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A.S.No.686 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

CORAM:

THE HONOURABLE **MR.JUSTICE RMT.TEEKAA RAMAN**

A.S.No.686 of 2023
and CMP No.24107 of 2023

Judgment reserved on 16.07.2024	Judgment pronounced on 13.08.2024
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M/s.Sri Vinayaka Projects,
A registered Partnership Firm
Rep.by its Partnership
P.Manikandan

...

Appellant

Vs.

1.Tmt.Ammaniammal @ Periakutty
2.Tmt.Sivagami
3.Tmt.Kalamani
(R2 & R3 are exonerated from the
appeal vide order of court dt.11.06.24
made in CMP 2407/2023 in AS No.686/2023
and memo filed on 11.06.2024 is recorded) ...

Respondents

Prayer: This First Appeal is filed under Section 96 read with Order 41 of Civil Procedure Code against the judgment and decree dated 29.08.2016 in O.S.No.657 of 2007 on the file of the IV Additional District Court at Coimbatore.



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For Appellant : Mr.N.Sridhar for
Mr.R.Bharathkumar

For Respondent : Mr.R.Singaravelan
Senior Counsel from
Tamil Nadu Senior Advocate
Forum for Legalaid,
assisted by Mrs.V.Ambika,
Legal-aid counsel
(Senior Panel) for R1

J U D G M E N T

Parties are referred to as per their ranking before the Trial Court, for the sake of convenience.

2. The unsuccessful plaintiff is the appellant herein. The brief facts leading to the filing of the suit are as under -

2(a) The suit property measuring an extent of 15 Cents with a larger extent of 75 Cents was originally owned by one Periakutty Gounder vide sale deed dated 12.09.1938 registered as Document No.1501 of 1938 on the file of the Sub Registrar, Sulur. The said Peria Gounder died intestate on 07.02.1963 leaving behind his wife Marathal, his daughters Periakutty @ Ammani



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Ammal, 1st defendant herein, Chinnammal, Thulasiammal and Saraswathi
and only son Subbalyan Suppanna Gounder to succeed his estate.

2(b) After death of Periakutty Gounder, Marathal his widow wife filed a civil suit on 21.11.1989 in O.S. No.287/87 on the file of District Munsif of Palladam against her daughters Periakutty @ Ammani Ammal, Saraswathi, Thulasiammal and his son Subbiah alias Supanna Gounder to divide the extent of 75 Cents comprised in G.S. No. 141/4B,4D which includes the suit property and another 3.00 Acres in G.S. No.567/2B into 25 shares and allot 6/25 shares to her. While the said suit was pending, Subbaiah @ Suppanna Gounder, son of Marathal and late Periakutty Gounder died on 01.04.1995. Thereafter the legal heirs of deceased Subbaiah @ Suppanna Gounder viz., Chinnammal his wife, Velusamy and Ponnusamy sons and Sundarambal daughter were impleaded as parties to the above suit. The District Munsif Court, Palladam passed a preliminary decree on 18.03.2004 directing division of properties into 25 equal shares allotting six shares to Marathal (6/25 shares).



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2(c) During the pendency of the above suit, Marathal had executed a Registered Will dated 31.01.1994 on the file of the Joint Sub Registrar No.3, Coimbatore bequeathing her 6/25 shares in the above properties in favour of her daughter Saraswathy as she was looking after Marathal and taking care of her. No share was allotted to her other children. As per the decree, the shares in the property, I.e 75 Cents in G.S.No.141/4B, 4D worked out as follows :

- a) Marathal 18 Cents
- b) Saraswathy 15 Cents
- c) Periakutty 15 Cents
- d) Thulasiammal 15 Cents
- e) Chinnammal 12 Cents

and her children

(Deceased Subbaiah @Suppanna Gounder's children and wife)

2(d) Marathal died on 29.01.2005. After her death, Saraswathy became entitled to 33 Cents out of 75 Cents and others as per extents mentioned above. The above mentioned legal heirs entered into an oral partition on 19.02.2005 with regard to the extent of 75 Cents comprised in G.S.No.141/4B,4D.



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WEB COPY 2(e) As per Coimbatore Local Planning Authority, Coimbatore-12, Ref No.ROC 3321/2006 LPA 3 dated 03.08.2006 the entire extent of 75 Cents in S.F.No.141/4B,4D Neelambur village lies in industrial (I-30) use in the Government approved Master plan proposal.

2(f) The above persons approached the plaintiff during first week of September 2006 and offered to sell the entire 75 Cents in S.F.No.141/4B.4D. The plaintiff also agreed to purchase the same at the rate of Rs.1,10,000/- per cent. The agreement was oral dated 05.09.06.

2(g) The further case of the plaintiff is that as per oral agreement, Thulasiammal and her children executed a sale deed dated 11.09.2006 with regard to their 15 Cents in S.F.No.141/4B,4D vide sale deed registered as Document No.7135/2006 on the file of Sub Registrar, Sulur for a consideration of Rs.16,50,000/- in favour of the Plaintiff.



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2(h) On the same day, Saraswathy and her children executed a sale deed in favour of the plaintiff with regard to her 33 Cents of land in S.F. No.141/4B,4D vide sale deed dated 11.09.2006 registered as Document No.7336/2006 on the file of the Sub Registrar Sulur for a consideration of Rs.36,30,000/-.

2(i) Chinnammal and her children executed another sale deed with regard to their 12 cents of lands in favour of the plaintiff vide sale deed dated 28.02.2007 registered as Document No.2872/2007 on the file of Sub Registrar, Sulur for a consideration of Rs.13,20,000/-

2(j) By virtue of the above mentioned three sale deeds, the plaintiff has become entitled to an extent of 60 cents absolutely.

2(k) The defendants herein who owned an extent of 15 Cents in the above mentioned extent of 75 Cents in G.S. No.141/4B,4D as per oral partition dated 19.02.2005, i.e the suit property, pleaded time for executing the sale deed and stated that they would execute the sale deed during the



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month of May 2007. Accordingly the 1st defendant, on behalf of defendants received a sum of Rs.2,00,000/- for urgent family expenses by virtue of a Demand Draft bearing No.003268 dated 18.05.2007 drawn on Bank of India, R.S. Puram Branch, Coimbatore as part of sale consideration.

2(l) The 1st defendant herein again received another sum of Rs.3,00,000/- for urgent family expenses by virtue of a Demand Draft bearing No.003275 dated 23.05.2007 drawn on Bank of India, R.S. Puram Branch, Coimbatore as part of sale consideration. The defendants also handed over possession of the suit property. After taking possession of the suit property, the plaintiff has fenced the same with barbed wire and they are in absolute possession and enjoyment of the same.

2(m) The defendants have encashed the Demand Draft for Rs.2,00,000/- through their account with Central Bank of India, Kalapatty Branch on 19.05.2007. They have also encashed the Demand Draft for Rs.3,00,000/- through their account with Canara Bank, Irugur on 25.05.2007.



