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O.S.A.Nos.162 & 164 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23.07.2024

CORAM

THE HONOURABLE MR.JUSTICE M.SUNDAR

and

THE HONOURABLE MRS.JUSTICE K.GOVINDARAJAN

THILAKAVADI

O.S.A.Nos.162 & 164 of 2023

and

C.M.P.Nos.164 & 20420 of 2023

in

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1. M/s.Radha Exports (India) Pvt. Ltd.,
Rep. by its Managing Director
Mr.M.Krishnan

2. Mr.M.Krishnan
S/o.Mr.Murugaian

3. Mrs.Radha Gouri
W/o.Mr.M.Krishnan

... Appellants
in both OSAs

Vs.

1. Mr.K.P.Jayaram
S/o.Late Krishna Pillai

2. Mrs.Shoba Jayaram
W/o.K.P.Jayaram
rep. by her Power Agent Mr.K.P.Jayaram

.. Respondents
in both OSAs



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Original Side Appeal No.162 of 2023 filed under Order XXXVI Rule 9 of the Madras High Court Original Side Rules read with Section 15 of Letters Patent, praying to set aside the common fair and decreetal order dated 25.07.2023 in Application No.2832 of 2023.

Original Side Appeal No.164 of 2023 filed under Order XXXVI Rule 9 of the Madras High Court Original Side Rules read with Section 15 of Letters Patent, praying to set aside the common fair and decreetal order dated 25.07.2023 in Application No.2831 of 2023.

For Appellant in both OSAs : Mr.K.V.Babu

For Respondent in both OSAs : Mr.Najeeb Usman Khan

COMMON JUDGMENT

[Judgment of the Court was made by M.SUNDAR, J.,]

This common order will now dispose of the captioned two 'Original Side Appeals' {hereinafter 'OSAs' for the sake of brevity} and captioned two 'Civil Miscellaneous Petitions' {hereinafter 'CMPs' for the sake of brevity} thereat.



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2. Captioned matters are short matters and therefore a thumbnail sketch of facts will suffice.

3. A suit in 'C.S.No.66 of 2013' {hereinafter 'said suit' for the sake of brevity} was filed on the Original Side of this Court vide a plaint dated 28.01.2013; that in the said suit, there are two plaintiffs, who are spouses and three defendants; that first defendant is a Company i.e., a juristic person, D2 and D3 are spouses and natural persons; that said suit has been filed with prayers for declaration that second plaintiff is the absolute owner of a 'house property at Door No.33, 2nd Street, Gill Nagar, Choolaimedu, Chennai-600 094' {hereinafter 'suit property' for the sake of brevity, convenience and clarity}, another declaration that a sale deed dated 06.07.2007 {registered as document No.2558 of 2007 on the file of Sub-Registrar's Office, Kodambakkam} in favour of D1 is null and void and a permanent injunction qua alienation as regards suit property; that usual prayer limb qua costs and standard residuary limb also form part of said suit prayer; that in said suit, three defendants entered appearance and filed written statement; that post completion of pleadings, issues were framed on 20.08.2014 {six issues were



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framed}; that trial commenced and first plaintiff (K.P.Jayaraman) deposed as PW1; that the cross-examination of PW1 which was done on as many as five days concluded on 08.01.2018; that it is to be noted that cross-examination of PW1 (first plaintiff) was on 08.12.2017, 12.12.2017, 19.12.2017, 05.01.2018 and 08.01.2018; that we are informed that thereafter further witnesses were examined; that thereafter, four years later i.e., in November of 2022, defendants filed an application in A.No.5459 of 2022 under Order XIV Rule 5 of 'the Code of Civil Procedure, 1908 (5 of 1908)' [hereinafter 'CPC' for the sake of brevity, convenience and clarity] with a prayer for recasting six issues which were framed on 20.08.2014; that this request for recasting was acceded to and issues 1 and 2 were recast on 15.12.2022; that thereafter, in May of 2023, the three defendants took out two applications with prayers for reopening plaintiffs' side evidence and recalling PW1; that these two applications are A.Nos.2831 and 2832 of 2023; that these two applications came to be dismissed (after full contest) by a Hon'ble single Judge in and by a 'common order dated 25.07.2023' {hereinafter 'impugned common order' for the sake of convenience, clarity and brevity}; that assailing the impugned common order, three defendants, who are



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unsuccessful in having the plaintiffs' side evidence reopened and in getting PW1 recalled are in intra-court appeals vide captioned two OSAs.

4. Before we proceed further, we deem it appropriate to write that thumbnail sketch of facts supra would demonstrate that two issues were recast on 15.12.2022 and they are issue Nos.1 and 2. For the sake of specificity, we deem it appropriate to set out issue Nos.1 and 2 (as framed on 20.08.2014) and the same read as follows:

'i. Whether the suit filed by the plaintiffs is barred by limitation?

ii. Whether the sale deed dated 06.07.2007 registered as document No.2558/2007 is valid and supported by consideration as mentioned in the sale deed?'

