



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 17.02.2020

CORAM:

THE HONOURABLE MR.JUSTICE N. SATHISH KUMAR

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S.A(MD)No.200 of 2013

Immanuel (died)

Judi Immanuel

: Appellant/Appellant/1st defendant

Vs.

P. Beulah

: Respondent / Respondent / plaintiff

Prayer: Second Appeal filed under Section 100 CPC against the Judgment and Decree, dated 19.10.2012 made in A.S.No.33 of 2012 on the file of the Subordinate Judge, Uthamapalayam, confirming the Judgment and Decree, dated 31.01.2007 made in O.S.No.265/2004 on the file of the District Munsif Court, Uthamapalayam, Theni District.

For appellant : Mr. T. Lajapathi Roy

For Respondent : Mr. R. Subramanian

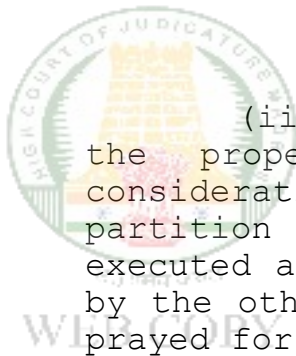
JUDGMENT

Aggrieved over the concurrent findings of the Courts below, decreeing the suit for partition, the present Second Appeal is filed.

2. For the sake of convenience, the parties are referred herein as per their ranking before the Trial Court.

3. The brief facts relating to the filing of the suit are as follows:

(i) The defendants 1 and 3 are brothers of the plaintiff. The second defendant is the father of the plaintiff. The fourth defendant is the wife of the 3rd defendant. The fifth defendant is the daughter of the 3rd defendant. Originally, the suit properties were purchased by the plaintiff and first defendant and they are enjoying the same jointly. The first defendant has induced the plaintiff to enter the partition deeds. In the partition deed an extent of 990 Sq. Ft., only said to have been allotted to the plaintiff apart from Rs.3,000/-. However, her contention that the said amount has also not paid. The property said to have been allotted to the plaintiff is an imaginary one. No such property is existing in ground and the entire partition deed is sham and nominal. Hence, she sought partition of the entire property purchased jointly.



(ii) It is the contention of the first defendant that though the properties purchased in joint names, the entire sale consideration is paid by the first defendant, it is also denied that partition deed is sham and nominal. The power of attorney also executed and the cancellation of power given to the first defendant by the other defendants is not valid in the eye of law. Hence, he prayed for dismissal of the suit.

(iii) The defendants 3 and 4 filed a written statement to the effect that the entire property was purchased by the first defendant. The first defendant was running a Ashram and the plaintiff was permitted to manage the Ashram and only in that circumstances, her name is also included in the sale deeds.

(iv) The trial Court has framed four issues. On the side of the plaintiff PW.1 was examined and Exs.A1 to A12 were marked and on the side of the defendants DW.1 was examined and Exs.B1 to B14 were marked.

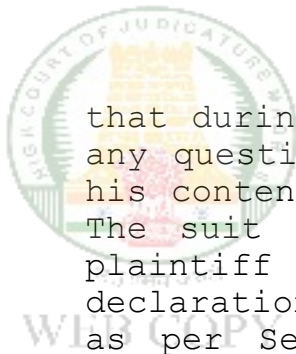
(v) The trial Court has decreed the suit on the ground that the partition deed is sham and nominal and the same has been fraudulently executed. The First Appellate Court has also confirmed the same, recording the finding of the trial Court that the property allotted in the partition to the plaintiff is not in existence. In order to prove the same, Encumbrance Certificate has been filed and additional evidence was taken in the First Appellate Court. Despite the above evidence, the First appellate Court has confirmed the findings of the trial Court, as against which, the present second appeal is filed.

4. While admitting the Second Appeal the following substantial Questions of law were framed:

"1. When Section 115 of the Indian Evidence Act provides for Estoppel, whether the plaintiff / respondent / respondent after executing the registered partition deed along with the defendant / respondent / appellant on 07.01.2000 is estopped from claiming the partition deed marked as Ex.B7 as sham and nominal.

