



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 20.04.2022

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THE HONOURABLE MS.JUSTICE R.N.MANJULA

A.S.(MD)Nos.204 and 211 of 2019
and
C.M.P.(MD)No.10886 of 2019
in
A.S.(MD)No.211 of 2019

A.S.(MD)No.204 of 2019:

Banumathi ... Appellant/Plaintiff

Vs.

1.Sadayakka @ Sadayammal
2.Saraswathi ... Respondents/Defendants

Prayer : Appeal Suit filed under Order 41 Rule 1 r/w. Section 96 of Civil Procedure Code, against the judgment and decree dated 12.07.2018 in O.S.No.57 of 2016 on the file of the Principal District Judge, Karur.

For Appellant : Mr.K.Govindarajan

For Respondents : Mr.K.Suresh

A.S.(MD)No.211 of 2019:

Banumathi ... Appellant/Defendant

Vs.

1.Sadayakka @ Sadayammal
2.Saraswathi ... Respondents/Plaintiffs

Prayer : Appeal Suit filed under Order 41 Rule 1 r/w. Section 96 of Civil Procedure Code, against the judgment and decree dated 12.07.2018 in O.S.No.25 of 2015 on the file of the Principal District Judge, Karur.

For Appellant : Mr.K.Govindarajan

For Respondents : Mr.K.Suresh



COMMON JUDGMENT

These Appeal Suits have been preferred challenging the common judgment and decree of the learned Principal District Judge, Karur, dated 12.07.2018 made in O.S.No.25 of 2015 and O.S.No.57 of 2016.

2.The appellant is the plaintiff in O.S.No.57 of 2016, which was filed for the relief of specific performance and the defendant in O.S.No.25 of 2015, which was filed for the relief of partition.

3.The summary of the pleadings of the parties made in O.S.No.25 of 2015 are as follows:-

3.1.The suit property was jointly purchased by the first plaintiff and the defendant on 25.11.1977 under a registered sale deed; hence, they are entitled to half share each; they were in joint enjoyment of the same; they jointly constructed building by contributing funds jointly; the first plaintiff was in need of money, hence, she sold her half share of the suit property to the second plaintiff under a registered sale deed dated 09.07.2010; the sale was concluded on the understanding that the first plaintiff would hand over her share in the buildings either by sale or otherwise at a later point of time; thus the plaintiffs and the defendant are in joint possession and enjoyment of the property.

3.2.The first plaintiff is an illiterate; her sisters, namely Athammal and Arukkaniammal filed a suit for partition of their property in O.S.No.323 of 1998; the defendant, her sister Muthulakshmi and the husband of Muthulakshmi, namely Velusamy used take the first plaintiff to the advocate's office for the purpose of the case; during that course, they had obtained the thumb impression on stamp papers by representing that they were needed for case purposes; by misusing those stamp papers, the defendant colluded with Muthulakshmi and her husband Velusamy and fabricated a sale agreement in respect of the property of the first plaintiff; the defendant, Muthulakshmi and her husband / Velusamy filed a suit in O.S.No.76 of 2013 before the learned Additional Sub Court, Karur on the basis of a concocted agreement; later the defendant allowed the suit for dismissal; in the said suit, the defendant pleaded that the suit property was orally divided between herself and the first plaintiff and the northern half was allotted to the first plaintiff; but actually no oral partition had taken place between the first plaintiff and the defendant in respect of the suit property; the first plaintiff never executed any sale agreement in favour of the defendant; since the defendant is acting in collusion with Muthulakshmi and Velusamy, the first plaintiff thought it fit to divide the suit property; after sending the pre-litigation notice, she had filed the suit for partition.



