



A.S.No.433 of 2

THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29.04.2024

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN
AND
THE HONOURABLE MR.JUSTICE R.SAKTHIVEL

A.S.No.433 of 2018

1.P.Marimuthu

2.M.Mariammal

...Appellants

Vs.

1.A.Paramasivam

2.P.Ramalakshmi

...Respondents

Prayer: First Appeal filed under Section 96 of the Code of Civil Procedure, 1908, against the judgment and decree dated 16.02.2018 passed by the Additional District and Sessions Judge, Chengalpattu in O.S.No.33 of 2008.

For Appellants : Mr.Mukundan

For Respondents : Mr.R.Gayathri



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J U D G M E N T

(Judgment of the Court was made by R.SUBRAMANIAN, J.)

The defendants in O.S.No.33 of 2008 on the file of the District Court, Chengalpattu are on appeal, aggrieved by a preliminary decree for partition, declaring 1/2 share of the plaintiffs in the suit property granted in the said suit.

2.The plaintiffs sued for partition, contending that the suit property was purchased by the plaintiffs and the defendants jointly under a sale deed dated 28.09.1998 from one Mr. and Mrs. Abraham. The plaintiffs would claim that the 2nd plaintiff and the 1st defendant are first cousins in as much as their mothers are sisters. The 1st defendant completed his Diploma in Plastic Technology in Central Institute of Plastic Engineering and Technology (CIPET), Chennai and married 2nd defendant and settled down in Chennai. Though the plaintiffs would claim that the father of the 1st defendant was not a man of means and the entire education expenses was borne by the 1st defendant, the same is denied by the defendants. Those averments or allegations are unnecessary for the determination of the issues involved in the appeal. Hence, we are not narrating those averments.



3. According to the plaintiffs, the suit property was purchased for a consideration of Rs.23,65,000/- on 28.09.1998 from Mr. and Mrs. Abraham.

A sum of Rs.12,00,000/- was paid by the plaintiffs towards their share of the property. The defendants availed a housing loan of Rs.14,24,587/- from State Bank of India, Ekkaduthangal Branch by mortgaging the schedule property and the balance sale consideration of Rs.11,65,000/- was paid by the Bank directly to the Vendors. It is the further plea of the plaintiffs that the defendants did not honour their commitment to repay the Bank loan and finally, the plaintiffs ended up repaying a sum of Rs.8,37,033.41/-, over and above what they are bound to repay. The plaintiffs reserved their right to sue the defendants for recovery of the said money. Relying upon the recitals in the sale deed which was marked as Ex.A3, the plaintiffs claimed that they are entitled to 25% each in the property and as such, put together, their share would be 50%.

4. The suit was resisted by the defendants contending that the claim of the plaintiffs is incorrect. According to the defendants, the total consideration for the property was about Rs.41,00,000/-. As per the agreement between the defendants and the Vendors dated 23.05.1998, the



defendants had paid an advance of Rs.12,00,000/- on the date of the agreement and a further sums of Rs.14,35,000/- and Rs.3,00,000/- on 12.07.1998 and 14.07.1998 respectively. The balance amount of Rs.11,65,000/- was paid from and out of the housing loan availed from State Bank of India, Ekkaduthangal Branch.

5.It was agreed between the parties that the plaintiffs should repay the loan, since the defendants had paid more than 1/2 of the sale consideration even before the plaintiffs stepped into contract. It is also contended that at the instance of the plaintiffs, the 1st defendant had, through his business which he was running, imported three machineries for the purpose of business of the 1st plaintiff, costing about Rs.14,00,000/- and it was agreed between the parties to set off the share that would be available to the plaintiffs in the suit property in lieu of the said sum of Rs.14,00,000/- which was paid by the defendants. Various other transactions by way of partnership etc., were also relied upon by the defendants to show that the contribution of the plaintiffs towards purchase of the suit property was not 50% and therefore, the plaintiffs would not be entitled to 50% share.



6. On the above pleadings, the learned Trial Judge framed the following issues:-

- i) Whether there is no cause of action for the suit as claimed by the defendants?*
- ii) Whether the sale deed dated 28.09.1998 executed by C.Asuntha Mary and Mr. and Mrs. Abraham in favour of the plaintiffs and the defendants is true ?*
- iii) Whether the plaintiffs are entitled to 1/2 share in the suit property as claimed by them?*
- iv) Whether the plaintiffs are entitled to account of the income from the suit properties ?*
- v) Whether the plaintiffs are entitled to prayer for sale of the property, if it is found to be indivisible ?*
- vi) To what other reliefs are the parties entitled to ?*

The issues were recast as follows:-

- i) Whether the plaintiffs are entitled to 1/2 share in the suit properties as claimed by them ?*
- ii) Whether the plaintiffs are entitled to accounts of the income from the suit property and their share of the income ?*
- iii) Whether the plaintiffs are entitled to appointment of a Commissioner for division of the properties ?*



iv) Whether the plaintiffs are entitled to prayer for sale of the properties, if it is found that the properties are indivisible ?

vi) To what other reliefs are the parties entitled to ?