2. When the Section 103 of the Indian Evidence Act, 1872 provides that the burden of proof of a particular fact lies on the person who wishes the court to believe its existence, whether the burden of proof is upon the plaintiff who alleges that the "C" schedule property of the partition deed marked as Ex.B7 is not in existence?"

5. The learned counsel appearing for the appellant / first defendant mainly contended that once the plaintiff is a party to the partition deed, dated 07.04.2000 under Ex.A7 and Ex.B7, without cancelling the above document, she could not contend that the partition deed is sham and nominal. It is the further contention



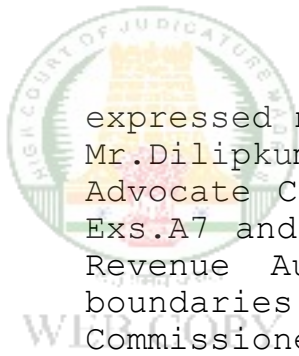
that during the trial, DW.1 in his cross examination has not raised any question with regard to non-existence of the property. Hence, his contention is that Ex.B5 proved the existence of the property. The suit ought to have been filed for declaration, whereas, the plaintiff filed a suit only for partition as the suit for declaration is barred by limitation. Further, his contention that as per Section 91 of Indian Evidence Act, no oral evidence is permissible as against the documents.

6. Whereas, the learned counsel appearing for the first respondent / plaintiff would submit that both the Courts below have concluded that Ex.A7 and Ex.B7 are the sham and nominal and there is no property available on ground. Even during the arguments, the learned counsel appearing for the appellant has asserted that the property allotted to the plaintiff under Ex.A7 is very much in existence, whereas, it is found by the first Appellate Court that no property is available and prayed for dismissal of the appeal.

7. I have heard the learned counsel appearing on either side and perused the materials available on record.

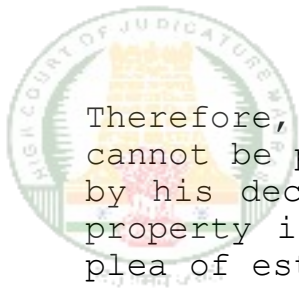
8. The suit has been filed claiming share in the property. It is the contention of the plaintiff that the suit property is jointly purchased by the plaintiff and and first defendant. The factum of joint purchase is not disputed. The only contention that sale consideration is paid by the defendants was negated by the Trial Court and further, the said Court has also held that such contentions have no force. Admittedly, Exs.A1 to A6 indicate that the properties were purchased jointly by the plaintiff and defendants. Whereas in the partition deed EX.A7, "A" schedule property included, to show as if father of the parties was given some share viz., Rs.3,000/- and "C" schedule properties said to have been allotted to the plaintiff measuring to an extent 990 Sq. Feet, land situated in Theni District. It is the contention of plaintiff that the document is sham and nominal. The property allotted is imaginary and no such property available on ground. It is the contention of the defendants that since the partition deed entered between the parties, the plaintiff without seeking the cancellation of partition, cannot file a suit for partition.

9. During the course of arguments, in the last hearing, when the matter came up before this Court on 30.01.2020, the learned counsel appearing for the first respondent / plaintiff contended that if the extent shown in the "C" schedule is existence in the ground, he will act as per the partition deed and take the land. The learned counsel appearing for the appellant has also submitted that the appellant has no objection for appointment of an Advocate Commissioner. Further, the learned counsel appearing for the plaintiff has pleaded before this Court that if the property is available he will certainly bound by the partition deed Ex.A7 and



expressed no objection, based on that, this Court has appointed one Mr.Dilipkumar, Advocate, No.54 Law Chambers, High Court, Madurai as Advocate Commissioner to visit the "C" schedule property shown in Exs.A7 and B7 in the suit, with the help of qualified Surveyor and Revenue Authorities and to identify the properties within the boundaries mentioned under Ex.A7 and Ex.B7 and directed the Commissioner to find out the boundaries for "C" schedule property to the extent of 990 Sq.Ft., and to verify whether there is any encroachment by anybody living there and whether the property is available on the ground or not with the help of a qualified Surveyor. The appellant is also directed to give a copy of the title deeds to the Advocate Commissioner.

