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S.A.No.578 of 2013

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08..02..2024

Coram

THE HON'BLE MR JUSTICE V. LAKSHMINARAYANAN

Second Appeal No.578 of 2013

and

M.P.No.1 of 2013

Nachimuthu

..... Appellant

-Versus-

1.Ramanan @ Ramasamy (Died)

[1st respondent died. Sole appellant and respondents 2 and 3 who are already on record are recorded as legal representatives of the deceased 1st respondent vide court order dated 10.08.2023 made in S.A.No.578 of 2013]

2.Palanisamy

3.Pongiammal

..... Respondents

Appeal filed under Section 100 of C.P.C. against the judgement and decree dated 22.03.2013 made in A.S.No.32 of 2012 by the learned II Additional District Judge, Salem reversing the judgement and decree dated 10.12.2011 made in O.S.No.70 of 2006 by the learned Subordinate Judge, Mettur, Salem District.

*For Appellants : Mr.A.K.Sriram
for Mr.A.Sundaravadhanan*

For Respondents : Mr.V.Sekar for RR2 and 3

R1 Died



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JUDGEMENT

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This appeal arises from a suit for declaration and injunction. Aggrieved by the judgement and decree dated 22.03.2013 made in A.S.No.32 of 2012 by the learned II Additional District Judge, Salem, in reversing the judgement and decree dated 10.12.2011 made in O.S.No.70 of 2006 by the learned Subordinate Judge, Mettur, Salem District, the plaintiff appeals.

2. The parties will be referred to as the plaintiff and the defendants for the sake of convenience.

3. The plaintiff and the 3rd defendant are the sons of defendants 1 and 2. It was the plea of the plaintiff that the properties are joint family properties and on account of the dispute that has arisen in the family there was a panchayat which was held on 01.06.2005. The panchayat, according to the plaintiff, were held in the presence of relatives and close friends and the properties of the family were divided. The plaintiff pleaded that on 12.10.2005, the partition that was effected on 01.06.2005 was reduced to writing. The plaintiff claims that he approached the defendants for peaceful enjoyment of the properties on the basis of document dated 12.10.2005 and since the defendants refused to accede to the same, he filed the suit for declaration of title and for injunction.



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4. The 1st defendant filed a written statement which was adopted by the 3rd defendant. The 1st defendant pleaded that the plaintiff and the defendants were jointly occupying several poramboke lands but, patta had been issued separately to each of them. The averment of joint family was denied and so also the factum of the oral partition dated 01.06.2005. They denied the document dated 12.10.2005 and stated that they never agreed to transfer the properties in the name of the plaintiff. They also denied the averments of the plaintiff that when he sought for partition again it was refused and the defendants 1 to 3 had trespassed into the properties. According to them, the suit properties are all poramboke land which had been occupied by the 1st defendant and his father, i.e., the grandfather of the plaintiff and the 3rd defendant. In no uncertain terms, the alleged oral partition dated 01.06.2005 and the panchayat muchalika were denied. According to them, the signatures found in the documents are theirs but, the defendants had taken a plea that their signatures were taken fraudulently and had been utilized for the purpose of fabricating the document dated 12.10.2005. More importantly, a specific plea was taken that the document requires registration under Section 17 of the Registration Act. On the basis of the above, the defendants pleaded that the suit must be dismissed.



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5. On the basis of the above pleadings, the trial court framed the

following issues:-

(1) Whether an oral partition was effected on 01.06.2005?

(2) Whether the plaintiff is entitled for the relief of declaration as prayed for?

(3) Whether the plaintiff is entitled for the relief of permanent injunction as prayed for?

(4) To what other relief the plaintiff is entitled to?

6. On the side of the plaintiff, the plaintiff-Nachimuthu examined himself as P.W.1 and one of the mediators viz., Mani was examined as P.W.2. Exs.A.1 to A.12 were marked. On the side of the defendants, the 3rd defendant-Palanisamy examined himself as D.W.1 and one K.Palanisamy and Senthilkumar were examined as D.W.2 and D.W.3. It is pertinent to point out that though the written statement was filed by the 1st defendant, it was the 3rd defendant who entered into the witness box and deposed supporting the case of the defendants. On the side of the defendants two documents were marked viz., Ex.D.1 and Ex.D.2 and another document Ex.X.1 was marked in evidence.

7. The learned trial judge on the basis of evidence, both oral and documentary, came to the conclusion that the plaintiff has proved his title to the properties relying upon the panchayat muchalika dated 12.10.2005 decreed



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the suit as prayed for.

