



S.A.No.282 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on
14.02.2024

Judgment Pronounced on
22.03.2024

CORAM

THE HONOURABLE MR. JUSTICE P.B.BALAJI

S.A.No.282 of 2018

1.A.Seerangasami
2.Muthulakshmi

..Appellants

Vs.

K.S.Kumarasami (Died)
1.P.Subramaniam
2.K.Sundararaj

..Respondents

PRAYER: The Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 21.04.2017 passed in A.S.No.41 of 2016 on the file of the II Additional District Judge, Erode, reversing the judgment and decree dated 11.03.2016 passed in O.S.No.5 of 2011 on the file of the Subordinate Court, Perundurai.

For Appellant : Mr.A.Sundaravadhanan

For Respondents

For R1 : Mr.S.Mukund
Senior Counsel
for M/s.Sarvabhauman Associates

For R2 : No appearance



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JUDGMENT

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This Second Appeal has been filed against the judgment and decree dated 21.04.2017 passed in A.S.No.41 of 2016 on the file of the II Additional District Judge, Erode, reversing the judgment and decree dated 11.03.2016 passed in O.S.No.5 of 2011 on the file of the Subordinate Court, Perundurai.

2.The defendants in a suit for partition and separate possession are the appellants herein.

3.The parties are described as per their litigating status before Trial Court.

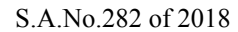
4.The brief facts that are necessary for adjudicating the Second Appeal are that the plaintiffs claim that the plaintiffs and the defendants are joint and absolute owners of the suit properties, having purchased the same, under three different Sale Deeds, dated 20.10.1997, 03.11.1997 and 11.11.1997. According to the plaintiffs, the said three items of the suit property actually form a Kalyanamandapam and the said Kalyanamandapam comprising all the three items, is in the joint possession and enjoyment of the plaintiffs as well



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as the defendants. In order to conveniently enjoy the property, the plaintiffs have sought for partition. According to the plaintiffs, in a Panchayat, a partition was entered into on 27.12.2003 and in terms of the decision of the Panchayat, the defendants agreed to take 5848 $\frac{3}{4}$ sq.ft on the western side and the 1st plaintiff was allotted to 2920 $\frac{1}{2}$ sq.ft in the middle east and the 2nd plaintiff was allotted to 2920 $\frac{1}{2}$ sq.ft in the eastern side. However, claiming that there was no regular Partition Deed executed and registered, pursuant to the Panchayat Partition dated 27.12.2003, the plaintiffs have filed the suit for partition and separate possession.

5.The suit was resisted by the 1st defendant, by filing a written statement, which was also adopted by the 2nd defendant. It is the case of the defendants that the plaintiffs were only name lenders and the properties were purchased out of hard labour and skill of the 1st defendant, who was carrying bore well drilling business. The oral partition, alleged to have taken place on 27.12.2003 before the Panchayatdars, was totally denied. However, the defendants have admitted that the suit properties to be a Kalyanamandapam and it forms one indivisible unit, though purchased under three different Sale Deeds. According to the defendants, the plaintiffs were never in possession and enjoyment and even the renovation of the Kalyanamandapam was only at



the instance and costs of the 1st defendant. However, the defendants plead that in a Panchayat in the presence of the Panchayatdars, headed by Velusamy, Rasa Gounder and Murugasamy, it was decided that the plaintiffs will not claim any share in the Kalyanamandapam and the 1st defendant would have to give two Rig Lorries to the 1st plaintiff and further, the 1st defendant would not claim any share in the property purchased in the name of the 2nd plaintiff at Seenapuram and Kunnathur Road, Perundurai. According to the 1st defendant, the decision of the Panchayat has become final and the same has also been acted upon.

6. The Trial Court came to the finding that the plaintiffs failed to establish that the suit properties were purchased jointly by the defendants and the plaintiffs and also found that Ex.A5, Panchayat partition dated 27.12.2003 was insufficiently stamped and also unregistered, that too, without any proper description of the properties and held that the properties could not have been divided in terms of the said Panchayat agreement dated 27.12.2003. The Trial Court further held that the defendants also failed to prove the Panchayat partition alleged to have taken place under the Panchayatdars, namely, Velusamy, Rasa Gounder and Murugasamy.



