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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12.04.2022

CORAM

THE HONOURABLE MRS. JUSTICE R.HEMALATHA

S.A.No.1281 of 2005

and

C.M.P. No.2184 of 2022

1.N. Dhara (deceased)

2. S. Gopal

3. N. Ashok

4. N. Yuvaraj

5. N. Selvam

6. N. Ganesh

...Appellants/Respondents/Defendants

Appellants 3 to 6 brought on record as LR's of the deceased 1st appellant vide order of court dated 01.09.2015 made in CMP No.389 to 391/2015.

Vs.

G. Srinivasan

...Respondent/Appellant/Plaintiff

Prayer : Second Appeal filed under Section 100 CPC, 1908 against the decree and judgment dated 29.10.2004 passed in A.S. No.4 of 2004 on the file of the Sub-Court, Poonamallee, reversing the decree and judgment dated 07.11.2003 passed in O.S. No.1562 of 1997, on the file of the District Munsif cum Judicial Magistrate Court, Ambattur.

For Appellants	:	Mr. R. Srinivas
For Respondent	:	Mr.T.R. Daveson

JUDGMENT

The appellants 1 and 2 are the defendants in O.S.No.1562/1997 on the file of the District Munsif cum Judicial Magistrate, Ambattur (transferred O.S.No.164/1994 on the file of the District Munsif, Poonamallee). The respondent/plaintiff filed the suit for a permanent injunction restraining the appellants 1 and 2 from interfering with his peaceful possession and enjoyment of the suit property. During the pendency of the present second appeal, the first appellant died and her legal heirs were brought on record as appellants 3 to 6.



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2. For the sake of convenience, the parties are referred to as per their ranking in the trial court and at appropriate places, their rank in the present appeal would also be indicated.

3. The case of the plaintiff in nutshell is as follows:

The suit property and the properties adjacent to it were originally owned by the plaintiff's father Gopi Naidu. Gopi Naidu and his sons including the plaintiff partitioned the entire properties belonging to their family through an unregistered partition deed dated 26.12.1974, whereby 28 cents of land in Survey Number 68/1 (the suit property) and 21 cents in Survey No.66/2 of Ayapakkam Village were allotted to the share of the plaintiff. According to the plaintiff, ever since the date of partition, he has been in possession and enjoyment of the suit property and that the defendants, on the basis of a sale deed executed by one of the brothers of the plaintiff, are attempting to interfere with his peaceful possession and enjoyment of the suit property. He, therefore filed the suit.

4. The suit was resisted by the defendants on the following grounds:

- 1) The partition deed dated 26.12.1974 is not true and valid.
- 2) The first defendant purchased the suit property (Plot No.13) through a sale deed dated 10.09.1987 from one Venkatesan, brother of the plaintiff. The other two brothers of the plaintiff, by names, Lakshmipathi and Ravi attested the said sale deed.
- 3) The first defendant is a bonafide purchaser for value and has also been in possession and enjoyment of the suit property.
- 4) The plaintiff though aware of the purchase made by the first defendant, did not file a suit for declaration of his title and on the other hand has filed only a suit for bare injunction and hence, the suit is liable to be dismissed.

5. The trial court, on the basis of the above pleadings, framed appropriate issues and after full contest dismissed the suit filed by the plaintiff on the following grounds:

- 1) The plaintiff is the brother of the vendor of the first defendant and the other two brothers of the plaintiff had also attested the sale deed dated 10.09.1987 (Ex.B1) and therefore, the same would bind the plaintiff.



2) The plaintiff did not take steps to cancel the sale deed executed in favour of the first defendant.

3) Since the plaintiff was allotted a share in respect of the suit property through an unregistered partition deed, he cannot claim any right over the same and he has to proceed only against his brother Venkatesan (vendor of the first defendant).

6. Aggrieved over the same, the plaintiff filed an appeal in A.S.No.4/2004 before the Subordinate Court, Poonamallee. The learned Subordinate Judge, after analysing the oral and documentary evidence adduced on both sides reversed the findings rendered by the trial court and allowed the appeal on the following grounds:

- 1) In the sale deed dated 10.09.1987 (Ex.B1), there is a reference about the partition deed dated 26.12.1974 (Ex.A7) and therefore, the defendants are estopped from contending that the plaintiff cannot claim any right through an unregistered partition deed.
- 2) The first defendant also, during the course of cross examination, admitted that he did not verify the partition deed Ex.A7 before purchasing the property from his vendor Venkatesan.
- 3) It is settled proposition of law that a purchaser should be more vigilant before buying any property and in the instant case, the defendants have purchased the suit property even without verifying the original partition deed Ex.A7.
- 4) The evidence of P.W.2 is very clear about the partition that took place on 26.12.1974.
- 5) The plaintiff had adduced sufficient evidence to show that he is in possession of the suit property and the observation of the trial court that the plaintiff should have sought for cancellation of the sale deed in favour of the first defendant is unknown to law as the plaintiff is not a party to the said document.