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8. Aggrieved by the same, a regular appeal was preferred before the learned District Judge at Salem. That regular appeal was taken on file as A.S.No.32 of 2012. The learned District Judge held that the document under Ex.A.12 on the basis of which the suit had been presented is inadmissible in evidence as the document divides the properties *in presenti* and hence allowed the appeal and dismissed the suit.

9. Aggrieved by the judgement of the appellate court, the present second appeal has been filed before this court.

10. This second appeal was admitted on 30.05.2013 on the following substantial questions of law:-

(1) Whether the appellate court was right in dismissing the suit when the defendants have admitted the signature in Ex.A.12, if the plea of the defendants is that the signature in the document was obtained by force and threat, whether the court below was right in shifting the burden of proof on the appellant, when the defendants have admitted the fact of signing the blank document?

(2) Whether the appellate court was right in giving a finding that Ex.A.12 is a partition deed and requires registration and thereby rejecting the document



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for want of registration is correct?

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11. Heard Mr.A.K.Sriram, learned senior counsel appearing on behalf of Mr.A.Sundaravadhanan for the appellant/plaintiff and Mr.V.Sekar, learned counsel for the respondents/defendants 1 and 2.

12. Mr.A.K.Sriram would argue that the plea of the defendants is that the signature in the document had been obtained under force and coercion and therefore, the burden of proof is on them to prove the vitiating circumstances. He would further argue that since the defendants had not proved the alleged threat and coercion and the police complaint was lodged nearly one year after the incident dated 01.06.2005, the appellate court had erred in allowing the appeal. He would further argue that the document under Ex.A.12 is a recording of a past transaction viz, the panchayat held on 01.06.2005 and such a document does not require any registration. He relies upon a judgement of the Supreme Court in **Kale v. Deputy Commissioner of Consolidation** [AIR 1976 SC 807 : (1976) 3 SCC 119].

13. Mr.A.K.Sriram would add that in the light of the judgement in C.R.P.(PD) No.3926 of 2007 dated 01.02.2008, the first appellate court ought not to have held that the document is inadmissible in evidence.

14. Mr.Sekar would on the other hand argue that Ex.A.12 has to be read



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in its entirety and reading so would lead one to the conclusion that the division of the properties is *in presenti* and therefore, it falls foul of Section 49 of the Registration Act. He would rely upon the judgement of the Supreme Court in **K.P.Saha and sons private Limited v. Development** [2008 (5) CTC 260] in particular drawing the attention of the court to paragraph 21 of the said judgement.

15. I have carefully considered the arguments on either side.

16. I have to decide whether Ex.A.12, the foundation of the plaintiff's case, is an admissible document or not. If I come to the conclusion that a property has been divided *in presenti* under the document and the suit being one for declaration of title based on that document, the second appeal has to fail. On the contrary, if I come to the conclusion that Ex.A.12 is merely a record of a past transaction, then it is admissible in evidence as held in **Kale v. Deputy Commissioner of Consolidation** [AIR 1976 SC 807 : (1976) 3 SCC 119] and therefore, the plaintiff will be entitled for a decree. This is on account of the fact that the defendants have not let in any evidence to prove the vitiating circumstances that existed on the date on which the transaction had been entered into. Further more it is not in dispute that the finger print as well as the signatures found on Ex.A12 are that of the defendants. Therefore, the



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interpretation of Ex.A12 is crucial.

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17. First I have to deal with the objections raised by Mr.A.K.Sriram that this court had allowed the Civil Revision Petition of the plaintiff on 01.02.2008 and it was pursuant to the order the document had been received in evidence and therefore, admissibility cannot be gone into all over again.

18. It is here I have to see the order that was passed in the C.R.P.(PD) No.3826 of 2007 dated 01.02.2008. The revision arose from an order of the learned Subordinate Judge, Mettur dated 22.10.2007 in I.A.No.413 of 2007. I.A.No.413 of 2007 had been presented by the defendants objecting that the document was not to be received in evidence at all and they filed the said application. The learned Subordinate Judge, agreed with the defendants herein and rejected the documents as inadmissible. That order was put to challenge in revision before this court and this court allowed the revision holding as follows:-

“3. The said document recites that already there was an oral partition between the members of the family and the same has been reduced into writing by the said panchayat mutchalika. The court below on a misconception had allowed the application filed by the respondents herein for rejection of the document. The order of the court below is totally erroneous and is



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liable to be set aside and accordingly set aside. The Civil Revision Petition stands allowed. However, the petitioner has to pay the stamp duty for the same document and as and when the same is paid by the petitioner, the same has to be received in evidence by the court below.

19. The view taken by this court is in line with the dictum of the Supreme Court in **Bipin Shantilal Panchal v. State of Gujarat [2001 (3) SCC 1]** in paras 13 and 14 it held that when a document is presented in evidence it is the duty of the court to receive the same and if it had been objected to, the court has to make an endorsement on its objection but to mark the same.