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2(n) The plaintiff has been making repeated requests and demands with the defendants to receive the balance sale consideration of Rs.11,50,000/- and execute the sale deed in favour of the plaintiff. The defendants have been demanding exaggerated amount than the agreed amount of Rs.1,10,000/- per cent from the plaintiff. The defendants, on 27.07.2007 had attempted to pull the barbed wire fencing of the suit property (i.e) South Western side of the property comprising of 75 cents, now in possession of the plaintiff, in order to wrench possession of the suit property from the plaintiff. The watch and ward staff of the plaintiff in the suit property had warned the defendants and successfully thwarted their illegal attempts.

2(o) Since the defendant attempted to trespass into the suit property on 27.07.2007, the police complaint was registered and thereafter the plaintiff has come forward with this instant suit for specific performance, permanent injunction and other reliefs..

3. Initially, the defendants 1 & 2 remained exparte before the court. One Ravikumar was appointed as court guardian of minor third defendant.



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Thereafter, Exs.B2 & B4 said to have been emanated from the defendant. On application, exparte order was set aside and the defendants 1 & 2 filed written statement saying that they have taken the stand as under.

4. The following facts are admitted in the written statement. The admitted extent of factual matrix are as follows -

4(a) The suit property measuring 15 cents with a larger extent of 75 cents originally owned by Peria Gounder as per the sale deed dated 12.09.1938 and the said Peria Gounder died intestate on 07.02.1963 leaving behind his Wife Marathal, his daughters, Periakutty @ Ammani Ammal viz., the first defendant herein, Chinnammal, Thulasiammal and Saraswathy and only son Subbaiyan @ Subbanna Gounder to succeed to his estate are true. The further contention in para 5 of the plaint that after the death of Peria Gounder, his wife Marathal field a suit on 21.11.1989 and subsequently renumbered as O.S.No.287 of 1997 on the file of the District Munsif of Palladam against Periakutty @ Ammaniammal, Saraswathy, Thulasiammal and his son Subbaiyan in G.S.No.141/4B and 4D which includes the suit



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property and another property of 3 acres in G.S.No.567/2B into 25 shares and for the allotment of 6/25 shares to her are true. It is also true that Subbaiyan died on 01.04.1995 and his legal heirs viz., his wife Chinnammal, his sons Veluswamy, and Ponnuswamy and daughter Sundarambal were impleaded as parties in the above said suit. It is also true that necessary preliminary decree was passed on 18.03.2004 directing the division of the properties into 25 equal shares and for the allotment of 6 shares to Marathal.

5. The following facts in the plaint are denied by defendants 1 & 2 in their written statement.

5(a) The alleged Will said to have been executed by Marathal was denied while admitted the date of death of Marathal as 29.01.2005. The defendant has denied execution of the Will dated 31.01.1994 and also denied the alleged oral partition on 19.02.2005 with regard to the extent of 75 cents and also denied that 15 cents was allotted to the defendant as per oral partition and also denied that various sale deeds were executed by other co-sharers in favour of the plaintiff.



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5(b) The defendant also denied that as per part performance of suit sale agreement, possession was handed over by the defendant to the plaintiff and also denied receipt of Rs.2 Lakhs on 18.05.2007 and Rs.3 Lakhs on 23.05.2007 by way of Demand Drafts.

5(c) The case projected by the defendant is that the extent of 75 cents originally belonged to the father of the 1st defendant Peria gounder. After the death of Peria gounder, the 1st defendant's mother, Marathal filed a suit for partition before the Sub Court, Tiruppur, and subsequently it was transferred to the District Munsif Court, Palladam in [O.S.No.287](#) of 1997. The said suit was one for partition in respect of the above mentioned 75 cents and also in respect of another property. In the said suit, necessary preliminary decree was passed on 18.03.2004 by allotting 6/25 shares to Marathal, namely, the mother of the 1st defendant. After the death of the Marathal, the mother's share devolved upon her children and as such, the 1 defendant's share got augmented to 26/100 shares which comes about 18 cents.



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5(d) The 1st defendant herein has been taking suitable steps for the separate allotment of her share in [O.S.No.287](#) of 1997 by filing necessary application for passing of a final decree.

5(e) The defendant has chosen to raise the plea that somebody has deposited in her account two cheques to the extent of Rs.2 Lakhs & Rs.3 Lakhs. The plaintiff might have able to ascertain the 1st defendant's bank account seems to have deposited two demand drafts of their own and now has taken a plea that they have paid advance amount.

5(f) Having found that an amount has been credited in her account, the defendant has instructed her bankers to make a re-entry and to withdraw the amount from her account and as such the 1st defendant was informed by her banker that the said amount has been sent to a miscellaneous account.

5(g) According to the defendant, 1st defendant is entitled to 18 cents out of the total 75 cents. The 1st defendant alone is the owner of the property. The 2nd and 3rd defendants are who are the daughters of the 1st defendant are



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not at all having any right whatsoever at present. Hence, there is no question of all the defendants entered into an oral sale agreement with the plaintiff.

Hence, the suit is bad for mis-joinder of parties. She would also state that there is an oral partition between the siblings and she never handed over the possession of suit property as part performance of the contract and prayed for dismissal of the suit.

6. The 3rd minor defendant represented by court guardian Mr.C.A.Ravikumar filed written statement admitting the case of the plaintiff and also the payment and prayed that the share of the third defendant has to be deposited in the court. Written statement of third defendant by court guardian is 07.03.2008. Defendants 1 & 2 filed written statement on 26.02.2009.

7. On appreciation of oral and documentary evidence, the Trial Court has framed as many as four issues -



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(i) Whether the Defendants 1 to 3 entered into an oral agreement for sale with the Plaintiff during the first week of September 2006 in respect of the suit 15 cents for a consideration of Rs.1,10,000/- per cent?

(ii) Whether the 1st defendant received a total advance of Rs.5,00,000/- by way of two DDs dated 18.05.2007 and 23.05.2007 out of the sale consideration for herself and on behalf of the Defendants 2 and 3?

(iii) Whether the plaintiffs are entitled to the relief of Specific Performance of agreement for sale as prayed for?

(iv) To what reliefs are the Plaintiffs entitled?

8. During the trial, on the plaintiffs' side, one of the Partners Mr.Manikandan was examined as PW1, one Ponnusamy was examined as PW2 and one S.Anandakumar was examined as PW3 and 22 documents were marked as Ex.A1 to Ex.A22. On behalf of the defendants, the 1st defendant was examined as DW1 and 20 documents were marked as Ex.B1 to Ex.B20 and the Bank Manager of Bank of India was examined as DW2.

9. On consideration of both oral and documentary evidence, the Trial



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Court accepted the case of the defendant and rejected the case of the plaintiff and non-suited the plaint. Hence, the present appeal.