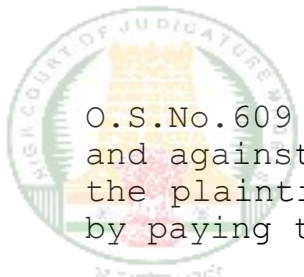
4.The defendant contested the suit by admitting her relationship with the first plaintiff and that the suit property was jointly purchased by the first plaintiff and the defendant under a registered sale deed dated 25.11.1977; however, it is stated by the defendant that in the year 1993, the suit property was divided in an oral partition in the presence of one Thambi Ramesh and Velusamy; in the said partition, the southern half was allotted to the defendant and the northern was allotted to the first plaintiff; the defendant had put up construction in her southern half and paying municipal tax and electricity charges; the first plaintiff agreed to sell her northern share to the defendant and entered into a sale agreement dated 09.11.2007; since the first plaintiff failed to perform her part of contract, the defendant filed O.S.No.76 of 2013 before the learned Additional Sub Court, Karur; the first plaintiff fraudulently created another document dated 09.07.2010 in favour of the second plaintiff and hence, she was impleaded as a party to that suit; the defendant was not a party to O.S.No.323 of 1998, hence, there is no necessity for her to take the first plaintiff to advocate's office; since the property had already been divided through oral partition, the suit itself is not maintainable and it should be dismissed.

5.Basing of the above pleadings, the learned trial Judge framed the following issues in O.S.No.25 of 2015:-

- "1.Whether the plaintiffs are entitled for half share in the suit property?*
- 2.Whether the alleged oral partition between the defendant and the first plaintiff is true?*
- 3.Whether the suit has not been valued properly for the purpose of Court fees?*
- 4.To what relief are the plaintiffs entitled?"*

6.The pleadings in O.S.No.57 of 2016 is in brief:-

6.1.The suit in O.S.No.57 of 2016 was filed for specific performance; the plaintiff in O.S.No.57 of 2016 and the first defendant had jointly purchased the suit property by virtue of a sale deed dated 25.11.1977; subsequently, in an oral partition held in the presence of Thambi Ramesh and Velusamy, the southern half share was allotted to the plaintiff and the northern half share was allotted to the first defendant; one Ramasamy filed a suit in O.S.No.609 of 2007 against the plaintiff and the first defendant for permanent injunction and that has been jointly defended by the plaintiff and the first defendant; the first defendant had agreed to sell her share in the northern side of the suit property to the plaintiff for a sum of Rs.4,99,100/- and executed a sale agreement on 09.11.2007; on the same day itself, she received a sum of Rs.4,00,000/- as advance from the plaintiff; the time to pay the balance sale consideration was one year from the date of disposal of



O.S.No.609 of 2007; O.S.No.609 of 2007 was dismissed on 04.08.2011 and against the same, A.S.No.22 of 2011 was filed before this Court; the plaintiff was ready and willing to perform her part of contract by paying the balance sale consideration.

6.2.The plaintiff came to know that the first defendant created a sham and nominal document dated 09.07.2010 in collusion with the second defendant and her husband; the said sale deed is void; the second defendant and her husband were aware of the sale agreement dated 09.11.2007 in favour of the plaintiff and hence, they are not bonafide purchasers of the suit property; they are not entitled to the suit property; since the first defendant failed to perform her part of contract, the plaintiff issued a legal notice on 31.01.2013 and called upon her to execute the sale deed; since the first defendant sent reply with false and frivolous allegation, the plaintiff has filed a suit for specific performance.

7.The first defendant filed written statement by denying the oral partition and also the sale agreement dated 09.07.2010; in view of the suit pending in O.S.No.323 of 1998 against the first defendant, she needed to attend to advocate's office with the help of the plaintiff and her sister Muthulakshmi and the husband of Muthulakshmi; during that time, they managed to obtain the thumb impression of the first defendant in various stamp papers by representing that they are needed for the purpose of the case; now it is understood that the said stamp papers were misused for the purpose of this suit; by using the stamp papers, Velusamy created a sale agreement also in the name of his associates, namely Selvaraj and a suit was filed in O.S.No.41 of 2000 for specific performance; so the first defendant had given a criminal complaint against Velusamy and others and the criminal case in this connection is pending in C.C.No.29 of 2013 and the suit in O.S.No.41 of 2000 was also dismissed for default; this suit agreement is also not a genuine one; the first defendant and plaintiff are joint owners of the suit property and the building put up therein; since the first defendant was in need of money, she sold her undivided share in favour of the second defendant on the understanding that the building in the property would be conveyed to her at a later point of time; the suit itself is barred by limitation and it should be dismissed.

8.The second defendant resisted the suit by stating that she is a bonafide purchaser for the suit property and she is in joint possession from the date of sale in her favour.

