesses on the side of the defendants</u> :

D.W.1 Mr.C.Nirmal Prasad

<u>List of Documents on the side of the defendants</u> : Nil

10. <u>Issue Nos.2</u> :

Admittedly, as far as the first item of the property is concerned, it is the admitted case of both sides that originally the first item of the property was allotted to the first plaintiff, father of the first plaintiff and the defendants 1 and 2.

It is also admitted by both sides that the first plaintiff has executed a gift deed in favour of the second plaintiff and the defendants 1 and 2 and it is also admitted in their pleadings. The deed of settlement dated 19.01.2006 has been filed as Ex.P.2. It appears that the as per the gift deeds executed in the year 2006 and 2000, several properties have been settled in favour of the second plaintiff and the first and second defendants. From the documents Ex.P.1 and Ex.P.2 settlement deeds dated 13.12.2000 and 19.01.2006, it could be seen that the father has executed settlement deeds in favour of his sons. Thereafter, it appears from Ex.P.7 that father has cancelled the settlement in respect of the settlement deed executed on 13.12.2000 by cancellation deed dated 23.11.2009, such cancellation was executed after a period 9 years.

11. It is well settled that once transfer is complete by settlement deed and title has been passed, unilateral cancellation of such settlement is not permissible in the eye of law. Settlement, of course, can be cancelled only as per the provisions of the Transfer of Property Act and only in the manner stipulated under section 126 of the Transfer of Property Act. Therefore, unilateral cancellation of the document which has already conveyed title to others cannot be revoked. It is

not valid in law. It is the contention of the learned counsel for the plaintiff that the father has retained life estate and the possession is never handed over. Therefore, settlement has not been acted upon. Therefore, cancellation deed is valid. Such contention has no legs to stand. It is now well settled that for a valid gift, transfer of possession is not sine qua non. In this regard, the Honourable Apex Court in a judgment in **Renikuntla Rajamma (D) by Lrs vs V.K.Sarwanamma** reported in **2014 (4) CTC 572,** has held that transfer of possession is not sine qua non for valid gift. Retaining the life interest by the settler will not vitiate the settlement. In such view of the legal possession, the contention of the plaintiff that he has become absolute owner by virtue of the cancellation deed and subsequent settlement in his favour cannot be accepted.

12. It is also relevant to note that the second plaintiff has examined himself as P.W.1. In his evidence, when carefully analysed, he himself has admitted in his cross examination that his father do not have any knowledge in English and even the plaint instruction has been given by the second plaintiff and only his signature has been obtained. When the father is old and in the control of the second plaintiff and any document executed by the person who is old and infirm, the onus is on the

person who is taking advantage of the document. Admittedly, the first plaintiff was in old age and is under the control of the second plaintiff, who is taking care and having apparent control over the first plaintiff. Therefore, any document executed by such person, who is under the control of such person, such document cannot be given any importance. At any event, even assuming that such cancellation was executed by the father, on his own, cancelling the title, which has already been conveyed, cannot be retrieved as it is already held that unilateral cancelation is not valid in the eye of law. The issues are answered accordingly.

13. Issue No.1, 3 & 5:

From the pleadings of both sides, it can be seen that, the only contention of the second defendant is that the third item of the property has been purchased by him out of his own income. Whereas, it is the specific assertion of the second plaintiff that the third item of the property though is in the name of the second defendant, the same has been purchased from the joint business income of the family. The burden is always on the person who ascert that the property is a joint family property when the person pleads that the particular property is a joint family property, he has to establish that the property is a result of a joint family income or nucleus of the family. Once he is able to show that there are materials to presume that the property purchased only out of the joint family income, the burden shifts on the other side in whose name the property stand to rebut such presumption to show that the properties are purchased out of his own income by showing the source of income etc. It is the case of the plaintiff that due to their father's old age, the business of the father, namely the first plaintiff was handled by the second defendant and he was incharge of the family business and he was incharge of the entire business.

14. Further, in the plaint, in para 10, it is the specific case of the plaintiff that the first item of the property was managed by the second defendant till the year 2009 and the entire income was managed by him and the income generated from the family business has been used for the purchase of the property, namely, the third item of the property in the name of the second defendant. Managing the first item of the property till 2009 is not denied in entirety by the second defendant. The second defendant has specifically admitted in the written statement that he has been managing the family business till the year 2009.

