IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28.04.2022

CORAM :

THE HONOURABLE MR. JUSTICE S.S. SUNDAR

S.A.No.364 of 2022
and
C.M.P.No.7749 of 2022

B.Babu ... Appellant

Vs.

1.M.Natarajan
2.G.Umapathy ... Respondents

Prayer : Second Appeal filed under Section 100 of Code of Civil Procedure, against the judgment and decree of the III Additional District Judge, Vellore, at Tirupattur, dated 21.01.2019 in A.S.No.4 of 2018, partly confirming the judgment and decree of the Subordinate Judge, Vaniyambadi, dated 20.04.2017, in O.S.No.245 of 2009.

For Appellant : Mr.K.Siva Subramanian

J U D G M E N T

The 2nd defendant in the suit in O.S.No.245 of 2009 on the file of Subordinate Court, Vaniyambadi, is the appellant in the above Second Appeal.

2.The 1st respondent in this Second Appeal as plaintiff filed the suit in O.S.No.245 of 2009 on the file of Subordinate Court, Vaniyambadi, for partition of the suit property into three equal shares with respect to good and bad soil and to allot one such share to the plaintiff and for consequential reliefs.

3.It is the case of the 1st respondent/plaintiff that the defendants in the suit and his father Shri Manickavelu jointly purchased the suit property from the original owner by name Sivalingam and that his father and defendants are in joint possession and enjoyment of suit property by doing business in the name and style of "Sri Raghavendra Bricks". It is the further case of plaintiff that his father Shri Manickavelu, out of love and affection, executed a gift deed, dated 27.03.2007, in respect of his 1/3rd share in the suit property in favour of plaintiff and that therefore, he became the absolute owner in respect of the 1/3rd share in the suit property. It is also stated that the gift deed executed by plaintiff's father is known to the defendants. Stating that the plaintiff found it difficult to be in joint possession and that the defendants were evading to divide the suit property to allot his 1/3rd share under one pretext or other, the suit came to be filed after issuing notice dated 24.07.2007 to the defendants. It is admitted that the defendants, after receiving the pre-suit notice, gave a reply on 01.08.2007 and it is contended by plaintiff that the case of defendants in the reply notice is false.

4.The 1st defendant in the suit remained *ex parte*.

5.However, the 2nd defendant filed a written statement. Though it is admitted that the suit property was purchased by plaintiff's father and the defendants under a sale deed dated 15.03.1996, the 2nd defendant has denied joint enjoyment. The 2nd defendant contended that plaintiff's father Shri Manickavelu resigned from the partnership firm by name “Sri Raghavendra Bricks”, agreeing to relinquish his right both in the partnership business and the suit property for a consideration of Rs.9,00,000/- by an agreement dated 01.07.2001. It is further stated that, after the agreement, the plaintiff's father received substantial amount except a sum of Rs.1,77,000/-, but refused to execute release deed upon receipt of balance amount of Rs.1,77,000/-. It is further contended that, in this regard, defendants have filed a suit against plaintiff's father Shri Manickavelu in O.S.No.175 of 2006 before the District Munsif Court, Vaniyambadi, and that the said suit is pending. It is then contended that the gift deed, dated 27.03.2007, conveying 1/3rd right in favour of plaintiff during pendency of the suit is invalid and that it is not binding on the defendants. In short, the main contention of the 2nd defendant is that the gift in favour of plaintiff in respect of 1/3rd share by plaintiff's father Shri Manickavelu after receiving substantial portion of consideration, that too during the pendency of the suit in O.S.No.175 of 2006, is illegal and unfair. It is also stated that the plaintiff is impleaded as 2nd defendant in the suit in O.S.No.175 of 2006 and the plaintiff is also contesting the suit. Stating that the 2nd defendant alone is in exclusive possession of the suit property, the 2nd defendant prayed for dismissal of the suit.

6.The trial Court framed necessary issues. On behalf of plaintiff/1st respondent, plaintiff examined himself as P.W.1 and one Munver Basha as P.W.2. On behalf of plaintiff, Exs.A1 to A4 were marked. Defendants examined D.W.1 to D.W.3 and marked Exs.B1 to B5. It is to be noted that plaintiff's father Shri Manickavelu is examined as D.W.2.