9.Basing of the above pleadings, the learned trial Judge framed the following issues in O.S.No.57 of 2016:-

"1. Whether the first defendant executed the suit sale agreement dated 09.11.2007 agreeing to sell the suit property to the plaintiff?"



2.If so, whether the first defendant is liable to execute the sale deed?

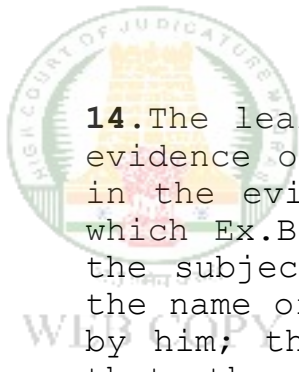
3.To what relief is the plaintiff entitled?"

10.Since the property and the parties to the above suits are same, the learned trial Judge had conducted joint trial and common evidence was recorded in O.S.No.25 of 2015. During the course of evidence, on the side of the plaintiffs, three witnesses were examined as P.W.1 to P.W3 and Exs.A1 to A8 were marked. On the side of the defendant, three witnesses were examined as D.W.1 to D.W.3 and Exs.B1 to B21 were marked.

11.At the conclusion of the trial and on considering the evidence on record, the learned trial Judge decreed the suit in O.S.No.25 of 2015 for partition and passed a preliminary decree for partition in respect of the half share of the suit property to the second plaintiff. The suit in O.S.No.57 of 2016, which has been filed for the relief of specific performance was dismissed. Aggrieved over the above common judgment, the appellant, who is the defendant in O.S.No.25 of 2005 and the plaintiff in O.S.No.57 of 2016 have preferred these Appeal Suits.

12.Heard the learned counsel for the appellant, the learned counsel for the respondents and perused the evidence on record.

13.The learned counsel for the appellant submitted that the oral partition in respect of the suit property was proved by virtue of the building plan approval got in the name of the appellant alone; the learned trial Judge had given much significance to the evidence of P.W.3, who is a stamp vendor; the evidence of stamp vendor / P.W.3 is relevant to the sale agreement connected to the other case in O.S.No.41 of 2000; the sale deed executed in favour of the second defendant would itself show that the vacant site alone was the subject matter of sale and it did not specify anything about the building; so, it is proved before the Court that the first defendant did not contribute any amount for raising the construction; as per the sale agreement dated 09.07.2010, the appellant was always ready and willing to perform her part of contract; the first respondent had created a sham and nominal document in favour of the second respondent just in order to defeat the interest of the appellant in the suit property; the evidence of first respondent, who was examined as D.W.1 would show that she has worldly knowledge and she did not require assistance of any one to go and attend the advocate's office; since the appellant has proved the oral partition and also the genuineness of Ex.B2 / sale agreement, she is entitled to get the relief for specific performance; the financial capability and readiness and willingness on the part of the appellant was not in dispute; hence, the learned trial Judge ought to have dismissed the suit for partition and decreed the suit for specific performance.



14.The learned counsel for the respondents submitted that the vital evidence of P.W.3 was rightly observed by the learned trial Judge; in the evidence of P.W.3, he would state that the stamp papers in which Ex.B2 / sale agreement and Ex.A7 / sale agreement (which was the subject matter of O.S.No.41 of 2000) were not sold by him and the name of the first respondent on the stamp papers was not written by him; the house tax receipts and water tax receipts would prove that they are in joint names of the appellant and the first respondent and this would show that the the alleged oral partition was not proved; though it is specifically pleaded by the appellant in the presence of Thambi Ramesh and Velusamy, the above persons were not examined as witnesses; since the first respondent had conveyed her undivided half share in favour of the second respondent, the learned trial Judge is right in allotting half share to the second respondent and decreed the suit for partition.

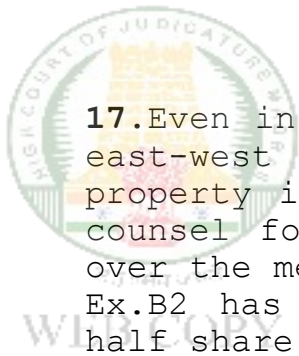
15.Point for consideration:

"(i) Whether the appellant has proved the fact of oral partition in respect of the suit property?