10. Heard the argument of Mr.N.Sridhar, the learned counsel for the appellant for two hearings and the matter was posted for arguments of the counsel for the respondent/defendant. After adjournment, Mr.D.Krishna Pradeep, learned counsel for the respondent reported that he has no instruction from the client. Hence, the High Court Legal Services Authority has been directed to appoint a legal-aid counsel from the senior panel who is well versed in civil law. Accordingly, Ms.V.Ambika, was appointed as legal aid counsel from the senior panel for High Court and her argument was heard on 01.07.2024. After hearing the argument of Ms.V.Ambika, legal aid counsel, this Court thought it fit to seek the assistance of a Senior Counsel and Mr.R.Singaravelan, Member of the Tamil Nadu Senior Advocate Forum for providing legal-aid, volunteered to argue the case on behalf of the respondent/defendant and accordingly heard his arguments on 02.07.2024 and 16.07.2024.

11. After hearing the rival submissions and perusing the records,



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following points arise for determination.

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- (i) Whether Ex.A4-Will said to have been executed by Marathal is true, valid and genuine ?
- (ii) Whether under Ex.A4, Saraswathy is entitled for 15 + 18 cents (share of her mother under Ex.A4-Will) ?
- (iii) Whether is any oral family partition between legalheirs of Marathal ?
- (iv) Whether there is an oral agreement between the parties on 05.09.2006, as pleaded by the plaintiff is true ?
- (v) Whether the delivery of possession by the defendant to the plaintiff is true or not?
- (vi) Whether Ex.A17 deposit of DD for Rs.2 Lakhs was not deposited by the defendant or deposited by the defendant, as pleaded by the plaintiff ?
- (vii) Whether it is true that Ex.A18 was deposited by the defendant ?



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(viii) Whether the plaintiff is ready and willing to perform his part of the contract as contemplated under Section 16(c) of C.P.C ?

(ix) Whether the plaintiff is entitled to specific performance of suit sale agreement ?

(x) The judgment and decree of Lower Court is sustainable in law ?

(xi) To what other relief ?

12(a) The learned counsel for the appellant contended that the entire case of the plaintiff / appellant is based upon four factual positions (viz.) that Ex.A4-Will which was executed by Marathal (mother) in favour of one of her daughter Saraswathy which was disputed by the 1st defendant (landlady). After the death of Periakutty Gounder, mother filed partition suit against her daughter and sons viz., Saraswathy, Periyakotti, Thulasiammal along with the legal representatives of the Subbiah and preliminary decree was passed and in the final decree application under Ex.A21 and Ex.A22, the defendant has admitted the execution and genuineness of the Will (by the Marathal – mother). As per Ex.A21, the share devolved upon Marathal namely 15 cents +



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3 cents (on the death of Subbiah in toto, 18 cents) has been devolved upon one of the daughter Saraswathy, thereby Saraswathy is entitled for 15+18=33 cents.

12(b) With regard to the attestor of Ex.A4-Will, since the contesting respondent herself by way of affidavit filed before the Competent Court in the final decree proceedings having sought for passing of final decree based upon Ex.A4-Will, she cannot go back and it has also been brought to my notice that she filed I.A.No.107 of 2006 in O.S.No.287 of 1997 (Ex.A22) which was dismissed for default and hence filed another I.A.No.17 of 2014 for final decree partition, however chosen to raise the plea of oral partition was disputed, her transfer application being filed. It was transferred to the very same Court which tried the suit.

12(c) However for the reasons best known, the learned Judge who tried this case has not taken up the final decree case. Only after the disposal of the present suit, the very same I.A.No.17 of 2014 was dismissed for modification of the preliminary decree filed by the first defendant on the ground oral



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partition has already been taken and based upon the oral partition plea raised by the very same party. Preliminary decree was passed and therefore, the same cannot be allowed to re-open and accordingly, I.A.No.17 of 2014 was dismissed on 23.04.2019.

12(d) On the point of oral agreement of sale, the learned counsel for the appellant has relied upon Exs.A11, A12 & A13 - sale deeds executed by the legal representatives Subbiah, Saraswathy, Thulasiammal and also relied upon the oral evidence of P.W.2 and P.W.3 who are the son of the Subbiah and daughter of Saraswathy Ammal and also relied upon the map attached to the above said documentary evidence Ex.A11, Ex.A12, Ex.A13 and Ex.A14 whereby, with specific boundaries lands have been sold, that there was a partition with specific boundaries and vendors are in possession and the land was sold under the above said documents.

12(e) On the point of oral agreement between the parties, the second limb of the argument of the appellant/plaintiff is based upon Exs.A17 and A18 with regard to deposit of Demand Draft for a sum of Rs.2 lakhs and R.3 lakhs



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and the defendant has filed balance sheet and pass book of Central Bank of India in respect of the plaintiff and not that of the defendant and drawn my attention to Page Nos.295 and 298 of the said pass book to show that the demand drafts have been emanated from the account of the plaintiff.

12(f) The learned counsel for the appellant further contended that admittedly Marathal died on 29.01.2005 and the date of agreement is 05.09.2006. The period of completion is 4 months, amount was credited to the account of the defendant on 19.05.2007. The suit was filed on 01.08.2007. A sum of Rs.2 lakhs and Rs.3 lakhs was credited on 23.05.2007. Ex.B4 notice was issued on 21.04.2009 namely, 11 months after the filing of the suit and it is almost one year after the credit of the amount. Ex.B2 was issued on 23.06.2008.

12(g) The learned counsel has relied upon the Supreme Court Judgment in C.A.No.9947 of 2014 (arising out of S.L.P(c)No.19555 of 2012) Zarina. Siddiqui Vs.A.Arumugam] and also contended that both in the pleadings as well as in the evidence, he had pleaded that he is ready with money and



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having instituted the suit within two months from the date of the expiry of the 4 months time fixed in the agreement, the plaintiff has demonstrated “ready and willingness” on their part and he is a “man of means” which was not disputed by the D.W.1. either in pleading or in witness, that will be discussed infra.

13. The learned Senior Counsel appearing for the respondent relied upon the decision of the Hon'ble Supreme Court and High Court touching upon the standard of proof for the plea of oral partition, burden of proof for the plea of part performance of the suit sale agreement said to have been given as a part performance of the suit sale agreement and necessary pleadings, evidence and burden of proof that are required to prove the readiness and willingness on the part of the plaintiff and also legal issues touching upon the execution and genuineness of Ex.A4-Will are discussed infra.