7.At trial, the 1st plaintiff was examined as P.W.1 and one Ponnusamy was examined as P.W.2. The 1st defendant was examined as D.W.1., one Chinnaiah was examined as D.W.2. Exs.A1 to A11 were marked on the side of the plaintiffs and Exs.B1 to B14 were marked on the side of the defendants.

8.On a consideration of the entire evidence on record, the learned Trial Judge accepted the recitals in Ex.A3 / sale deed to the effect that the plaintiffs and the defendants would each be entitled to 25% share in the suit properties. Relying upon Section 45 of the Transfer of Property Act, 1882 and Section 92 of the Evidence Act, 1872, the learned Trial Judge concluded that the share of the purchaser will have to be determined on the basis of the recitals in the sale transaction and the defendants would not be entitled to lead evidence against the contents of Ex.A3, sale deed. The learned Trial Judge refused to go into the question of the quantum of



consideration paid by each of the parties, apart from concluding that there is no evidence for showing the exact proportion at which, the consideration was paid by the parties to the sale deed. On the said findings, the learned Trial Judge concluded that the plaintiffs would be entitled to 1/2 share in the suit properties. Upon reaching the said conclusion, the learned Trial Judge granted a preliminary decree for partition, while rejecting the prayer for accounting. Aggrieved, the defendants are on appeal.

9. We have heard Mr.R.Mukundan, learned counsel appearing for the appellants and Ms.R.Gayathri, learned counsel appearing for the respondents.

10. Mr.R.Mukundan, learned counsel appearing for the appellants would submit that the learned Trial Judge was not right in concluding that there is no evidence for actual proportion at which, the consideration was paid. The learned counsel would draw our attention to sale agreement dated 23.05.1998 marked as Ex.B2 and the fact that the 1st plaintiff has attested the sale agreement. He would also submit that the evidence on record including various payments that have been made to the State Bank of India



by way of repayment of loan would demonstrate that the plaintiffs have not contributed the sale consideration equally and that there was an agreement between the parties that the defendants would be entitled to set off the share of the plaintiffs towards the cost of the machineries imported for the business of the plaintiff by the 1st defendant.

11.The learned counsel for the appellants would also rely upon the judgment of the Division Bench of this Court in ***Ramaswami Naidu Vs. Shyamala Devi*** reported in ***1978 (1) MLJ 505*** wherein, the Division Bench has considered Section 45 of the Transfer of Property Act with reference to coparcenary to contend that, *de hors* the recitals in the sale deed, the Court can always look into as to whether there is any contribution of any other person to the sale consideration and what would be the proportion of the consideration.

12.Reliance is also placed on the judgment of the single Judge of the Allahabad High Court in ***Mohan Lal Vs. Board of Revenue, U.P., Allahabad and Others*** reported in ***1982 SCC Online All 141*** wherein, the learned single Judge had held that *de hors* the recitals in the sale deed, the



Court can go into the question of proportion of the contribution made by the parties for purchase of the property. Reliance is also placed by the learned counsel on the judgment of the Division Bench of this Court dated 01.02.2024 made in A.S.(MD).No.174 of 2013.

13.Contending contra, Ms.R.Gayathri, learned counsel appearing for the respondents would submit that as per Section 45 of the Transfer of Property Act, the share in the property of one of the joint purchasers would be dependent on the share at which, the contribution was made for purchase of the property. She would however, point out that Section 45 itself makes the rule applicable subject to a contract to the contrary. Therefore, according to the learned counsel, once there is an agreement between the parties regarding the proportion at which the property is to be shared, it is that agreement that would prevail *de hors* the proportion, at which, the consideration was contributed by the parties. She would also invite our attention to Sections 91 & 92 of the Evidence Act which prohibits oral evidence which runs contrary to the recitals in a document which is required to be looked into.



14. Reliance is also placed by her on the judgment of a Division Bench of the Delhi High Court in ***Suraj Munjal Vs. Chandan Munjal and Others*** reported in **292 (2022) (DLT) 436** wherein, the Division Bench after having examined the scope of Section 45 of the Transfer of Property Act and scope of Sections 91 & 92 of the Evidence Act concluded that in the absence of any challenge to the registered sale deed, the plea that one of the joint owners is entitled to larger share than what has been conferred on him under the document cannot be countenanced. The learned counsel would also point out that the contentions of the defence even assumed to be true, cannot affect the share of the plaintiffs in the immovable property. She would also contend that on facts there is no evidence to establish such excess contribution by the defendants. We have considered the rival submissions.