5. Aforementioned two issues as recast on 15.12.2022 read as follows:

'i. Whether the suit filed by the plaintiffs is not barred by limitation?

ii. Whether the sale deed dated 06.07.2007 registered as document No.2558/2007 is not valid and is not supported by consideration as mentioned in the sale deed?'

6. Reverting to appeals at hand i.e., captioned OSAs, Mr.K.V.Babu, learned counsel on record for three appellants and Mr.Najeeb Usman Khan,



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learned counsel on record for two respondents are before us.

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7. Notwithstanding myriad grounds that have been raised in two memoranda of grounds of appeal qua captioned OSAs, Mr.K.V.Babu, learned counsel on record for appellants predicated his campaign against the impugned common order on one point and that one point is recasting of issue Nos.1 and 2 on 15.12.2022 necessitated the filing of two applications for reopening and recalling which were negatived by Hon'ble single Judge vide impugned common order. Elaborating on this, learned counsel submitted that he is primarily concerned with Ex.P10 which was marked through PW1. Learned counsel also submits that Ex.P10 is a Bank Statement and that the transactions that can be evidenced qua Ex.P10 are of immense significance.

8. Mr.Najeeb Usman Khan, learned counsel for respondents (two plaintiffs before Hon'ble single Judge in said suit) submitted to the contrary i.e., learned counsel submitted that applications for reopening and recalling have been filed with the intention of delaying the said suit. In other words,



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it is dilatory tactics is learned counsel's say.

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9. We carefully considered the records before us, case files before us and we also considered the arguments made on both sides. Before we proceed further, we make it clear that the arguments were terse, crisp and were made with specificity. Therefore with the consent of learned counsel on both sides, we are dealing with only the arguments that were advanced in the hearing though myriad grounds have been raised in the two memoranda of grounds of appeal.

10. Owing to the narrative thus far, it becomes clear that we need to discuss and give our dispositive reasoning on one point and that one point is, whether reopening and recalling got necessitated owing to recasting of aforementioned two issues on 15.12.2022.

11. On a careful perusal of the impugned order, we find that Hon'ble single Judge has negated the applications by saying that recasting of issues



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really does not make a difference to the *lis* or trial as it has only shifted the burden (of proof) from defendants to plaintiffs and on this basis discussed the reopen and recall applications. We carefully considered this reasoning and conclusion. We agree with the conclusion of Hon'ble single Judge but for a different reason. The logic is, 'burden' never shifts in a *lis*, it is only 'onus' that can shift. To borrow the language of Hon'ble Supreme Court, 'onus' swings like a pendulum from one end of the *lis* to the other. As burden does not shift, it cannot be gainsaid that the burden qua original issue Nos.1 and 2 as framed on 20.08.2014 was on the defendants and that they got shifted to plaintiffs owing to recasting on 15.12.2022. The burden of proof is always on plaintiffs. At the highest, the onus would have swung but we refrain from expressing any opinion on whether onus has shifted as it may really be outside the remit of intra-court appeals, which we are dealing with and it would be in the realm of autonomy of Hon'ble single Judge who would be deciding the said suit (main suit). We find that issue Nos.1 and 2 being recast really does not make a difference as both issues put together turn on three points namely (a) limitation qua said suit i.e., whether said suit is barred by limitation; (b) validity of impugned sale deed dated 06.07.2007



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registered as document No.2558 of 2007 on the file of Sub-Registrar's office, Kodambakkam and (c) passing of consideration qua impugned sale deed. These three aspects remain to be contested in main suit i.e., said suit and we also find that PW1 has been cross-examined on as many as five dates, to be noted, we have given the five dates elsewhere supra in this order but we set out the same again. The five dates are 08.12.2017, 12.12.2017, 19.12.2017, 05.01.2018 and 08.01.2018.

12. There is also no dispute that PW1 has been cross-examined on Ex.P10 but we express no opinion on this deposition part as that would be the remit of Hon'ble single Judge while hearing the said suit as PW1 has been cross-examined on as many as five dates, PW1 has been cross examined on Ex.P10. To put it in a nutshell, as recasting of issues really does not make a difference to *lis* as between the parties, we agree with the conclusion of Hon'ble single Judge qua impugned order but for these reasons articulated supra.

13. Ergo, the sequitur is captioned two OSAs fail and the same are



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dismissed. Consequently, captioned two CMPs also perish with OSAs

i.e., CMPs are also dismissed. There shall be no order as to costs.

(M.S.,J.)

(K.G.T.,J.)

23.07.2024

Index : Yes

Speaking order

Neutral Citation : Yes

mk

To

The Sub-Assistant Registrar

Original Side

High Court, Madras.

M.SUNDAR, J.,

and

K.GOVINDARAJAN THILAKAVADI, J.,

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