



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 18.03.2022

DELIVERED ON : 01.04.2022

WEB COPY

CORAM:

THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR

S.A(MD)No.727 of 2021

and

C.M.P(MD)No.9700 of 2021

Baldana

... Appellant/Respondent/
Defendant

Vs.

P.M.Shahul Hameed

... Respondent/
Appellant/Plaintiff

PRAYER : Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree, of the Lower Appellate Court, dated, 10.01.2020 passed in A.S.No.116 of 2018 on the file of the IV Additional District , Tirunelveli with regard to granting the relief of partition and separate possession and reversing the judgment and decree of the trial Court, dated, 17.04.2018, passed in O.S.No.304 of 2010 on the file of Additional Subordinate Court, Tirunelveli.

For Appellant : Mr.R.J.Karthick

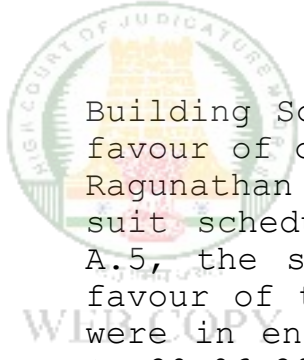
For Respondent : Mr.V.Meenakshi Sundaram

JUDGMENT

The defendant is the appellant.

2. The plaintiff filed a suit for partition, claiming half share in the suit schedule properties. The suit was dismissed by the trial Court. The plaintiff filed A.S.No.116 of 2018 before IV Additional District Court, Tirunelveli. The learned District Judge was pleased to allow the first appeal and decreed the suit as prayed for. As against the same, the defendant has filed the present second appeal.

3. The plaintiff has contended that the suit schedule properties originally belonged to Tirunelveli NGO Co-operative



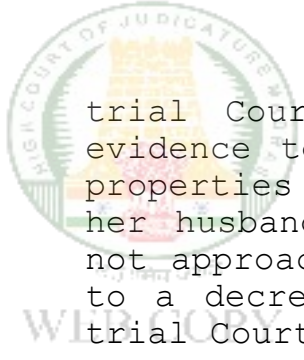
Building Society Limited. The said society had sold the property in favour of one S.Ragunathan on 08.03.1976 under Exhibit A.3. The said Ragunathan has constructed a house and he was in enjoyment of the suit schedule properties. Thereafter, on 18.11.1991, under Exhibit A.5, the said Ragunathan has sold the suit schedule properties in favour of the defendant and her husband Jerome Baldan. Both of them were in enjoyment of the suit schedule properties as joint owners. On 20.06.2007, the said Jerome Baldan had executed a registered sale deed in favour of the plaintiff of his undivided half share under Exhibit A.2. In the said house property, the defendant alone is residing.

4. According to the plaintiff, the defendant was aware of the sale made by her husband and the defendant had agreed to remain in the suit schedule properties on payment of Rs.5,000/- (Rupees Five Thousand only) every month till the properties are partitioned. However, in violation of the said agreement, the defendant had filed O.S.No.124 of 2008, seeking a decree for permanent injunction and the same is pending. In view of the attitude of the defendant, it is difficult to be in joint possession of the suit schedule properties. Hence, the present suit for partition.

5. The defendant filed a written statement contending that the suit schedule properties were purchased out of the income of the defendant jointly in the name of the defendant and her husband. The original sale deed is with her husband. Due to family misunderstanding, the husband of the defendant has deserted her and she is residing separately in the suit schedule properties. According to the defendant, she is in exclusive possession and enjoyment of the suit schedule properties and she is paying the property tax for the suit schedule properties. In paragraph 3 of the written statement, she has contended that she is not aware of the alleged sale deed said to have been executed by her husband in favour of the plaintiff. She further contended that there is no such agreement between herself and the plaintiff for payment of Rs.5,000/- (Rupees Five Thousand only) per month towards use and occupation of the suit schedule properties.

6. The defendant had further contended that the suit schedule properties are residential building and half share in the said residential building is said to have been purchased by the plaintiff and hence, the defendant is having right of preemption under the Partition Act. She has further contended that she has got a right to purchase the share of the co-owner, namely, the plaintiff. She further disputed that the plaintiff is not in joint possession with the defendant.