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14. The admitted factual matrix of the case are (at the risk of repetition, however for the sake of continuity)

14(a) The suit property measuring 15 cents with a larger extent of 75 cents originally owned by Peria Gounder as per the sale deed dated 12.09.1938 and the said Peria Gounder died intestate on 07.02.1963 leaving behind his Wife Marathal, his daughters, Periakutty @ Ammani Ammal viz., the first defendant herein, Chinnammal, Thulasiammal and Saraswathy and only son Subbaiyan @ Subbanna Gounder to succeed to his estate. The further contention in para 5 of the plaint is that after the death of Peria Gounder, his wife Marathal filed a suit on 21.11.1989 and subsequently renumbered as O.S.No.287 of 1997 on the file of the District Munsif of Palladam against Periakutty @ Ammaniammal, Saraswathy, Thulasiammal and his son Subbaiyan in G.S.No.141/4B and 4D which includes the suit property and another property of 3 acres in G.S.No.567/2B into 25 shares and for the allotment of 6/25 shares to her. Subbaiyan died on 01.04.1995 and his legal heirs viz., his wife Chinnammal, his sons Veluswamy, and Ponnuswamy and daughter Sundarambal were impleaded as parties in the above said suit. Necessary preliminary decree was passed on 18.03.2004

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directing the division of the properties into 25 equal shares and for the allotment of 6 shares to Marathal..

14(b) According to the 1st defendant, the extent of 75 cents originally belonged to the father of the 1st defendant viz. Peria gounder. After the death of Peria gounder, the 1st defendant's mother, Marathal filed a suit for partition before the Sub Court, Tiruppur, and subsequently it was transferred to the District Munsif Court, Palladam in O.S.No.287 of 1997. The said suit was for partition in respect of the above mentioned 75 cents and also in respect of another property. In the said suit, necessary preliminary decree was passed on 18.03.2004 by allotting 6/25 shares to Marathal, namely, the mother of the 1st defendant. After the death of the Marathal, the mother's share devolved upon her children and as such, the 1st defendant's share got augmented to 26/100 shares which comes about 18 cents. The alleged Ex.A4-Will of mother was disputed by one of the daughter viz. Ammaniammal @ Periakutty

14(c) The inter party relationships are admitted . The plaint proceeds on the basis that Ex.A4-Will was executed by Marathal.

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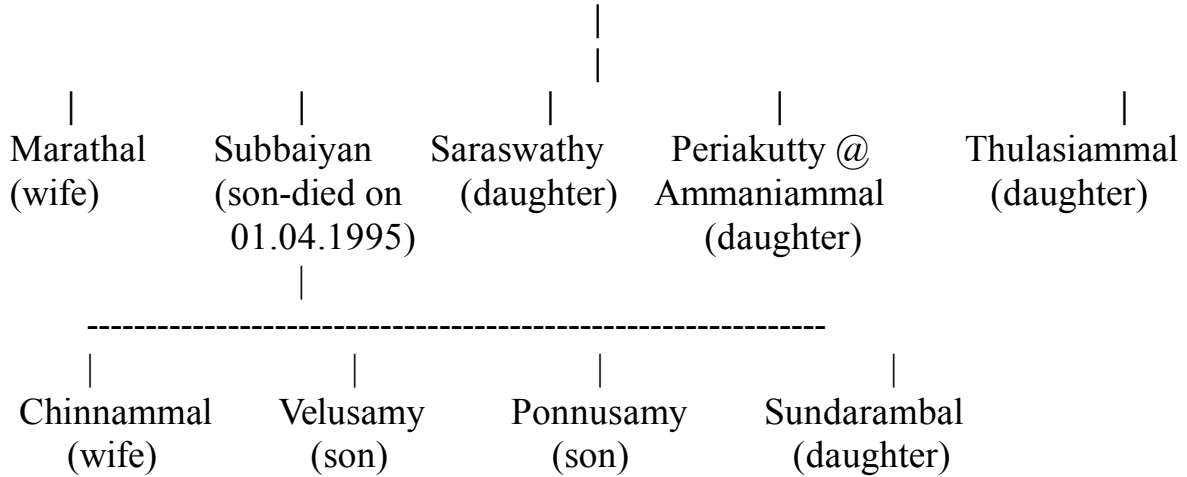
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GENEALOGY TREE

Periakutty Gounder (died)



15. The larger extent of 75 cents originally belonged to Peria Gounder by virtue of sale deed and he died intestate on 07.02.1963. The mother filed partition suit on 21.11.1989 before Sub Court, Tiruppur. On transfer to the District Munsif Court, Palladam, it was re-numbered as O.S.No.287 of 1997. One of the son of Marathal died on 01.04.1995 and his legalheirs Chinnammal, Velusamy, Ponnusamy and Sundarambal were impleaded in the above suit. Preliminary decree was passed on 18.03.2004 whereby 6/25 share was allotted to each party . The mother (Marathal) died on 29.01.2005. Upto this division of property, there is no dispute.



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16. According to the plaintiff, after passing of the preliminary decree on 18.03.2004, 6/25 shares were allotted to each branch; there was an oral partition among the siblings of said Peria Gounder and Marathal whereby the properties have been divided by metes and bounds . Before the original family partition or arrangement, Marathal, during her lifetime had executed Ex.A4-Will in favour of one of her daughter viz. Saraswathi, whereby apart from the initial share of 15 cents, 18 cents of Marathal was also added to the share of Saraswathi (in total 33 cents). The legal heirs of Subbiah are entitled to 12 cents and 3 cents was given to the Marathal increasing 15 cents + 3 cents = 18 cents. Under Ex.A4-Will dated 31.01.1994, Marathal had bequeathed her 6/25 shares in favour of her daughter Saraswathi thereby on her death on 29.01.2005, the share and extent of land of Saraswathi (increased from) from 15 cents to 33 cents.

17. The first defendant Ammaniammal @ Periakutty denied the execution of Will and also denied the oral partition . She further denied the



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alleged oral agreement between the plaintiff and the defendant and also denied the alleged handing over of possession as part performance of contract. She also denied the further payment of sale consideration of Rs.2 lakhs and Rs.3 lakhs by way of demand drafts during May 2007 and the same is discussed infra in chronological order.

Point Nos.(i) & (ii)

(i) Whether Ex.A4-Will alleged to have been executed by Marathal is true and genuine?

(ii) Whether under Ex.A4, Saraswathy is entitled for 15 + 18 cents = 33 cents (share of her mother under Ex.A4-Will), as pleaded by the plaintiff is true ?

18. Mr.R.Singaravelan, learned Senior Counsel for the respondent would contend that the requirement of law on this point is no longer integra and the same has been dealt with by the Hon'ble Supreme Court in the decision reported in **2010 (5) SCC 274 [S.R.Srinivasa and others vs. S.Padmavathamma]** wherein the Hon'ble Supreme Court has held as follows:



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“ It is undoubtedly correct that a true and clear admission would provide the best proof of the facts admitted. It may prove to be decisive unless successfully withdrawn or proved to be erroneous. The legal position with regard to admissions and their evidentiary value has been dilated upon in many cases. On the basis of law stated therein, it is not possible to agree with the High Court that there was no need for independent proof of the will, in view of the admissions made in the subsequent suit”.