7. Now the present second appeal is filed by the defendants on the following substantial questions of law:

- 1) Whether the lower appellate court is correct in deciding the title of the suit property when the suit itself was filed for a bare injunction simpliciter and when more



particularly the appellants were defending their case on possession only before it?

2) Whether the lower appellate court is justified in indirectly deciding the title when the said relief is barred by limitation?

3) When the plaintiff has failed to prove his possession over the suit property and the defendants have established their possession, is he (plaintiff) entitled to a decree of injunction?

8. Mr. R. Srinivas, learned counsel for the appellant harped on only one aspect that since the partition deed Ex.A7 is unstamped and unregistered, the same is not admissible in evidence and the plaintiff's suit for a permanent injunction on the basis of the said document is not maintainable. His contention is that Section 17 (1)(b) of the Registration Act, 1908, mandates that any document which has the effect of creating and taking away the rights in respect of an immovable property must be registered and Section 35 of the Registration Act, 1908 imposes a bar on the admissibility of an unregistered document and deals with the documents that are required to be registered under Section 17 of the Registration Act. It is also his contention that since Ex.A7 is unstamped and unregistered, the same cannot be used for any purpose and secondary evidence of the factum of partition cannot also be admitted by reason of Section 91 of the Indian Evidence Act, 1872. He would further contend that the plaintiff can only file a suit for partition and the present suit filed by the plaintiff for a permanent injunction is liable to be dismissed. He relied on the following decisions in support of his contentions.

- 1) Uma Pandey vs. Munna Pandey & others reported in (2018) 5 SCC 376.
- 2) Shyam Narayan Prasad vs. Krishna Prasad & Ors reported in (2018) 7 SCC 646.
- 3) Yellapu Uma Maheshwari & Another vs. Buddha Jagadheeswararao & Ors. reported in (2015) 16 SCC 787.
- 4) A.C. Lakshmipathy vs. A.M. Chakrapani Reddiar & Ors reported in (2001) 1 LW 257.
- 5) Korukonda Chalapathi Rao & another vs. Korukonda Annapurna Sampath Kumar reported in 2021 SCC Online SC 847.
- 6) Saminathan vs. Sukumar - Order of Madras High Court dated 30.07.2021 in C.R.P. (P.D) No.578 of 2021.



9. Per contra, Mr.T.R. Daveson, learned counsel for the respondent contended that even the recitals of Ex.B1 sale deed speak about the earlier partition among the family members of the plaintiff and that it is clear from the evidence on record that the suit property was not allotted in favour of the vendor of the first defendant. It is his contention that both the courts below had rendered a concurrent finding that the plaintiff is in possession of the suit property and that the trial court wrongly dismissed the suit by observing that the plaintiff had not filed a suit for cancellation of the sale deed. It is further contended that when the plaintiff is not a party to Ex.B1, he need not seek for cancellation of the sale deed and the sale effected by the brother of the plaintiff in respect of the suit property despite earlier partition in the family is not valid.

10. Section 2(15) of the Indian Stamp Act, 1899 defines an instrument of partition as follows:

Section 2(15) in The Indian Stamp Act, 1899

(15) "Instrument of partition" means any instrument whereby co-owners of any property divide or agree to divide such property in severalty, and includes also a final order for effecting a partition passed by any revenue-authority or any Civil Court and an award by an arbitrator directing a partition;

Section 35 of the Indian Stamp Act contains a bar against the admissibility of an unregistered document in evidence and the same reads as follows:

35. Instruments not duly stamped inadmissible in evidence, etc.—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: Provided that—

(a) any such instrument [shall], be admitted in evidence on payment of the duty with which the same is chargeable, or, in the case of an instrument insufficiently stamped, of the amount required to make up such duty, together with a penalty of five rupees, or, when ten times the amount of the proper duty or



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deficient portion thereof exceeds five rupees, of a sum equal to ten times such duty or portion;

(b) where any person from whom a stamped receipt could have been demanded, has given an unstamped receipt and such receipt, if stamped, would be admissible in evidence against him, then such receipt shall be admitted in evidence against him, then such receipt shall be admitted in evidence against him on payment of a penalty of one rupee by the person tendering it;

(c) where a contract or agreement of any kind is effected by correspondence consisting of two or more letters and any one of the letters bears the proper stamp, the contract or agreement shall be deemed to be duly stamped;

(d) nothing herein contained shall prevent the admission of any instrument in evidence in any proceeding in a Criminal Court, other than a proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898 (5 of 1898);

(e) nothing herein contained shall prevent the admission of any instrument in any Court when such instrument has been executed by or on behalf of [the [Government]] or where it bears the certificate of the Collector as provided by section 32 or any other provision of this Act.