10. Today, the Advocate Commissioner has filed a report before this Court, same indicates that despite with the help of qualified Surveyor and Revenue Officers, the property could not be identified as set out in Ex.A7 and Ex.B7, which is subject matter of partition. Similarly, he has also made attempt to locate the property with reference to the sale deeds said to have been registered in the year 2006 in respect of the suit "C" schedule property. From the Commissioner's report, it could be seen that though the property said to have been allotted under Ex.A7 and Ex.B7 to the plaintiff, who is the sister of the first defendant, such property is not available on ground. The above facts clearly substantiate that the partition deed is registered only for some other purpose which is sham and nominal, since the first defendant is running a Ashram. It is to be noted that first defendant is the elder brother of the plaintiff and the second defendant is the father, he did not have any share in the property as per Exs.A1 to A6, purchased by the plaintiff and first defendant jointly. Such being the matter, making the father as one of the party and making some provision as if the partition has been effected in the family makes it clear that partition deed executed for some other purpose and not for division of property. In fact, the defendants pleading indicates that the plaintiff has given charge to manage the Ashram, which was run by the first defendant. The above pleadings would clearly show that appellant being elder member in the family was in the position to dominate the Will of plaintiff, as a result partition deed came to be executed. Further, showing imaginary property and allotting the same to plaintiff and allotting entire property to defendant itself show that partition deed is in equal and sham and nominal only. Further, it is to be noted that plaintiff was working in the Ashram run by his brother, she was under mercy of brother and father they were in a position to dominate the Will of the plaintiff. Therefore, entire burden lies on the first defendant to show the good faith in the transactions. Defendants have not discharged their burden. When allotment shown including property which is not existence in the ground makes it clear that partition deed not entered bonafidely, further there is no equal distribution. All the above circumstances, substantiate case that partition deed is sham and nominal.



Therefore, merely document is registered, the plea of estoppel cannot be put against the respondent. In fact, the first defendant by his declaration, act made the plaintiff to believe "C" schedule property is available on ground and made her sign. Therefore, the plea of estoppel cannot be put against the plaintiff.

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11. Admittedly, the properties are purchased jointly by the first defendant and plaintiff. Such being the position, when the deed of partition on the face of records, appears to be sham and nominal and the plaintiff need not be driven to file a suit for declaration for cancelling the document. The plaintiff has not only established the fact that "C" schedule property was not in existence in ground, but also established that earlier partition deed is sham and nominal. The Commissioner's report filed before this Court clearly show that those properties allotted under "C" schedule is not existence on the ground.

12. Therefore, this court is of the view that the decree and Judgment passed by both the Courts below do not call for interference by this Court and accordingly, all the substantial questions of law are answered, the Second Appeal is dismissed. The Commissioner's report filed before this Court, shall form part of this Judgment and Decree. There shall be no order as to costs.

Sd/-

Assistant Registrar (CS-III)

// True Copy //

/ /2020

Sub Assistant Registrar(CS)

To

1. The Subordinate Judge, Uthamapalayam.
2. The District Munsif, Uthamapalayam, Theni District.

Copy to:

The Section Officer, (2 Copies)
V.R. Section,
Madurai Bench of Madras High Court, Madurai.

+1 CC to M/s.R.SUBRAMANIAN, Advocate (SR-6867[F] dated 18/02/2020)
+1 CC to M/s.T.LAJAPATHI ROY, Advocate (SR-6833[F] dated 18/02/2020

S.A(MD)No.200 of 2013

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