19. Saraswathy is the sole beneficiary under the Will. Admittedly she is one of the daughter of Marathal who was the testatrix under the Will and she was under custody of the daughter till her death, as admitted by D.W.1 in the cross examination. Section 63 of the Indian Succession Act requires Will to be attested and it cannot be used as an evidence until one attesting witness has been called for the purpose of proving its execution, As required by Section 68 of Indian Evidence Act, one attesting witness has to be examined for the purpose of proving the execution, if there be an attesting witness alive, he has to be examined subject to cross examination. Ex.A4 is true copy of the Will. Plaintiff has projected himself as an agreement holder. The defendant has



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chosen to deny the Will in the suit. As stated supra, passing of the preliminary decree in the partition suit in O.S.No.287 of 1997 was admitted by the defendant. Ex.A4 was projected as if it was said to have been come into existence during the pendency of the suit. Marathal died on 29.01.2005. Date of death of Marathal is admitted by the defendant. As stated supra, Ex.A4 Will was disputed.

20(a) The learned counsel for the appellant drew my attention to Exs.A21 and A22. On perusal of Exs.A21 and A22, I find that it is an affidavit and petition filed in the very same partition suit filed by Marathal in the O.S.No.287 of 1997. It is a petition filed under Order XX Rule 18 and Section 151 of C.P.C filed by 2nd defendant therein who is the first defendant herein. The said I.A 107 of 2006 is filed under the above section.



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20(b) In Ex.A22 at Para 3, the defendant has stated “that subsequent to passing of the preliminary decree, her mother had bequeathed her share for 6/25 in the suit property in favour of Saraswathy by way of registered Will dated 31.01.1994. Thus as per the preliminary decree, she is entitled for 1/5th share”.

20(c) “In paragraph 4, she has further stated that after passing of the preliminary decree, her mother died on 29.01.2005. Thus, she is entitled for 1/5th share in the suit property and hence it is necessary to pass supplementary preliminary decree for partition and separate possession allotting 1/5th share to her in the suit property”.

20(d) Those affidavits has been sworn before her Advocate on 19.01.2006. Ex.A21 is the petition, while Ex.A22 is the affidavit of the party. Lower court records reveal that after service of some of the respondents, the matter was posted for taking steps for some of the respondents by substituted of service and it appears that the said petition was dismissed for default for not taking steps for some of the respondents therein on 13.12.2007.



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21. At this juncture, it remains to be stated that from the typed set of Court records pertaining to I.A.No.17 of 2014 in O.S.No.501 of 2013 (I.A.No.251 of 2009 in O.S.No.287 of 1997) filed by the first defendant before the IV Additional District Court, Coimbatore is also enclosed.

22. Thus, it is clear that even in 2006, the defendant was aware of the Will executed by the first respondent in favour of the second respondent on 31.01.1994. It is also clear that the defendant has accepted the Will and has sought re-allocation of her share of 1/ 5th in the property to her by way of such petition. The Sworn in affidavit filed by the defendant in I.A No.107 of 2006 cannot be construed to be a just passing comment, but it shall be construed to be a statement given on oath. Hence, it assumes sanctity and the defendant cannot be permitted to deviate from the same after almost 5 years by way of this petition filed in 2011 originally.

23. The learned counsel for the appellant, relying upon Exs.A21 and A22, would contend that in the affidavit in I.A.No.107 of 2006 filed in



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partition suit in O.S.No.287 of 1997, the very same defendant has filed a sworn affidavit admitting the execution of the Ex.A4-Will by Marathal and as per the affidavit, he has also admitted the genuineness of the Will and claimed benefit of the Will however to the limited extent, as contended by the plaintiff is found force.

24. Per contra, this Court has noticed that in Para 13 of the written statement, the defendant raised a different stand namely after the death of Marathal, the mother's share, devolved upon her children and as such, the first defendant's share got augmented to 26/100 which comes about 18 cents and not 15 cents as projected by the plaintiff.

25. After perusing the affidavit and petition filed in the very same partition suit under Exs.A21 & A22, I find that the very same defendant herein had admitted not only the execution of Ex.A4-Will by her mother Marathal but also admitted the genuineness of the said Will and claimed the benefit and prayed for final decrees, as per the terms and recitals of the Will. The said I.A.No.107 of 2006 was dismissed for default on 13.12.2007.



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26. Unlike other documents, the Will speaks from the death of the testator and therefore the maker of the Will is never available for deposing as to the circumstances in which the Will came to be executed. This aspect introduces “the element of solemnity” in the decision of the question, whether the document propounded is proved to be the last Will and Testament of the testator . Normally, the onus always lies on the propounder can be taken to be discharged on proof of the essential facts which go into the making of the Will.

27. It remains to be stated that when the testator breath last and he dies, it gives birth (oxygen) to the Will and recitals therein speaks from the date of the death of the testator. As observed earlier, under Exs.A21 and 22, affidavit and petitions, petition for passing of supplementary decree for partition in I.A.No.107 of 2006 in O.S.No.287 of 1997, I find that from the recitals that there is a true and clear admission as to the recitals of the Will, which provides the best proof of facts admitted.



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WEB COPY 28. In **Narayan Bhagwantrao Gosavi Balajiwale v. Gopal Vinayak**

Gosavi, it was observed as follows :

“11. An admission is the best evidence that an opposing party can rely upon, and though not conclusive, is decisive of the matter, unless successfully withdrawn or proved erroneous.”

29. In **Nagindas Ramdas v. Dalpatram Ichharam**, it has been observed as follows :

“27. Admissions, if true and clear, are by far the best proof of the facts admitted. Admissions in pleadings or judicial admissions, admissible under Section 58 of the Evidence Act, made by the parties or their agents at or before the hearing of the case, stand on a higher footing than evidentiary admissions.

30. A thing admitted in view of the Section 58 of the Indian Evidence Act need not be proved. However, it is open to the party who is admitting the execution of the Will to explain under what circumstances the same had been



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made or it was made under a mistaken belief or to clarify one's stand, inter alia, in relation to the extent or effect of such admission.

31. It is one thing to say something that without resiling from an admission and it is another thing to say that a person can be permitted to totally resile therefrom. In this regard, the Hon'ble Supreme Court in **Gautam Sarup v. Leela Jetly** reported in **1974 (1) SCC 242** has held two propositions of law which are extracted as follows:-

28. a categorical admission cannot be resiled from but, in a given case, it may be explained or clarified. Offering explanation in regard to an admission or explaining away the same, however would depend upon the nature and character thereof. It may be that a defendant is entitled to take an alternative plea. Such alternative pleas, however, cannot be mutually destructive of each other.

and thus the duty is cast upon the Court to ascertain whether the admission is only about making of the Will and not the genuineness of the Will. If the admission is only about making of the Will, then it is for the party who claims



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right based upon the Will to prove the genuineness of the Will. However, if party having admitted both making of the Will as well as the genuineness of the Will, they cannot be allowed totally resiling from the circumstances. As extracted supra, the said fact would depend upon the nature and character of the evidence that is available before the court.