7.On the admitted facts and the document Ex.A1, namely the sale deed dated 15.03.1996, under which the suit property was purchased by defendants along with plaintiff's father and the gift deed dated 27.03.2007, the trial Court held that the gift deed conveying 1/3rd share of plaintiff's father in favour of plaintiff is valid. Though it is contended by 2nd defendant that Shri Manickavelu (plaintiff's father) had already released his 1/3rd share to the defendants, the trial Court found that only an agreement to release is pleaded, whereas no release deed is pleaded or proved. Since a valid release can only be by way of a registered instrument, the trial Court did not agree with the contention of the 2nd defendant that Shri Manickavelu had already released his share to the defendants. The trial Court further found that the defendants have not filed any suit for specific performance for enforcing the release agreement. The trial Court also considered the suit in O.S.No.175 of 2006 filed against the plaintiff and his father. It is found by the trial Court that the suit in O.S.No.175 of 2006 is a suit for injunction and further, the suit is to cancel the settlement deed Ex.A2. It is also admitted before the trial Court that the said suit was dismissed. The trial Court held that the contention of 2nd defendant that the settlement in favour of plaintiff is hit by *lis pendens* is not established. Considering the fact that the suit in O.S.No.175 of 2006 was dismissed, the trial Court observed that the defendants cannot contend that the transaction is hit by Section 52 of Transfer of Property Act, 1882. Though the 2nd defendant contended that the defendants, along with plaintiff's father, were carrying on partnership business in the suit property, the trial Court found that the partnership firm, which was registered on 08.10.1988, did not continue its business after 01.04.2005. The trial Court, having regard to its findings, held that the plaintiff is entitled to a preliminary decree for allotment of 1/3rd share in the suit property. Hence, the suit was decreed with further direction giving liberty to the defendants to seek allotment on payment of Court fee.

8.Aggrieved by the judgment and decree of the trial Court, the appellant/2nd defendant preferred an appeal in A.S.No.4 of 2018 before the III Additional District Court, Vellore at Tirupattur.

9.The lower Appellate Court also agreed with the trial Court and confirmed the findings of the trial Court after independently examining the issues. The Appellate Court found that plaintiff's father, along with defendants, purchased the suit property on 15.03.1996, and it is their own property. Though the three owners started a business in the suit property in the name and style of “Sri Raghavendra Bricks”, the suit property was found to be the joint owned property of all the three. Since plaintiff's father executed a registered settlement deed on 27.03.2007, conveying his 1/3rd share in the suit property, the plaintiff was found entitled to his father's 1/3rd share. The Appellate Court found that the settlement deed is only in respect of 1st item and not in respect of 2nd item. Though the Appellate Court found that the plaintiff is entitled to step into the shoes of his father Shri Manickavelu, the settlement deed is only in respect of 1st item of suit property. As regards the agreement of release and receipt of a sum of Rs.7,23,000/- pleaded by the appellant, the Appellate Court found that the appellant did not file any agreement of release nor any receipt for payment of a sum of Rs.7,23,000/- as pleaded by the appellant. When a copy of deed of agreement of release dated 01.07.2001 was produced, the lower Appellate Court found that specific time is mentioned in the document for performance and that the appellant had not taken any steps to enforce the agreement within the period of limitation by filing a suit for specific performance of the agreement of release. Therefore, the Appellate Court held that the plaintiff is entitled to preliminary decree for partition in respect of 1/3rd share only in respect of 1st item of the suit property. Since the Appellate Court found that the deed of gift is not in respect of 2nd item, the suit was decreed only in respect of 1st item and the judgment and decree of the trial Court was modified by confirming the preliminary decree in respect of 1st item alone and dismissing the suit in respect of 2nd item.

10.Aggrieved by the judgment and decree of the lower Appellate Court, the 2nd defendant has preferred the above Second Appeal.

11.In the course of hearing, learned counsel appearing for the appellant submitted that the 1st respondent/plaintiff has filed a Second Appeal in S.A.No.731 of 2021 as against the same judgment and decree. It is open to the 1st respondent/plaintiff to challenge the judgment and decree in respect of 2nd item. It is now brought to the notice of this Court that the said Second Appeal in S.A.No.731 of 2021 filed by the 1st respondent/plaintiff against the same judgment and decree dated 21.01.2019 in A.S.No.4 of 2018 had already been dismissed by this Court on 29.03.2022. This Court confirmed the same judgment as regards the 2nd item on the ground that the gift deed under Ex.A2 is not in respect of 2nd item of the suit schedule property and that the father of plaintiff/1st respondent is still alive. Therefore, now, there is no impediment to dispose of this Second Appeal independently.