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7.The Trial Court dismissed the suit for partition. Aggrieved against the same, the plaintiffs preferred an appeal in A.S.No.41 of 2016 and the First Appellate Court has reversed the findings of the Trial Court and granted a decree for partition, declaring that the plaintiffs were entitled to $\frac{1}{2}$ share in the suit properties. Aggrieved by the reversal findings rendered by the First Appellate Court, the defendants have preferred the above Second Appeal.

8.The above Second Appeal was admitted by this Court on 16.04.2018 on the following substantial questions of law:

“1.Whether the Appellate Court failed to appreciate that Section 92 of the Evidence Act would contemplate that no party shall be permitted to let in evidence contrary to a registered document subject to the Proviso (1), which states 'want or failure of consideration', when such an exemption is provided to prove the contrary of the document, the objecting party needs to let in evidence to prove the same, when the plaintiffs having admitted the fact that the consideration not being paid by them, the burden of shifting the proof on the defendants does not arise?

2.Whether the Appellate Court was right in not considering the admission made by the party is the best form of evidence, and whether the Appellate Court,



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without appreciating the same, have held that the defendant ought to have proved that the consideration was paid by them, when plaintiff/respondent had admitted in evidence that the sale consideration was not paid by them, since they do not have sufficient means?

3. Whether the Appellate Court was right in decreeing the suit for partition for wrong description of property, when it is admitted by the respondents in evidence that there is a Kalyanamandapam in the suit property, which was not stated as part in the schedule?

4. Whether the Appellate Court was right in holding that the suit for partition was only based on the schedule mentioned in Ex.A1 to Ex.A3 without actual boundaries and nature of the property? And

5. Whether the Appellate Court was right in decreeing the suit for partition on Ex.A5 a concocted document, when the evidence of P.W.1 and P.W.2 are contradictory in nature about the execution of the same, when the Trial Court have disbelieved the same, when there is no new evidence to prove the same?"

9.I have heard Mr.A.Sundaravadhanan, learned counsel for the appellant and Mr.S.Mukund, learned Senior Counsel for M/s.Sarvabhauman



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Associates, for the 1st respondent.

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10.Mr.A.Sundaravadhanan, learned counsel for the appellants would mainly contend that admittedly, when the property had been purchased jointly in the names of the plaintiffs and the defendants, the defendants cannot set up any plea to the contra, especially in the light of the mandate of Section 92 of the Indian Evidence Act. He would also state that the plaintiffs themselves had admitted in their cross-examination that the sale consideration was not paid by the plaintiffs, as they did not have sufficient means. According to the learned counsel for the appellants, the First Appellate Court failed to factor the vital admission, which can be the best evidence in this case.

11.The learned counsel would also invite my attention to the alleged partition before the Panchayat in Ex.A5 and in order to establish that it is only a concocted document, the learned counsel would also take me through the evidence of P.W.1 and P.W.2 with regard to the said Ex.A5, Partition Deed. However, the First Appellate Court, on an erroneous appreciation of the documentary evidence as well as the oral evidence, has failed to see that when a property was admittedly single, individual Kalyamandapam, it was



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not capable of division and having disbelieved Ex.A5, partition deed, the First Appellate Court ought to have dismissed the suit and not granted a decree, declaring 1/4th share each to the plaintiffs and the 2nd defendant.

12.The learned counsel for the appellants would place reliance on the decision of the Hon'ble Supreme Court in ***Smt.Krishnabai Bhritar Ganpatrao Deshmukh Vs. Appasaheb Tuljaramarao Nimbalkar and Others*** reported in ***(1979) 4 SCC 60***, where the Hon'ble Supreme Court has relied on Section 92 of the Indian Evidence Act and held that only when there is a dispute regarding the true character of the document, then evidence can be led to show that witting in the document was not the real nature of the transaction, but was only an illusory, fictitious and colourable device which cloaked something else.