32(a) The affidavit filed by the 1st defendant under Exs.A21 and A22 clearly speaks about the admission of the execution of Ex.A4- Will as well as the genuineness, as could be seen from the fact that she claims benefit under the Will by treating the same as genuine and seeking for passing final decree without any augmentation of share. Hence, on the facts available under Exs.A21 and A22, I find that the admission is about both, viz. making of the Will and genuineness of the Will.

32(b) During the cross examination of DW1, she was confronted with, Exs.A21 and A22 wherein she spoke “the language of silence” and on the later point of cross examination, she deposed that she is not aware of the same. Hence, I find that she is refusing to answer upon Exs.A21 and A22.



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Her own evidence in the very same partition suit would demonstrate that the defendant is changing her stand thereby she stands exposed.

32(c) Thus, in view of Exs.A21 and A22 coupled with demeanor of witness during cross examination touching upon Exs.A21 and A22 and the stand adopted by the very same defendant in the said I.A, goes to show that she had admitted both execution of the Will as well as genuineness of the Will. Hence, it falls under the category of admission in full, as stated by the Hon'ble Apex Court in **Goutam sarup's case**.

32(d) In view of the above, I have no hesitation to come to the conclusion that the statement contained in Exs.A21 and A22 and the cross examination of DW1 would amount to admission with regard to due execution and genuineness of the Will dated 31.01.1994. Hence, in view of the judicial pronouncement as to the proof of evidence, as to the standard of proof and the burden of proof required to prove the Ex.A4-Will are found to have been satisfied.



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33. At the risk of repetition, however for the sake of clarity on the facts that the defendant adduced before the court by way of affidavit, attested by her own advocate filed in the court in I.A. No.107 of 2006 in Exs.A21 and A22 and the answer of DW1 in the cross examination, this court comes to the conclusion that DW1 herein has admitted the execution of Ex.A4-Will in respect of both aspects namely, execution of the Will, i.e. the contents of the Will and the genuineness of the Will. Hence, she cannot now resile from an admission adduced before the Competent Court in the very same partition proceedings. Hence, on the facts and circumstances of the instant case, this case falls under Section 58 of the Indian Evidence Act, that a thing admitted need not to be proved and thus, as against the first defendant, Ex.A4-Will was already admitted by her, need not be proved. Hence, the contra finding given by the learned District Judge is hereby set aside and it is held that Ex A4 is proved in the manner known to law and Ex.A4-Will is true and genuine binding upon the first defendant and she is estopped from challenging the very same Will in a different proceeding.



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34. With regard to the admission of the Will, non-examination of the testator in normal course is hit by Section 68 of Indian Succession Act. It is the proposition of law that scribe and the Sub Registrar who has drafted the Will and registered the Will respectively does not fall under the category of attester. When the attester of the Will has admitted as to the execution and genuineness, it takes the place of the proof, as per the judgement of the Hon'ble Supreme Court in *S.R.Srinivasa's case*, as cited supra.

35. In view of the discussion in the preceding paragraphs, this court has held that Ex.A4-Will is true and genuine and the last Will of the testator Marathal, by operation of law, one of her daughter Saraswati is entitled for 18 cents (the share of marathal devolving upon the Saraswathi) and therefore Saraswathi, one of the legalheir of Marathal is entitled for 15 cents + 18 cents (share of her mother as per Ex.A4-Will). Hence, these two points are answered accordingly in favour of the appellant in affirmation.



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Point No.(iii): Whether there is an oral agreement between the parties

on 05/09/2006 as pleaded by the plaintiff ?

36. The plaint proceeds on the specific plea that there was an oral family partition between the parties on 05.09.2006. Based upon the said oral partition family partition between the family members and on the strength of Ex.A4-Will, the parties have agreed to take the share on the ratio of Saraswathi (15 cents + 18 cents), Periakutty @ Ammaniammal 15 cents, Tulasiammal 15 cents and legal heirs of deceased Subbaiyan 12 cents and it was demarcated and the oral partition has taken place on 19.02.2005 with respect to the extent of 75 cents comprised in G.S No.141/4B and 4D. The defendant, at Paragraph 9 of the written statement denied the oral family partition between the parties on 05.09.2006.

37. Heard the learned counsel for the appellant and the learned Senior Counsel for the respondent.



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38. The oral evidence of PW1, one of the partner of the plaintiff and Ponnusamy, brother's son of DW1 was examined as PW2 and one Anandakumar, who is the sister's son of DW1 was examined as PW3. Exs.A11 to A15 were marked. Evidence of P.W.1 and P.W.2 were pressed into service. Both PW2 and PW3 who are none other than the brother's son and sister's son of D.W.1 have deposed that there was an oral family partition after the death of Marathal and the family members have divided the property as mentioned in the Will and as per the preliminary decree along with the share allotted to the mother as per Ex.A4 Will, they have divided the property according to the extent and they have sold their respective shares along with other persons under Exs.A12, A13 and A14 on various dates.

39(a) On perusal of Exs.A12, A13 and A14 along with the oral evidence of PW1, PW2 and PW3, this Court finds that except 15 cents, the suit property of the other members of family of Marathal and Peria Gounder has been purchased by the plaintiff based upon the oral agreement. The same will be discussed infra.



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39(b) Per contra, the learned Senior counsel for the defendant would state that there is no oral family arrangement. At this juncture, orders have been passed in I.A.No.17 of 2014 in O.S.No.501 of 2013 (I.A.No.251 of 2009 in O.S.No.287 of 1997) filed by the first respondent before the IV Additional District Judge, Coimbatore, assumes significance.

40(a) It is submitted across the Bar that there was a transfer O.P.No.128 of 2011 on the file of Principal District Court, Coimbatore filed by the 1st respondent, in and by an order dated 05.07.2011, the present specific performance suit along with final decree proceedings in O.S.No.287 of 1997 were ordered to be tried along with. For the reasons best known, though both the cases were made over to the IV Additional District Court, Coimbatore, the Court has not followed the transfer order passed in Tr.O.P.128 of 2011 dated 05.07.2011. Had there been a joint trial or simultaneous trial, these types of divergent orders could not have come. When the Principal District Judge, Coimbatore passes an order for joint trial, it is incumbent upon the Additional District Judge to try both the cases jointly.



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Instead of doing so, as per judicial order in transfer OP, it appears that the partition suit was kept aside and this specific performance suit, trial was conducted and concluded. Such a practice adopted by the learned District Judge is hereby deprecated.

40(b) Be that as it may, the final orders passed in I.A No.17 of 2014 in O.S No.501 of 2013 (original number was re-numbered after transfer). The final decree proceedings on the file of District Munsif Court was transferred to District Court for joint trial however the same was not conducted wherein the petition has been filed to pass a fresh preliminary decree by dividing the property to an extent of 75/100 and allot 26 shares to her.