15. The following points arose for determination in this appeal:-

i) Whether the defence to the effect that the defendants would be entitled to larger share or that the plaintiffs are not entitled to any share in the suit property which runs counter to Section 45 of the Transfer of Property Act, 1882 and Sections 91 & 92 of the Evidence Act, 1872 could be entertained by the Court.

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16.While the plaintiffs have constructed their case on the basis of the recitals in Ex.A3, sale deed which specifically state that the purchasers would be entitled to 25% share in the property that is purchased under it, the defendants seek to contend, *de hors* such recitals in the sale deed, they would be entitled to a much larger share or the plaintiffs would not be entitled to any share, in view of the subsequent oral agreement between the parties. It is not the case of the defendants that the recitals in the sale deed conferred 25% share in each of the purchasers are incorrect. They would contend that there were some subsequent oral arrangements between the parties which resulted in variation or negation of the relevant recitals in Ex.A3.

17.The question that would loom large is as to whether the defendants are entitled to take such a plea. The fact that Ex.A3, sale deed recites that each of the parties are entitled to 25% share in the property is admitted. What is attempted to be done by the defendants is to demonstrate that the recitals are not correct and to prove subsequent oral agreement which runs counter to the recitals in the instrument. The relevant statutory provisions are Section 45 of the Transfer of Property Act and Sections 91 &



92 of the Indian Evidence Act, 1872. They read as follows:-

Section 45 of the Transfer of Property Act

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"45. Joint transfer for consideration.— Where immoveable property is transferred for consideration to two or more persons and such consideration is paid out of a fund belonging to them in common, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property identical, as nearly as may be, with the interests to which they were respectively entitled in the fund; and, where such consideration is paid out of separate funds belonging to them respectively, **they are, in the absence of a contract to the contrary,** respectively entitled to interests in such property in proportion to the shares of the consideration which they respectively advanced.

In the absence of evidence as to the interests in the fund to which they were respectively entitled, or as to the shares which they respectively advanced, such persons shall be presumed to be equally interested in the property."

Section 91 & 92 of the Indian Evidence Act

91. Evidence of terms of contracts, grants and other disposition of property reduced to form of document.-

When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by



law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

Exception 1. - When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.

Exception 2. - Wills [admitted to probate in [India] may be proved by the probate.

Explanation 1. - This section applies equally to cases in which the contracts, grants or dispositions of property referred to are contained in one document and to cases in which they are contained in more documents than one.

Explanation 2. - Where there are more originals than one, one original only need be proved.

Explanation 3. - The statement, in any document whatever, or a fact other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact.



92. Exclusion of evidence of oral agreement.

When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to or subtracting from, its terms :

Proviso (1). - Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, [want or failure] [Substituted by Act 18 of 1872, Section 8, for "want of failure".] of consideration, or mistake in fact or law.

Proviso (2). - The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.

Proviso (3). - The existence of any separate oral agreement, constituting a condition precedent to the attaching



of any obligation under any such contract, grant or disposition of property, may be proved.

Proviso (4). - The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

Proviso (5). - Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved :Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.

Proviso (6). - Any fact may be proved which shows in what manner the language of a document is related to existing facts.

18.A bare reading of Section 45 of the Transfer of Property Act would demonstrate that share in the immovable property in case of joint purchase would be in the same proportion as the contribution to the consideration is. This rule is subject to an exception that it is subject to the contract to the contrary between the parties. The relevant recitals in Ex.A3, 15/22



sale deed are as follows:-

"Whereas the share of the purchasers in the property conveyed by the Vendor shall be 25% each."

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There is nothing in the document to show that the exact proportion at which the purchasers have contribution to the consideration. Therefore, it has to be presumed that the consideration has been contributed equally by the purchasers. Therefore, natural corollary would be that the purchasers would be entitled to equal share in the property. This conclusion is based on the second part of Section 45 which has extracted *supra*.