7. The trial Court after careful consideration of the oral and documentary evidence, arrived at a finding that it has not been explained by the plaintiff whether any construction was made as per the sale deed executed by the Co-operative Housing Society. The

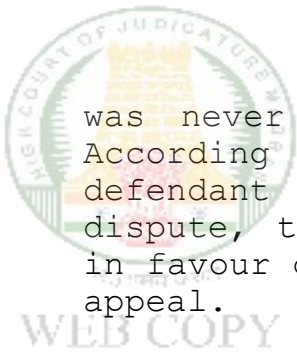


trial Court further held that there is no oral or documentary evidence to explain how Ragunathan was enjoying the suit schedule properties before alienating the same in favour of the defendant and her husband. The trial Court further found that the plaintiff has not approached the Court with complete facts and he is not entitled to a decree as prayed for. Based on the above said findings, the trial Court dismissed the suit.

8. The First Appellate Court after independent analysis and consideration of the oral and documentary evidence, arrived at a finding that the defendant has admitted that herself and her husband have jointly purchased the suit schedule properties under Exhibit A.5. The First Appellate Court further found that the defendant and her husband have jointly contributed for purchasing the suit schedule properties. The husband of the defendant was examined as P.W.2 on the side of the plaintiff through Advocate Commissioner. During the deposition, he has admitted that he has sold his half share in favour of the plaintiff under Exhibit A.4. Based upon the said facts, First Appellate Court arrived at a finding that the defendant and her husband are each entitled to a half share in the suit schedule properties. But due to some misunderstanding, the husband is residing away from the suit schedule properties.

9. The First Appellate Court further found that the originals of the parent document are with the husband of the defendant. That apart, the electricity service connection and property tax assessment are also standing in the name of the defendant's husband. The First Appellate Court further found that the defendant has not initiated any action, challenging the sale deed executed by her husband in favour of the plaintiff. Based upon the said findings, the First Appellate Court came to a conclusion that the defendant's husband is entitled to execute a sale deed in favour of the plaintiff with regard to his half share. The defendant is a joint owner along with her husband. The plaintiff should also be treated as a joint owner of the suit schedule properties and hence, the Court fee paid by the plaintiff is correct. However, the First Appellate Court rejected the prayer for damages. As against the said findings, the defendant has filed a present second appeal.

10. The learned counsel for the appellant/defendant has contended that the Court fee paid by the plaintiff, claiming to be in joint possession of the suit schedule properties is absolutely incorrect and the plaintiff ought to have paid Court fee under Section 37(1) of Tamil Nadu Court-Fees and Suits Valuation Act. The learned counsel for the appellant further contended that the First Appellate Court ought not to have accepted the power of attorney of the plaintiff, who does not have any personal knowledge about the receipt of sale consideration under Exhibit A.4. According to the learned counsel for the appellant, the First Appellate Court erred in arriving at a finding that the plaintiff is in joint possession of the suit schedule properties when P.W.1 himself has admitted he



was never in joint possession of the suit schedule properties. According to the learned counsel for the appellant, when the defendant and her husband living separately due to matrimonial dispute, the defendant's husband could not have granted possession in favour of the plaintiff. Hence, he prayed for allowing the second appeal.

11. Per contra, the learned counsel for the respondent contended that the First Appellate Court has arrived at a categorical finding that the suit schedule property has been jointly purchased in the name of the defendant and her husband. The defendant's husband had contributed money for purchasing the suit schedule property. The parties are Christians and hence the principle of co-ownership does not arise. That apart, both the husband and his wife have purchased the suit schedule property jointly. They should be treated only as the joint owners, not co-owners. The possession of one of the joint owners is considered to be a possession on behalf of the other joint owner also. Hence, the Court fee paid by him before the trial Court under Section 37(2) of Tamil Nadu Court-Fees and Suits Valuation Act is correct.