20. In this particular case, I called for the original record and I found that Ex.A.12 had been received in obedience of the order of this court on 01.02.2008 but both on the document as well in the docket, it has been made very clear that the document had been received subject to objections. The objection that had been raised by the learned counsel for the defendants/respondents says that document is inadmissible in evidence for want of registration. Therefore, the judgement in Civil Revision Petition does not come to the rescue of the appellant/plaintiff.

21. Now looking at the document as rightly pointed out by Mr.Sekar, I



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find the following recitals in the document:-

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“இனி 1, 2, 4 நபர்களுக்கு மேலே குறிப்பிட்டுள்ள விவசாய நிலங்களிலும், வீடுகளிலும், கிணறுகளிலும், மின் இணைப்புகளிலும், ஏந்த ஒரு பாத்தியதையோ, உரிமையோ, சுதந்திரமோ இல்லை. 1, 2, 4 நபர்கள் பெற்றுக்கொண்ட ரொக்கம் ரூ.15,00,000.00 (ரூபாய் பதினைந்து இலட்சம் மட்டும்)க்கும் இதுவே ரசீது ஆகும். நம் குடும்பத்திற்கு பொதுவான மேட்டூர் அணை நீர்ப்பிடிப்பு முலுகடை நிலங்களில் உள்ள மணியக்காரன் காடு, பனமரத்துக்குழி, ஏரணக்காடு, ஆகியவைகளில் நம்மில 3, 4 நபர்கள் சரிபாதியாக அடைந்து அனுபவித்துக் கொள்ள வேண்டியது.”

The Tamil word “இனி” means that from hereafter which implies that the first portion of the document records the alleged panchayat that had taken place on 01.06.2005 and that the latter portion of the document speaks about division and enjoyment by the sons to the exclusion of the parents in equal terms hereafter. It is therefore clear from the aforesaid averments that the division has been made *in presenti*.

22. If this was a suit for injunction based on possession I would have no difficulty in receiving the document because I can read it for collateral



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purposes. However, the entire suit is predicated on the basis of Ex.A.12 and

title is sought to be asserted on the basis of this document. The position of law is that where a document divides the property *in presenti* the same requires stamp duty and registration. This objection had been taken at the earliest point of time in the written statement by the defendants. While a document which deficit in stamp duty can be rectified by payment of penalty, registration does not have such curable effect. The judgement of the Supreme Court in **K.B.Saha & Sons Private Limited v. Development Consultant Limited** [2008 (5) CTC 260] makes it very clear that if a document requires registration, then, it is inadmissible in evidence, as directed by the Parliament, under Section 49 of the Registration Act. The document under question Ex.A.12 being one such document, I am constrained to hold that the same is inadmissible.

23. A history of Sections 17 and 49 of the Registration Act needs to be looked into under Act XX of 1866. Section 49 reads as follows:

"No instrument required by Section 17 to be registered shall be received in evidence in any civil proceedings in any Court or shall affect any property comprised therein, unless it has been registered in accordance with the provisions of the Act."

24. This provision fell for consideration before the Bench of this Court in



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Achoo Bayamah Vs. Dhany Ram case reported in (1869) 4 **M.H.C.R.** 378. The

question that had to be decided in that case was whether an unregistered mortgage could be received in evidence for the purpose of proving the instrument to repay the debt and for enforcing the personal obligation under the said document. A Full Bench of this Court held that the documents are inadmissible and relied upon the words "No documents shall be received in evidence".

25. Sir Colley Scotland, the then Chief Justice dissented from the view of the other judges and held that if an instrument, which has two fold operation of a simple contract or bond to pay a debt, a collateral security insofar as the debt is concerned, is admissible in evidence for the purpose of proving the debt. He held as follows:

“ The object of Section 49 was solely, I think, to prevent instruments from being of legal force for any of the purposes which make registration compulsory under Section 17. This is especially made evident by the words in Section 49 “ or shall affect any property comprised therein.” To give due effect to the intention of the Legislature as well in regard to optional registration under Section 18 as to compulsory registration under Section 17, it appears to me that Section 49 should be read as if it had expressly said that no instrument should be received in evidence, for any of



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the purposes specified in Section 17 unless registered.”

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26. Taking note of this dichotomy, the Colonial legislature brought out Registration Act VIII of 1871. Under the said provision, the rigour of the old section was modified. It reads as follows:

"No documents required to be registered shall unless registered, be received in evidence of any transaction affecting any immovable property comprised therein."

27. The composition between Act XX of 1856 and Act VIII of 1871 will show that the words “received in evidence in any civil proceedings” were modified to "be received in evidence of any transaction affecting any immovable property comprised therein".