19. The next question that would arise is as to whether the defendants are entitled to plead and prove a different transaction. The answer is a definite no, in view of Sections 91 & 92 of the Evidence Act. Reliance placed by the learned counsel for the appellants on the judgment in ***Ramaswami Naidu Vs. Shyamala Devi*** reported in **1978 (1) MLJ 505**, we find, is misconceived. The Division Bench was concerned with the claim of a brother that he is a co-owner invoking Section 94 of the Trust Act, contending that he has contributed for purchase of the property. The Hon'ble Division Bench concluded that such a plea is allowed and it will be open for a person to show that, though the property stood in the name of

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one of the brothers, the other brother has also contributed and the person in whose claim the property stands in only an ostensible owner and holds it in trust for other person who has contributed for the consideration. We must also immediately point out that such judgment was rendered prior to the introduction of Benami Transactions (Prohibition) Act. Sections 94 & 95 of the Indian Trust Act recognized the concept of ostensible ownership and beneficial ownership also. Therefore, we do not think that the pronouncement of the Division Bench which dealt with a completely different situation could be taken as precedent to enable a person to lead evidence or to take a plea contrary to the contract in violation of the provisions of Section 45 of the Transfer of Property Act.

20.The next judgment relied upon by the learned counsel is that of a single Judge of the Allahabad High Court in ***Mohan Lal Vs. Board of Revenue*** where it was found that *de hors* the recital in the document of sale, the plaintiff is entitled to 1/2 share. We are straight away, with due respect, point out that we are unable to agree with the conclusion of the learned Judge in as much as the said judgment runs counter to Section 45 of the Transfer of Property Act as well as Section 92 of the Indian Evidence Act.



We are unable to agree with the conclusion of the learned Judge which is based on the premise that recitals in the sale deed executed by the vendor will not constitute a binding contract between the purchasers for the reason that the purchasers apart from being parties to the contract of sale take the property only in the proportion it is conveyed under the sale deed. In other words, in the case on hand, the vendors have conveyed only 25% share in the property to each of the 4 purchasers. The learned counsel for the appellant also placed reliance on the Division Bench of this Court in ***Sasikala Vs. M.Selvaraj*** dated 01.02.2024 made in ***A.S.(MD).No.134 of 2013*** which also arose out of a plea by the wife that she has also contributed for the purchase of the property in the name of the husband and therefore, she is entitled to a share. The Hon'ble Division Bench which decided ***Sasikala*** had relied upon the judgment in ***Ramaswami Naidu Vs. Shyamala Devi***, which we had dealt with supra.

21.As we had already point out such a plea of fiduciary relationship and beneficial ownership can be entertained in cases where the documents stands in the name of a person and any other person claims to have a share in the property having contributed for purchase of the property.



Unfortunately, for the defendants that is not the case on hand. Here, the document stands in the name of the four parties. It also recites as to how they should share the property or the proportionate share that belongs to all the purchasers is clearly set out in the document. If we are to allow any oral evidence contrary to the recitals in the documents, that will clearly offend Section 92 of the Evidence Act and once a document does not indicate as to the exact contribution by the parties, 2nd part of Section 45 mandates that we should presume that the parties are entitled to equal share in the property.

22.As we have already point out, there is no indication in the sale document as to the exact proportion at which the consideration was contributed by the purchasers then, the statutory presumption under 2nd part of Section 45 would arise. Therefore, the learned Trial Judge has found that there is no evidence on record to demonstrate that the contribution was different or that there was any subsequent oral arrangement. We must also point out at this juncture that a subsequent oral arrangement cannot divest a person of title in immovable property which has to be only by way of a registered instrument in view of the Section 17 of the Registration Act.



23. The learned counsel for the respondent would draw our attention to the judgment of the Delhi High Court in ***Suraj Munjal Vs. Chandan Munjal and Others*** reported in **292 (2022) DLT 436** where the Division Bench has considered the effect of both Sections 91 & 92 of the Evidence Act apart from the judgment of the Hon'ble Supreme Court ***Ramti Devi Vs. Union of India*** reported in **1995 (1) SCC 198** to conclude as follows:-

"40. The Sale Deed was admittedly executed on 12th October, 2011 mentioning the appellant and respondent No.1 as the joint owners of the property. If the appellant was aggrieved or was claiming his share to be 80%, the sale deed or its contents could have been challenged within a period of 3 years from 12th October, 2011 and since it was not so done, any challenge now has become time barred and the Deed and its contents have to be read as such. The assertions made by the appellant to prove his share to be to the extent of 80 per cent also stands barred by the limitation."

We are in respectful agreement with the views expressed by the Division Bench of the Delhi High Court in the said decision.



24.We therefore, find that the challenge to the decree by the defendants in O.S.No.33 of 2018 in the instant appeal cannot be sustained.

This First Appeal therefore, fails and it is accordingly, **dismissed**.

However, bearing in mind the relationship between the parties, we direct the parties to bear their own costs. Consequently, connected miscellaneous petitions, if any, are closed.

(R.S.M., J.) (R.S.V., J.)
29.04.2024

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Internet:Yes

Index:Yes

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Neutral Citation :Yes

To:-

The Additional District Court,
Chengalpattu.



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R.SUBRAMANIAN, J.
and
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