13.Per contra, Mr.S.Mukund, learned Senior Counsel for the 1st respondent would state that the plaintiffs are brothers and the defendants 1 and 2 are husband and wife. The learned Senior Counsel would take me through evidence of P.W.2, who is a witness to Ex.A5, Partition Deed before the Panchayat, and would contend that the plaintiffs had established the oral



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Panchayat partition. He would place reliance on the decision of this Court in

Muthu Goundar Vs. Poosari @ Palaniappan and 4 Others reported in **1998**

(I) CTC 477, where this Court held that while appreciating the oral and documentary evidence, it is always better to accept and rely upon the documentary evidence over the oral evidence.

14.He would also rely on the decision of this Court in ***R.Ramanathan Vs. M.Arunkumar and Others*** reported in **2012 (6) CTC 286**, where this Court held that where the property is purchased or obtained on payment under consideration from common fund, then the purchasers shall have interest in the property in proportion to their share in the common fund; if consideration is paid from their separate funds, then their interest is proportionate to their contribution and in the absence of evidence as to their share in joint fund, the interest could be equal, subject to any contract to the contrary and if there was any evidence to prove on what proportion the individuals contributed for purchasing a property, then according to the said proportion, the property should be divided among them and in the event of the parties concerned are not in a position to adduce clear and clinching evidence, then the Court has to hold that all the joint purchasers are equally entitled to the suit property.



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15.The learned Senior Counsel would also refer to Ex.B3, Sale Deed, under which the 1st defendant has given 20 cents of land to the 2nd plaintiff, however, on a reading of said Ex.B3, it appears to be an independent transaction and consideration for the said Sale Deed has not been stated to be any settlement arrived at in any Panchayat on the oral partition, as claimed by the defendants. He would therefore pray for the judgment and decree of the First Appellate Court being confirmed.

16.Admittedly, the suit properties are comprising three items, which have been purchased under Ex.A1 to Ex.A3 and all the three Sale Deeds are in the joint names of the plaintiffs as well as the defendants. It is also an admitted fact that even though the properties comprises three items, there is a single Kalyanamandapam, situate in and over the said three items of the property. Both the plaintiffs as well as the defendants have pleaded oral partition, having already taken place. According to the plaintiffs, under Ex.A3, there was a partition before the Panchayat and that the said partition has been accepted by the parties that the properties would be divided in a particular manner, as set out in paragraph No.5 of the plaint. However, in the very same paragraph, the plaintiffs also admit that there was no formal



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partition and therefore, the suit has been filed for partition in terms of the Panchayat partition dated 27.12.2003.

17.Per contra, the defendants have pleaded a different oral partition, in and by which, according to the defendants, the plaintiffs relinquished their share in the Kalyanamandapam (i.e.) the three items of the suit property in entirety, in lieu of the 1st defendant handing over two Rig Lorries in favour of the 1st plaintiff and also relinquishing their share in the property at Seenapuram, Perundurai, in favour of the 2nd defendant.

18.The Trial Court has discussed the oral evidence adduced by the parties in a proper perspective and came to a conclusion that both the partitions pleaded by the plaintiffs as well as the defendants were not proved, in accordance with law and therefore, the Trial Court dismissed the suit. The Trial Court also found that the 1st defendant cannot raise a plea that the entire consideration being paid by the defendants, especially, the 1st defendant, the plaintiffs were only name lenders. The said plea is not available to the defendants, in view of the specific provisions of Benami Transactions (Prohibition) Act, 1988.

19.Thus, the Sale Deeds have to be interpreted as they are in and the



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plaintiffs and the defendants are entitled to all the three items of the suit property, each being entitled to 25% in the divided share. However, the finding that the three items were not available independently and that there is only a single Kalyanamandapam constructed over the three items of the property and therefore, the Kalyanamandapam is indivisible and consequently, no partition could be granted does not appeal to me. In any property, as long as it is in joint ownership, capable of partition, the first step in a suit for partition is only declaration of shares of the parties.