12. He further contended that the husband of the defendant has been examined on his side as P.W.2, who was categorically admitted execution of Exhibit A.4-sale deed in his favour. When the joint owner has deposed in favour of the plaintiff, the defendant has no right what so ever to question the sale deed executed by her husband with regard to his half share.

13. When the plaintiff has established that he has legally purchased the half share from the husband of the defendant, he is entitled to a preliminary decree for partition with regard to the said half share. He prayed for dismissal of the second appeal.

14. I have carefully considered the submissions made on either side.

15. A perusal of Exhibit A.4-sale deed indicates that the defendant and her husband have jointly purchased the suit schedule properties. There is no indication what so ever in the sale deed that the entire contribution has been made by the defendant for purchasing the suit schedule properties. Hence, the defendant and her husband are joint owners of the suit schedule properties. As a joint owner, the defendant's husband has executed Exhibit A.2-sale deed in favour of the plaintiff. Hence, there cannot be any doubt that the plaintiff is entitled to a half share in the suit schedule properties.

16. The next contention of the learned counsel for the defendant is that the plaintiff was never in possession of the suit schedule properties. Hence, the Court fee paid under Section 37(2) of Tamil Nadu Court-Fees and Suits Valuation Act is not correct.



17. I have carefully perused the plaint and the written statement in this regard.

18. The defendant and her husband are joint owners and after sale by the defendant's husband in favour of the plaintiff, the plaintiff also becomes one of the joint owners of the suit schedule properties along with the defendant. The possession of the defendant in the suit schedule property is also on behalf of the plaintiff. Hence, the contention of the plaintiff that he is in joint possession along with the defendant cannot be considered to be legally incorrect. Hence, the Court fee paid by the plaintiff under Section 37(2) of Tamil Nadu Court-Fees and Suits Valuation Act is perfectly correct.

19. The learned counsel for the appellant had contended that in paragraph 5 of the written statement, she has taken a plea that the suit schedule properties being a residential house, she is entitled to the benefits under Section 4 of the Partition Act. Though in paragraph 5 of the written statement she has claimed rights under Section 4 of the Partition Act, she has not filed any application expressing her willingness to purchase the half share of the plaintiff. No such application has been filed till the filing of the second appeal. The learned counsel for the appellant relied upon **AIR 1997 SC page 471** to impress upon the Court that the Section 4 application can be filed by a co-owner even during the pendency of the proceedings. He further contended that as per Section 44 of the Transfer of Property Act, a transferee of a share of the dwelling house belonging to an undivided family is not entitled to joint possession or part enjoyment of the house. In the present case, the dwelling house does not belong to an undivided family. The joint owners are husband and wife. Hence, I do not find Section 44 of the Transfer of Property Act is applicable to the facts of the present case.

20. The learned counsel for the respondent contended that Section 4 of the Partition Act is applicable only between the co-owners and not between the joint owners. However, the learned counsel for the appellant contended that even assuming that the defendant and her husband are joint owners, section 4 of the Partition Act can be invoked, claiming right for purchasing the half share of the plaintiff. However in the present second appeal arising out of preliminary decree for partition, the said issue could not be decided. The appellant is at liberty to make her claim under Section 4 of the Partition Act as and when the plaintiff files an application for passing of a final decree.

21. In view of the above said discussion, I do not find any illegality or perversity in the judgment and decree of the First Appellate Court in granting a preliminary decree of half share in the suit schedule property to the plaintiff. No question of law much less a substantial



question of law arises for consideration in the present second appeal. Hence, this Second Appeal is dismissed with the above observations. No costs. Consequently, connected Civil Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (CS II)

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Sub Assistant Registrar(CS)

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Note :

In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate / litigant concerned.

To

- 1.The IV Additional District Judge,
Tirunelveli.
- 2.The Additional Subordinate Judge,
Tirunelveli.
- 3.The Section Officer,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.D.NALLATHAMBI, Advocate (SR-16178[F] dated 01/04/2022)

+1 CC to M/s.R.J.KARTHICK, Advocate (SR-16243[F] dated 04/04/2022)

S.A(MD)No.727 of 2021

01.04.2022

MGJ(11.04.2022) 6P 7C