40(c) After hot contest, it appears that RW2 one of the attestor of the Will executed by Marathal wife of Periya Gounder was examined, who had deposed that, after reading over the contents by Advocate Venkatesa Murthy to the testatrix Marathal, who after hearing the contents of the Will affixed her left thumb impression and after that another witness Ramasamy had attested the same. Ex.A4-Will herein, whose certified copy was marked by issuing



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supina to the Sub Registrar to produce the registered copy of the Will that appears to have been marked as Ex.R3 through RW3 - Junior Assistant from SRO, Coimbatore.

40(d) The learned District Judge has commented upon the attitude of the present defendant in filing different kind of affidavit after coming to know about the sale of other parts of the land by co-sharers to the plaintiff and that petition filed for passing fresh preliminary decree was rejected on the ground that there was already an oral partition among the family members and there is an amicable division of the properties with specific boundaries and selling the same in favour of the 9th respondent therein (namely the plaintiff herein) cross examination of DW1 has also been acted upon.

40(e) A finding has also been rendered that the sale deed executed by the respective share holders to the plaintiff herein and further found that there is no undivided property available for partition to be allocated specific share of 26/100, especially when the property has been already divided by metes



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and bounds through amicable arrangement among the co-sharers and the said division itself has been acted upon by all the heirs of Marathal and Peria Gounder except the petitioner herein, by selling their respective shares to the 9th respondent.

40(f) It is further observed that when no undivided property is available and when the division has taken place amicably by metes and bounds and the same has also been acted upon, the petitioner/defendant herein is not entitled to the relief of partition either by way of fresh preliminary decree or a final decree, especially when earlier preliminary decree dated 13.08.2014 is neither cancelled nor set aside, but has been given effect to by all the parties except the petitioner/defendant herein and the petition was dismissed on 23.04.2019.

41. It is submitted across the Bar that as against the said order, no appeal has been filed before the higher forum.



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42. The Hon'ble Supreme Court in Jaiprakash Gupta (D) through

Lrs.Vs. Riyaz Ahamad and ors. reported in 2009 10 SCC 197 has held as follows:-

19.The normal rule is that in any litigation the rights and obligations of the parties are adjudicated upon as they obtain at the commencement of the lis. But this is subject to an exception. Wherever subsequent events of fact or law which have a material bearing on the entitlement of the parties to relief or on aspects which bear on the moulding of the relief occur, the court is not precluded from taking a 'cautious cognizance' of the subsequent changes of fact and law to mould the relief (emphasis supplied)

18. Again in *Pratap Rai Tanwani v. Uttam Chand* MANU/SC/0741/2004 : 2004 (8) SCC 490, this Court also held that subsequent developments can be taken into consideration to afford relief to the parties, provided only when such developments had a material impact on those rights and obligations. (emphasis supplied)

20. It also reminds us of a celebrated Judgment of a Full Bench decision of the Nagpur High Court in *Chote Khan v. Mohammad Obedalla Khan* MANU/NA/0115/1953: AIR 1953 Nag 361 in which the view of the Court to take note of the subsequent developments specially at the appellate stage was taken up for consideration. Hidayatulla, J (as His Lordship then was) held as under :



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on a review of judicial opinion, that an action must be tried in all its stages on the cause of action as it existed at the commencement of an action. No doubt, Courts 'can' and sometimes 'must' take notice of subsequent events, but that is done merely 'inter partes' to shorten litigation but not to give to a defendant an advantage because a third party has acquired the right of the plaintiff. (emphasis supplied)

21. In view of the discussions made herein above, it is therefore, a settled proposition of law that subsequent developments of fact or law which have a material bearing on the entitlement of the parties to relief or on aspects which bear on the moulding of the relief occur, the Court, even at any stage of the proceeding, is not precluded from taking a cautious cognizance of the subsequent developments of fact and law to mould the relief.

43. Thus, this Court finds that, for the reasons best known, both the cases viz. partition suit and specific performance suit were not conducted jointly, inspite of specifically ordered in the transfer O.P. Further, for the reasons best known, the application filed by the 1st defendant for passing a fresh preliminary decree was kept at dark and a specific performance suit has been concluded and orders have been passed. Thereafter, it appears that the petition filed by the defendant has been taken up and she has faced rejection on the ground that already an oral family partition had taken place and parties



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have been allotted the respective shares with metes and bounds and the co-sharers of the property has also sold the same to the plaintiff herein and a categorical finding was rendered by the trial Court that no undivided property is available and division of property has already taken place by metes and bounds in the oral family partition and the same has been acted upon and other co-sharers have also sold the property and after filing of the specific performance suit, the defendant has come forward with this I.A. The above said order passed by Trial Court, *inter se* parties are the very same subject matter of lis, and has also attained finality, in the absence of any appeal. Thus, the ratio laid down in ***Jaiprakash Gupta's case*** is squarely applicable to the facts of this instant case. Thus, I find, once again that the defendant is in the habit of changing the stand in one forum to another forum whereby she stands exposed in her misadventure.

44. To sum up, following the judgment of the Hon'ble Supreme Court and also the application of the defendant was dismissed as early as on 23.04.2019 holding that there was an oral family partition among the family



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members by metes and bounds, the plea raised by the plaintiff herein was upheld and answered in affirmation in favour of the plaintiff.

45. The plaint proceeds on the specific plea of oral agreement of sale and based upon such an alleged oral agreement of sale, the plaintiff was let in possession by the defendant. The defendant in the written statement at Para 20 has specifically denied the same.

46. Heard the argument of the respective counsels.

47. On the point of oral agreement of sale the following proposition of law are kept in mind.

(a) There is no dispute that even a decree for specific performance can be granted on the basis of oral contract. Lord Du Parcq in a case (AIR 1946 Privy Council) observed, while deciding a suit for specific performance, that an oral contract is valid, binding and enforceable. “A decree for specific performance could be passed on the basis of oral agreement”. This view of a Privy Council was followed by this Court in the case of Koillipara Sriramulu vs. T.Aswatha Narayana, AIR 1968



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Sc 1028, and held that an oral agreement with a reference to a future formal contract will not prevent a binding bargain between the parties.

(b) However, in a case where the plaintiff come forward to seek a decree for specific performance of contract of sale of immovable property on the basis of an oral agreement or a written contract, heavy burden lies on the plaintiff to prove that there was consensus ad idem between the parties for the concluded agreement for sale of immovable property. Whether there was such a concluded contract or not would be a question of fact to be determined in the facts and circumstances of each individual case. It has to be established by the plaintiffs that vital and fundamental terms for sale of immovable property were concluded between the parties.

(c) That where the plaintiff brings a suit for specific performance of contract for sale, the law insists upon a condition precedent to the grant of decree for specific performance: that the plaintiff must show his continued “readiness and willingness” to perform his part of the contract.

(d) Nevertheless once an agreement to sell is legal and validly proved and further requirements for getting such a decree are



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established, then the Court has to exercise its discretion in favour of granting relief for specific performance.