20. Admittedly, the plaintiffs and the defendants are entitled to 25% undivided share in all the three items of the properties. The plaintiffs have pleaded an oral partition before the Panchayatdars under Ex.A5 and the Trial Court has rightly held that the said partition has not been established by the plaintiffs. In fact, admittedly, there is no regular Partition Deed registered and if at all it is said to be an oral partition, also then the same should have been acted upon. It is the plaintiffs' admitted case that the said Ex.A5, Panchayat partition was not acted upon by the parties, dividing the suit property in the manner named by them at paragraph No.5 of the plaint. Therefore I do not find any illegality or perversity in the findings arrived at by the Trial Court



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that Ex.A5, Panchayat partition has not been proved. The First Appellate Court has rightly found that since there is no specific mention in Ex.A1 to Ex.A3, Sale Deeds, that the parties have contributed to the sale consideration in any particular manner, the law confers an equal right on all the parties. Thus, the plaintiffs and the defendants are jointly entitled to the suit property, each being individually entitled to 1/4th undivided share in the property.

21.Even though the plaintiffs have come to Court with a case to declare their shares, in terms of the Panchayat partition in Ex.A5, substantially, the suit being one for partition, I see no reason why the Court should not grant a preliminary decree for partition, declaring ¼ share each of the two plaintiffs and the two defendants. In so far as the indivisible Kalyanamandapam is concerned, it is matter to be dealt with only at the time of final decree proceedings and it cannot be a ground to dismiss the suit for partition.

22.In so far as the substantial questions of law are concerned, even though the plaintiffs may have admitted to not having contributed for payment of the sale consideration, the plea as taken by the defendants cannot be raised, in view of the express provisions of Section 4 of the Benami



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Transactions (Prohibition) Act, 1988. Even though it may be true that the properties have been set out as available under the said three Sale Deeds, admittedly, the plaint schedule does not refer to existence of the Kalyanamandapam in and over the said three items of the property. This would certainly be a matter of concern at the time of final decree proceedings. A decree cannot be put in execution, since it does not contain the correct description of the property. For this reason alone, despite the plaintiffs being entitled to 1/4th undivided share each in the suit property, the plaintiffs cannot maintain the present suit for partition and for separate possession in terms of Ex.A5, Panchayat partition.

23.However, since the appeal is being allowed only on a technical ground the parties would be at liberty to workout their right to seek partition and separate possession of the Kalyanamandapam, including the three items of the suit property, by filing a separate suit for partition, describing the suit properties correctly. However, the shares of the plaintiffs and the defendants stand confirmed at 1/4th share undivided share each in the suit properties and the parties cannot relitigate the very same issues that the plaintiffs have not contributed to the sale consideration or oral partition having taken place. All these issues are settled finally, holding that the plaintiffs are entitled to jointly



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take one half of undivided share in the suit properties and the defendants are jointly entitled to the undivided half share in the suit properties.

24.In fine, for all the above reasons, the substantial questions of law 3 and 4 are answered in favour of the appellants. In the result, the Second Appeal has to be necessarily allowed in part in the following manner:

(i) The judgment and decree dated 21.04.2017 passed in A.S.No.41 of 2016 on the file of the II Additional District Judge, Erode, is set aside.

(ii) The plaintiffs and the defendants are held to be jointly entitled to the said three items of the suit properties and the parties are at liberty to file a proper suit for partition, giving correct description of the suit properties, including the Kalyanamandapam and thereafter, seek for division of the same in accordance with law.

(iii) There shall be no order as to costs.

22.03.2024

Index : Yes/No
Speaking Order/Non-Speaking Order
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To



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- 1.The II Additional District Judge, Erode.
- 2.The Subordinate Court, Perundurai.
- 3.The Section Officer, V.R.Section, High Court, Madras.

P.B.BALAJI, J.

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Pre-delivery judgment made in

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