(ii) Whether the sale agreement dated 09.07.2010 entered into between the appellant and the first respondent is fair and genuine one?

(iii) Whether the judgment of the trial Judge in decreeing the suit for partition as against the second respondent and dismissing the suit for the relief of specific performance is fair and proper?"

16.The fact that the suit property was purchased by both the appellant and the first respondent jointly by virtue of sale deed dated 25.11.1977 is not in dispute. However, it is claimed by the appellant that subsequent to the said purchase, an oral partition was taken place between them and in the said partition, northern half share was allotted to the first respondent and the southern half share was allotted to the appellant. Despite it is claimed by the appellant that the said oral partition was held in the presence of Thambi Ramesh and Velusamy, the said persons were not examined as witnesses. Even on perusal of Ex.B8 / house plan approval, it is seen that the plan was obtained by showing the entire vacant site. If the property was divided into two halves on the north and south side respectively, the site plan / Ex.B8 would have shown the same. It is seen from the water tax receipts and property tax receipts that they are being assessed both in the names of the appellant and the first respondent. The first respondent was examined as P.W.1 and she had stated in her evidence that the building built in south side of the suit property is in possession of the appellant. However, the appellant who was examined as D.W.1 has also stated in her evidence that on the southern side there are two water connections each in the names of the appellant and the first respondent and the water tax is being paid in their respective names. The above features of the suit property does not pre-postulate partition.



17.Even in Ex.A1 sale agreement under the property particulars, the east-west and north-south measurement of the northern half of the property is not mentioned. However, it is claimed by the learned counsel for the appellant that since the boundaries would prevail over the measurement and that the details of property as given under Ex.B2 has specific boundaries and that would define the northern half share. In the evidence of the appellant / D.W.1, it is claimed that oral partition had taken place in the year 1993. Despite the same, no partition deed was registered in terms of the oral partition at any time later.

18.The appellant has stated that she could not get the partition deed registered because of the pending suit in O.S.No.609 of 2007. The above suit said to have been filed by a third party by name Ramasamy for the relief of permanent injunction against the appellant and the first respondent. The above suit has got nothing to do with the title of the suit property and hence, it could not be a hurdle for writing a registered partition deed between the appellant and the first respondent.

19.The appellant had stated in her evidence that her son is an M.Com graduate and he was running a textile unit. Even the appellant had studied upto S.S.L.C. Under said circumstances, the appellant would have known about the risk of not reducing the oral partition into writing and get it registered as a partition deed. Despite that, she had not taken any attempt to register the partition deed for years together.

20.So far as the oral partition is concerned, the burden to prove the oral partition would be on the person who pleads so. The appellant had mentioned certain specific persons in whose presence the oral partition had taken place. However, she did not choose to examine them as witnesses for oral partition. Neither the revenue records would show that in pursuance of above said oral partition, the patta and other property assessment have been made in the names of the respective sharers individually. While stating about the oral partition, the appellant had stated contradictory facts about the year in which it took place. Though she pleaded in her written statement filed in O.S.No.25 of 2015 that the oral partition had taken place in the year 1993, in her evidence and her plaint in O.S.No.57 of 2016, she had stated that the oral partition had taken place in the year 2003.

21.Though it is seen from the evidence of D.W.1 that the appellant alone is in enjoyment of the building on the southern side of the suit property, the oral partition of the same in favour of the appellant is not proved. It is to be noted that even in the sale deed executed by the first respondent in favour of the second respondent in respect of her alleged undivided half share, there is no mention about the building in the suit property. The learned



counsel for the appellant submitted that the purposive omission of the building in the sale deed / Ex.A2 would itself confirm that the house was constructed by the appellant alone from and out of her own funds.