11. The contention of the learned counsel for the respondent is that an unregistered partition deed is admissible in evidence for the purpose of proving collateral purposes like division of the property and the nature and character of possession.

12. In the decision in C.S.Kumaraswami Gounder V. Aravagiri Gounder and another reported in AIR 1974 Mad 239, a division bench of this Court held that in the case of an express, completed partition there are three different stages, namely, (1) the stage of effecting a division in status, (2) the stage of dividing the properties by metes and bounds, and (3) the stage of the parties taking possession of the properties allotted to them. It was further held that in respect of the stages 1 and 3, even if there is a document, it need not be



registered as the said stages cannot be said to create, declare, assign, limit or extinguish any right, title or interest to or in immovable property. It is only with regard to the second stage, namely, division of properties into different shares and allotment thereof to the various members, it requires registration under Section 17(i)(b) of the Act, if the same is reduced to writing. Thus, the unregistered partition deed though not admissible in evidence to prove the terms of the partition, can be admitted in evidence for proving the stages 1 and 3 namely, the division in status and nature and character of possession of the sharers, these being collateral purposes.

13. At this juncture, it is appropriate to extract Section 49 of the Registration Act.

"49. Effect of non-registration of documents required to be registered.—No document required by section 17(Inserted by Act 21 of 1929) [or by any provision of the Transfer of Property Act, 1882 (4 of 1882)], 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:

[Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 (I of 1877) (See now the Specific Relief Act, 1963) (The expression "or as evidence of part performance of a contract for the purposes of section 53A of the Transfer of Property Act, 1882 (4 of 1882)" were omitted by the Registration and other related Laws Amendment Act 2001 (48 of 2001) w.e.f. 24-9-2001) or as evidence of any collateral transaction not required to be effected by registered instrument.]."

Section 49 thus expressly states the admissibility of an unregistered documents in evidence for collateral purposes. The



word 'collateral' signifies something beyond or parallel. According to Law Lexicon it means that which by the side and not direct line, that which is additional to or beyond a thing. In the decision in Yellapu Uma Maheswari and another vs. Buddha Jagadheeswararao and others reported in (2015) 16 SCC 787, the Apex Court held that in a suit for declaration of title and possession, an unregistered document can be relied upon for collateral purposes, i.e. to prove the possession and nature of possession but not for primary purpose i.e. sale between the plaintiff and the defendant or its terms.

14. In the decision in Booraswami vs Rajakannu And Ors reported in 1978 1 MLJ 248, it was held that for determining the status and nature of possession, oral evidence was also admissible. In the instant case, in order to prove earlier partition in the family of the plaintiff, the plaintiff relied on his oral evidence as well as the evidence of one of his brothers Lakshmipathi (P.W.2). P.W.2 had categorically deposed that there was a division in the family during the year 1974 and that the plaintiff was allotted the suit property. However, P.W.2 has signed as a witness in the sale deed dated 10.09.1987 (Ex.B1) executed by his another brother Venkatesan in favour of the first defendant. It is also pertinent to point out that the original partition deed was marked as Ex.A7. At the time of marking this particular document, the defendant did not raise any objection contending that Ex.A7 is unregistered and unstamped. This is obviously because in his sale deed dated 10.09.1987 (Ex.B1), there is a specific mention about the partition deed Ex.A7. The recitals in Ex.B1 further show that the property conveyed under Ex.B1 was allotted to the share of Venkatesan through the partition deed dated 26.12.1974 (Ex.A7). In the decision in Javer Chand and others vs. Pukhraj Surana reported in AIR 1961 SC 1655, it was held that once the document had been marked as an exhibit in a case and had been used by the parties in examination and cross examination of their witnesses, Section 36 of the Stamp Act comes into operation and it is not open either to the trial court itself or to a court of appeal or revision to go behind that order. However, the learned counsel for the appellants contended that an unregistered partition deed precludes proof of a prior partition between the brothers of the plaintiff. His argument is that Section 49 (c) of the Registration Act puts the unregistered document out of Court. According to him, the plaintiff can only file a suit for partition and not a suit for permanent injunction.