12.The appellant has raised the following substantial questions of law in this Second Appeal :

i. Can not the share of a retiring partner in a partnership firm and assets be valued and settlement be made to him accordingly ?

ii. When Manickavelu has been excluded from possession since 01.07.2001, is not the alleged Settlement Deed Ex.A2 executed by him thereafter void and inoperative ?

iii. Is the suit filed without impleading the firm maintainable ?

13.Learned counsel appearing for the appellant submitted that the Courts below failed to appreciate the law as regards partnership, dissolution of firm, and retirement of a partner. The learned counsel submitted that a partner retiring from the firm need not execute any release deed regarding partnership assets in favour of continuing partners and that the Courts below failed to consider important legal aspects while holding that there is no document evidencing relinquishment of share by plaintiff's father. The learned counsel submitted that, even without a registered document of release, a partner of firm loses his right in the partnership assets if he retires from the partnership firm. The learned counsel also submitted that the plaintiff can only file a suit for recovery of balance amount of Rs.1,77,000/- payable to his father and that Shri Manickavelu, who has relinquished his rights in the firm by retirement, cannot execute a gift in favour of plaintiff.

14.This Court is unable to countenance any of the arguments of the learned counsel appearing for the appellant for the following reasons :

(a) The suit property was purchased by a sale deed dated 15.03.1996. The property was not purchased in the name of any firm. Ex.B5 shows that the partnership firm came into existence much after the sale deed under which plaintiff's father purchased the same along with defendants. No document is produced before the trial Court to suggest that the property was treated as a property of firm. Merely because the partnership firm was carrying on business in the premises owned by three individuals, it cannot be presumed that the suit property is the property of the firm. The suit property is the joint property of plaintiff's father and defendants 1 and 2. In such circumstances, the contention of the appellant's counsel that the plaintiff's father has lost his title to the property by retirement from the partnership firm cannot be accepted.

(b) It is surprising to note that the appellant has not produced any document even to show that plaintiff's father had retired from the firm. No document of release or agreement of release is produced before the Court. Though the Appellate Court has made some observations on seeing the alleged agreement of release, this Court cannot appreciate the contention of appellant's counsel based on a document which was never marked as an evidence. The trial Court has found that the appellant has not filed any suit for specific performance seeking enforcement of the agreement of release upon payment of balance. Therefore, the contention of the appellant on the basis of an agreement of release cannot be considered as a valid defence in a suit for partition by one of the co-owners.

(c) Therefore, when there is no pleading nor any document to show that the suit property is an asset of the partnership firm, the 1st question of law does not survive for consideration.

(d) The 2nd question of law is based on the presumption that plaintiff's father had retired from the firm on 01.07.2001. The gift deed in favour of plaintiff was executed on 27.03.2007 and the suit was filed on 21.08.2009 for partition. The settlement deed is in respect of undivided 1/3rd share of plaintiff's father in favour of plaintiff. When the right of plaintiff's father as a co-owner having purchased the property jointly under Ex.A1 is not disputed, this Court is unable to appreciate the 2nd question of law. However, the settlement deed cannot be held to be void and inoperative merely because the settlement is in respect of undivided 1/3rd share. There is no prohibition in law to deal with undivided interest or share over the property by way of gift. The property is not a coparcenary property, where gift of undivided interest without the consent of other shares is prohibited. Hence, the 2nd question of law framed is misleading and this Court is unable to consider the same as a valid ground to interfere with the judgment and decree of the Courts below.

(e) The 3rd question of law has no force as it is not established that the suit property belongs to the firm. From the admitted facts and the recitals of the document Ex.A1, this Court finds that the partnership firm has nothing to do with the suit property and that therefore, the suit is not bad for non-joinder of partnership firm.

15.As a result, this Court finds no merit in this appeal and **this Second Appeal is dismissed with costs.** Consequently, connected miscellaneous petition is closed.

28.04.2022

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Internet : Yes
Index : Yes / No

To

1.The III Additional District Judge,
Vellore at Tirupattur.

2.The Subordinate Judge,
Vaniyambadi.

S.S. SUNDAR, J.

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