Though there are vague allegations as if the properties have been purchased from his independent income, the second defendant is not able to produce the sale deed in his name and what is the so called nature of income he derived at the relevant point of time from the different source. In his cross examination, he has admitted that he has purchased the property around 2004 and he does not even know what is the extent shown in the document under which the Item no.3 was purchased in his name. Further, he has also admitted that he was engaged in goldsmith business till 1996. Though he has admitted in his cross examination that he had carried on the business till 1996, in the written statement, he has stated that till 2009, he has been managing the first item of the property. Further, he has shown total ignorance to the tax returns and also whether he has shown the property details in the tax returns. He is not even able to produce the sale deed standing in his name.

15. Further, D.W.1 in his cross examination, has admitted that under Ex.P.4, promotion agreement was entered into respect of Item No.4. It is also admitted that the agreement has been entered by himself along with his friends and relatives and he has also admitted that the construction has been completed. Further, he has shown ignorance about the nature of allotment made to him. The

admissions of D.W.1 makes it clear that he was not even able to depose when the property has been purchased and what was the source for the purchase of the property. Whereas, his admissions show that the property was purchased only in the year 2004. But his admission in the written statement proves the fact that he was incharge of the first item of the property, which is a joint family property, till 2009. When the plaintiff was able to show that the second defendant was managing the business and operating the income of the family properties at the relevant point of time and the property has been purchased in the name of the second defendant, in the absence of any evidence to prove any independent income or source for purchase of the property by the second defendant, the Court has to necessarily presume that the third item of the property has been purchased out of the joint family business as contended by the second plaintiff.

16. As far as the fourth item of the property is concerned Ex.P.4 agreement makes it clear that a vacant site has also been purchased from the joint family business. The evidence of D.W.1 also clearly reveals that the building has been completed and he is not able to indicate about the nature of allotment made to him. Whereas, the suggestion to P.W.1 by the second defendant counsel makes it clear

that the second defendant is entitled to 3/10th share in the fourth item of the property. But P.W.1 was confronted whether notice has been issued to the other share holders who are having share in the fourth item of the property. The above fact makes it clear that the second defendant is entitled to an extent 3/10th share in the entire fourth item of the property. Though the plaint schedule does not set out the nature of the share held by the second defendant, since the second defendant himself has admitted that the fourth item of the property stands in his name and he has not filed any documents to prove the source of income to purchase the property from his individual income and he was managing the first item of the property till 2009 and these properties have been purchased in the year 2004 and 2007 as per the admission of D.W.1 and Ex.P.4, this Court is of the view that those properties are also amenable for partition. As far as Item Nos.2 and 5 are concerned, there is no dispute between the parties and they crave for partition of 1/3rd share in the above properties. Hence, the issue is answered accordingly.

17. Issue No.4 :

The second defendant claim a sum of Rs.26,80,390/- towards claim of reimbursement of the loan amount paid by him towards the loan obtained over the second item of the property. In the counter claim made by him in the written statement, in para 19, it is stated by the second defendant that he has paid a sum of Rs. 26,80,390/- towards the loan availed on Item No.2 and the said amount has to be paid to him. Except stating that he is entitled to such amount, what was the nature of the loan availed by them, how many instalments of loan has been paid, have not been pleaded. Further, to substantiate that the amount has been paid to the bank, no document has been filed by the second defendant. Though the second plaintiff as P.W1 has admitted that each of the sons are liable to pay 1/3rd amount liable to be paid to the bank, such admission itself cannot be taken as admission of the payment made by the second defendant. A reading of the entire cross examination of P.W.1 indicate that what was admitted that as sons, all the three brothers are equally liable to pay the amount and he will be liable to pay only 1/3rd of the amount. Whether the entire amount has been paid by the second defendant, absolutely, there is no evidence. In the absence of any evidence to show that the second defendant alone has paid the entire amount, merely on the basis of the pleadings, which is also bereft of any details, the second defendant cannot be succeeded in the counter claim.

18. In the result, a preliminary decree is passed for dividing of the item

nos.1, 2, 3 and 5 of the suit properties into three equal shares and allot 1/3 each share to the second plaintiff and the second defendant and the first defendant is also entitled to 1/3 remaining share on payment of court fee in the final decree proceedings. As far as the fourth item of the property is concerned, a preliminary decree is passed dividing 3/10 share into three equal shares and allot one such share to each, the second plaintiff and the second defendant and the first defendant (on payment of court fee). Counter claim for recovery of the amount is dismissed. As far as mesne profit is concerned, the parties are relegated to separate enquiry at the time of final decree proceedings. Considering the nature of relationship between the parties, there is no Order as to costs.

22.07.2020

vrc

N. SATHISH KUMAR, J.
vrc

Pre-delivery Judgment in:
Civil Suit No.843 of 2009

22.07.2020