15. In the decision in Ram Rattan vs. Parma Nand reported in AIR 1946 PC 51 it was held that unstamped memoranda



showing the details of partition by metes and bounds were wholly inadmissible because it cannot be received in evidence for any purpose under Section 35 of the Indian Stamp Act and that since these memoranda were also unregistered came under the ban of Section 49(c) of the Registration Act also. The judicial committee said "It is unnecessary to consider the effect of this section (Sec. 49 of the Registration Act) because the documents in question not being stamped, the wider prohibition contained in the Stamp Act applies ...". No regard was therefore paid to the unstamped and unregistered Memoranda of partition. However, their Lordships pointed out an important question as to whether partition had been effected before the institution of the suit. The case in defence was that a complete partition took place during February 1939 and in respect of the said contention evidence was let in by the defendants in the suit. Dealing with this, it was held that "Two witnesses, Das Mal and Sain Das, gave evidence of a partition of the joint property in February, 1939, at which the witnesses were present, and of the parties taking possession of the property allotted to them. This evidence was supported by evidence that soon after February 1939, some land revenue was paid separately by respondent, though previously it had been paid by both parties jointly; by evidence of two witnesses who stated that they had cultivated land belonging jointly to the parties, but that since April, 1939, they had paid separate returns for income tax". It was also held that it was unnecessary to discuss the evidence further in detail since this was done by both the Courts below. In their Lordships' view the evidence establishes a physical division of much of the joint properties in February, 1939, and this is only consistent with a severance in the status of the parties having taken place. The suit for partition was therefore dismissed in the said suit and the relief was granted only in respect of the properties which admittedly remained joint. This decision shows that though allotment of specific shares by metes and bounds being embodied in an unstamped and unregistered document, the other evidences to prove the factum of partition can be adduced. In the instant case as already observed, P.W.2, one of the brothers of the plaintiff had spoken about the earlier partition in the year 1974 and the sale deed Ex.B1 in favour of the defendant also speaks about the said partition. In the circumstances, the plaintiff cannot file a suit for partition as contended by the counsel for the defendants.

16. This is only a suit for bare injunction and based on the evidence of P.W.1 and P.W.2, the first appellate court had come to a conclusion that there was an earlier partition and the



parties to the partition were also put in possession of their respective shares. The vendor of the first defendant also did not take steps to nullify the partition (Ex.A7) and the defendants in order to show their title in respect of the suit property also rely on the very same unregistered partition deed. The specific contention of the first defendant is that he purchased plot No.13 (the suit property) from his vendor Venkatesan as this particular property was allotted to the share of his vendor through Ex.A7. Ex.A7 was marked on the side of the plaintiff to show his possession over the suit property. As already observed, the defendants' claim of title over the suit property is mainly based on the partition deed Ex.A7. The counsel for the appellant contended that since Ex.A7 is unregistered and unstamped, it has to be presumed that there was no partition at all in the family. If this argument is accepted, the plaintiff would become a co-owner in respect of the suit property and the sale deed (Ex.B1) does not speak about undivided share but on the contrary a property bearing house site No.13 with specified boundaries was sold.

17. A co-sharer can validly make a transfer of his interest or right in a joint family property and Section 44 of the Transfer of Property Act states the rights of the transferee of an undivided share from a co-sharer. Section 44 of the Transfer of Property Act, reads as follows:

44. Transfer by one co-owner.—Where one of two or more co-owners of immoveable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires as to such share or interest, and so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting at the date of the transfer, the share or interest so transferred. Where the transferee of a share of a dwelling-house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house."

Thus the transferee steps into the shoes of his transferor i.e. the co-owner and is clothed with all the rights and becomes subject to all the liabilities of his transferor. It is settled law that a person who purchases an undivided share of a co-parcener of joint Hindu family cannot claim to be put in



possession of any definite piece of family property. He does not even acquire any interest in the property sold. He does not become a tenant in common with the members of the family. He has only an equity to work out his rights by means of a partition standing in his vendors' shoes. The alinee's suit for partition must be one for partition of the entire property and not for the partition of any specific item of, or interest in the family property. Thus, the remedy available to the appellant is to file a suit for partition subject, of course, to the provisions contained in Limitation Act. In the circumstances, the observation of the first appellate court that the plaintiff is entitled for a permanent injunction is acceptable. The substantial questions of law are answered accordingly.

18. In the result,

- i. the second appeal is dismissed. No costs. Consequently connected Civil Miscellaneous Petition is dismissed.
- ii. The decree and judgment dated 29.10.2004 passed in A.S.No.4 of 2004 on the file of the Subordinate Judge, Poonamalle, is upheld.
- iii. The decree and judgment dated 07.11.2003 passed in O.S. No.1562 of 1997, on the file of the District Munsif cum Judicial Magistrate, Ambattur, is set aside.

s/d-
Assistant Registrar

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Sub-Assistant Registrar

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To

1. The Subordinate Judge, Poonamalle .
2. The District Munsif cum Judicial Magistrate, Ambattur.
3. The Section Officer, VR Section, High Court, Madras.

+2 Ccs to Mr.T.R. Daveson, Advocate sr 25003.

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and C.M.P. No.2184 of 2022

SJ(CO)

SP(02/05/2022)