28. Taking into consideration the amended provision, two judgements of this Court in *Stri Seshathri Ayyengar v. Sankara Ayen* case reported in 7 *Mad.H.C.R. 296* and *Guduri Jagannadham Vs. Rupaka Ramanna* case reported in 7 *Mad. H.C.R. 348* held that an unregistered document though required to be compulsory registered, would be admissible in evidence for the purpose of enforcing personal liability of the person executing the document. The Bench in Jagannadham's case observed that the view taken by Sir Colley Scotland was adopted by the legislature. It held as follows:



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“The old law did not render such securities void, but merely prevented them from being offered in evidence.

The new law has explicitly adopted the doctrine which the late Chief Justice of this Court believed to be derivable from the old.”

29. Act VIII of 1871 was repealed and a new Registration Act was brought into force under the Registration Act of 1877. The words found in Section 49 were similar to the words found under the 1871 Act.

30. Pithily interpreting the said section, the bench in ***Stri Seshathri Ayyengar v. Sankara Ayen*** case reported in **7 Mad.H.C.R. 296** held as follows:

“Looking at the language of Section 49 of Act VIII of 1871, we are of opinion that the bond, though an unregistered instrument, should be received in evidence for the purpose mentioned, in a suit to enforce the personal liability of the person executing the bond. It is only excluded where it is offered as evidence of a transaction affecting immovable property.”

31. Interpreting this provision, a Division Bench consisting of Mr. Justice Muttusami Ayyar and Justice Best in the case of ***Sambayya Vs. Gangayya*** case reported in (1890) ILR 13 Mad 308 laid down the following test :

"the test therefore is whether the transaction



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evidenced by the particular instrument is single and indivisible, or whether it really evidences two transactions which can be severed from each other, the one as creating an independent personal obligation and the other as merely strengthening it by adding a right to proceed against immovable property. But it should be remembered that it is not enough that there is an obligation to pay a sum of money, but that it is also necessary that the obligation should have an independent existence, and be in no way contingent or conditional on the breach of some obligation relating to immoveable property created by the same instrument, for the contingency or the condition and the obligation would then be parts of one indivisible transaction ".

32. While holding so, they followed the earlier view laid down by this Court in ***Venkatrayadu Vs. Papi*** case reported in (1884) ***I.L.R. 8 Madras 182***. This test laid down by Justice Muttusami Ayyar was approved by the Supreme Court in ***Mattapalli Chelamayya and Another Vs. Mattapalli Venkataratnam and Another*** case reported in (1972) ***3 SCC 799***. Therefore, the document which is an indivisible transaction if it affects the right in any immovable property cannot be received in evidence by virtue of Section 49. However, when the document evidences two transactions which can be separated from



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each other, the personal obligation part, for example:- to pay a sum of money can be enforced and the rest of the part would have to be discarded.

33. Applying the aforesaid test to the present case, I have to come to the conclusion that Ex.A12 was an indivisible transaction creating a new right in favour of the plaintiff and it had extinguished the rights of the defendants. Therefore, it would be a document which would come within the teeth of Section 17.

34. The idea of writing Ex.A12 was to put an end to the infighting in the family and therefore, the transactions dealt with in the first page of Ex.A12 are inextricably linked to the transactions found at Page 2. Therefore, applying the test laid down by Justice Muttusami Ayyar, it is the case of an indivisible transaction and consequently, the same is inadmissible. The claim of the plaintiff being based on this document and the document being inadmissible, I am necessarily bound to hold that the appeal has to fail.

35. Further more on going through the evidence, I am unable to see that the plaintiff had given any evidence to show that there had been an oral partition. Only one person had been examined as P.W.2. P.W.2 does not seem to be a reliable witness as he is interested in the transaction. That being the situation, the plaintiff has miserably failed to prove the alleged panchayat held



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on 01.06.2005. No reasons have been given for the non-examination of the panchyatars at whose instance the mediation was supposed to have taken place.

In fine, the Second Appeal is dismissed. The judgement and decree of the court of the II Additional District Judge, Salem, dated 22.03.2013 made in A.S.No.32 of 2012 in allowing the appeal suit and setting aside the judgement and decree of the learned Subordinate Judge, Mettur, dated 10.12.2011 made in O.S.No.70 of 2006 is confirmed. Costs throughout. Consequently, connected MP is closed.

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Index : yes / no
Neutral Citation : yes / no
Speaking / Non Speaking Order
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To

- 1.The II Additional District Judge, Salem, Salem District.
- 2.The Subordinate Judge, Mettur, Salem District.



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V.LAKSHMINARAYANAN, J.

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