22. Since the suit has been filed for the relief of partition and specific performance, the issue with regard to contribution of funds to raise the building on the southern side of the suit property can be left open to be decided during the final decree for partition. When the joint purchase of the suit property is admitted and the oral partition is not proved, then the only inference is that the property is yet to be partitioned. Since the entitlement of the first respondent cannot be denied by virtue of the joint sale deed / Ex.A1, it is right for the learned trial Judge to record a finding as to the half share of the first respondent in the suit property. Since the first respondent had sold her share in favour of the second respondent, the second respondent stands in the shoes of the first respondent. So, the learned trial Judge has passed a preliminary decree for partition in respect of the half share to the second respondent. **Thus, Point No.1 is answered accordingly.**

23. The appellant has filed the suit for specific performance on the basis of the Ex.B2 / sale agreement dated 09.11.2007. The sale agreement is said to have been executed by the first respondent in favour of the appellant on 09.11.2007 in respect of the northern half share of her suit property for a valuable consideration of Rs.4,99,100/-. It is claimed by the appellant that she had paid an advance amount of Rs.4,00,000/- on the date of sale agreement itself and the first respondent received the same. But in the sale agreement / Ex.B2, it is seen that the thumb impression of the first respondent is seen to have been affixed below the signatures of the witnesses. This would only favour the contention of the respondents that in the empty stamp papers and papers in which the thumb impression of the first respondent was obtained were subsequently used for concocting Ex.B2 / sale agreement.

24. The evidence of P.W.2 would only aggravate the above doubtful circumstances surrounding Ex.B2 / sale agreement. The stamp vendor / P.W.3 has stated clearly that the stamp paper bearing Serial No.2685 was sold by him to one Kandamasamy. In Ex.B2 the serial number of the stamp paper is found as 2685 and P.W.3's name is shown as stamp vendor. But P.W.3 disowned the selling of the above stamp paper to the first respondent. He also denied that he did not write the name of the first respondent in the stamp paper also. His evidence would further state that the stamp paper bearing Serial No.2684 was sold to one Prabakaran. But it is strange to note that in the stamp paper bearing Serial No.2684 only the another sale agreement, which was the subject matter of O.S.No.41 of 2000 has been written. The stamp papers in which the above agreements which are marked as Ex.A7 and Ex.B2 bear the consecutive serial



numbers 2684 and 2685. So there is a possibility of collusion between the appellant and the agreement holders of Ex.A7 in creating sale agreement by binding the first respondent.

25.As per the evidence of P.W.3 / stamp vendor, those stamp papers were sold in the year 2007. Though the date on the stamp paper is seen as 07.11.2007, from the extract of the register maintained by P.W.3 which is marked as Ex.A8, it is seen that those stamp papers were sold on 21.02.2007. The first respondent had given a police complaint in respect of Ex.A7 / sale agreement against the agreement holders. During the police enquiry also, P.W.3 submitted a letter wherein he had stated that he had sold the stamp papers bearing Serial No.2684 on 21.02.2007 to one Prabakaran. Though it is submitted by the learned counsel for the appellant that Ex.A7 / sale agreement has got no relevance to Ex.B2 / sale agreement, the fact that both the sale agreements have consecutive serial number would show their concocted nature. As already stated, the manner in which the thumb impression of the first respondent obtained below the signatures of the witnesses in Ex.B2 along with the evidence of P.W.3 / stamp vendor would only confirm the fact that Ex.B2 / sale agreement was a created one. The learned trial Judge has rightly appreciated the materials on record and rendered a finding to this effect. Since the genuineness of Ex.B2 / sale agreement is not proved, it is right for the learned trial Judge to deny the relief of specific performance and grant the relief of preliminary decree for partition. **Thus Point Nos.2 and 3 are answered accordingly.**

26.In the result, A.S.(MD)Nos.204 and 211 of 2019 are dismissed and common judgment and decree of the learned Principal District Judge, Karur, dated 12.07.2018 made in O.S.No.25 of 2015 and O.S.No.57 of 2016 is confirmed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-II)

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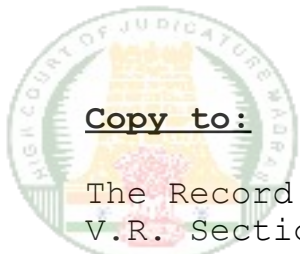
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Sub Assistant Registrar(CS)

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To:

The Principal District Judge,
Karur.



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+1 CC to M/s.K. GOVINDARAJAN, Advocate (SR-20305[F] dated
21/04/2022)

+1 CC to M/s.K. SURESH, Advocate (SR-20599[F] dated 22/04/2022)

A.S.(MD)Nos.204 and 211 of 2019
20.04.2022

RK(31/05/2022) 10P 6C