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48. In connection with the above point for consideration as to the alleged oral agreement of sale between the plaintiff and the defendant, the plaintiff, both in his pleadings as well as evidence as P.W.1 would categorically depose that amongst all the family members, they have entered into an oral agreement of sale and further, in furtherance of the oral agreement of sale, except the defendant, the other three branches of the family have executed sale deeds under Exs.A11 & 12 dated 11.09.2006 and Ex.A13 dated 28.02.2007 wherein there is a specific recital found to the effect that the plaintiff has entered into an oral agreement of sale with all the four branches of the persons and they also executed sale deeds as stated supra.

49(a) In connection with Ex.A11, P.W.2, the vendor (brother's son of D.W.1) was examined so also P.W.3 (sister's son of D.W.1) was examined. D.W.1 (landlady) in the witness box denied any such oral agreement between the parties. The trial Court accepted the case of the defendant and rejected the case of the plaintiff, as it viewed P.W.2 and P.W.3 are the interested witnesses.



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49(b) This Court has given its anxious consideration for the rival submissions made on behalf of the parties. It is axomatic that decree for specific performance can be granted on the basis of oral contract as held in the Privy Council in AIR 1946 and the very same proposition of law has been accepted by the Hon'ble Supreme Court in the case of ***Koillipara Sriramulu vs. T.Aswatha Narayana***, the standard of proof and burden of proof and the above plea has also been extracted in the preceding paragraphs.

50. The conduct of the party plays a vital role in deciding the issue whether there was an oral agreement of sale. Needless to say, the specific performance suit seeking for a direction for execution of the sale deed pursuant to an agreement is discretionary relief. When the terms and conditions of the sale agreement are reduced into writing, “the written instrument would be the best piece of evidence”.

51. In a suit for specific performance of sale of an immovable property based upon an oral agreement, the plaintiff has to specifically plead in respect



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of essential terms of the contract including the description of the property, date and place of execution, consideration for sale, any advance amount, delivery of possession, if so and title deeds in respect of the property and encumbrance that existed upto the date of the agreement and to adduce evidence strictly briefing the same.

52. In the absence of necessary and requisite pleading and in insufficient or lack of piece of evidence would suffice to reject the relief of the plaintiff. The oral testimony adduced by the plaintiff has to be necessarily subjected to a careful scrutiny. In such a case, the circumstances would indicate the genuineness or otherwise of the agreement, apart from establishing the court in assessing the veracity of the witness examined.

53. PW2 and PW3 who are the brother's son and sister's son of DW1 respectively have spoken about the oral agreement entered into by the plaintiff along with the branches of the family and consequently they also executed the sale deeds. After the sale deeds, Exs.A11,A12 and A13 came into force, the defendant as DW1 refused to execute the sale deeds and it is the evidence of



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PW2 and PW3 that the defendant has demanded more amount for more extent of land, dehorse the Ex.A4-Will. For the reasons stated in the preceding paragraphs, this Court has already upheld the death of mother, execution and genuinity of Ex.A4-Will and it is a close door of negotiation among the family members belonging to all the branches, with the plaintiff assumes significance.

54. The defendant has denied the existence of any oral agreement. During the cross examination, DW1 in connection with the alleged demand drafts marked as Exs.A17 and A18, have deposed that those demand drafts might have been deposited by the land brokers between the parties. For the reasons best known, the said brokers were not examined by either of the parties. Merely because PW2 and PW3 happens to be the relatives of DW1, the same is not a ground to term them as interested witness, in the absence of anything elicited in the cross examination of PW2 and PW3. On a combined reading of the chief and cross examination of PW2 and PW3, I find that their evidence is clear and cogent with the version of PW1. There is nothing in the cross examination of PW 2 and PW3 to suggest that they are not speaking the



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fact, except the suggestion that since the defendant was not co-operating, they are deposing against the defendant.

55. In view of the oral evidence of PW2 and PW3, coupled with documentary evidence of Exs.A11, A13 & A14, coupled with Ex.A14 and A15, this Court is of the considered view that there was an oral agreement of sale not alone with the defendant but also with the other branches of Thulasiammal, Saraswati and Chinnamal in favour of the defendant and their evidence is sufficient on the scale of burden of proof and accordingly I have no hesitation to hold that there was an oral agreement between the parties, as pleaded by the plaintiff and the said pleadings have been duly corroborated by the evidence of PW2 and PW3 along with Exs.A11 to A15. The Contra finding rendered by the Trial Court is hereby vacated and set aside and further held that the plaintiff has proved the pleading with regard to the oral agreement of sale with the defendant on 05.09.2006.

56. In view of the decision of the Hon'ble Supreme Court in ***Koillipara Sriramulu's case*** cited supra, decree for specific performance can be granted



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on the basis of oral contract, subject to the conditions as contemplated under Section 16(c) of the Specific Relief Act. When the plaintiff has come forward to seek a decree for specific performance of contract of sale of immovable property on the basis of an oral agreement or a written contract, heavy burden lies on the plaintiff to prove that there was consensus ad idem between the parties for the concluded agreement for sale of immovable property. Whether there was such a concluded contract or not would be a question of fact to be determined in the facts and circumstances of each individual case. It has to be established by the plaintiffs that vital and fundamental terms for sale of immovable property were concluded between the parties.

57. In the instant case, this Court found that based upon the evidence of PW2 & PW3, Exs.A11 to A15, they passed the test of reliability and accordingly this Court has held that there is an oral agreement between the parties and also on the point of further payment, based upon the oral agreement in connection with further payment of sale consideration by way of demand draft was given to the defendant as could be seen in Exs.A17 & A18, assumes significance, which will be discussed infra .



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58. The next plea of the plaintiff is the delivery of possession by the defendant to the plaintiff as a part performance of the agreement between the parties. Section 53-A of the Transfer of Property Act deals with such a position.

59. The learned Senior Counsel Mr.R.Singaravelan appointed by the Court from the Tamil Nadu Senior Advocate Forum for legalaid, drew my attention to the judgment of the Hon'ble Supreme Court in *Moolchand Bakhru and another v. Rohan and others* reported in *2002 (2) SCC 612* wherein the Hon'ble Supreme Court has held that statutory requirement is on the “written agreement” only. The written agreement must have come into existence before the proposed vendee was put into possession of the property concerned.

60. Section 53-A provides that where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be



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ascertained with reasonable certainty and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract, then he is entitled to protect his possession in respect of the property of which he was put in possession in part performance of the agreement to sell.

61. The Hon'ble Supreme Court in *Nathulal v. Phool Chand*, reported in *MANU/SC/0492/1969: 1970 (2) SCR 854*, while interpreting Section 53-A culled out the following conditions to be fulfilled for making out the defence of part performance to an action in ejectment by the owner, as under:

"(i) that the transferor has contracted to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty;

(ii) that the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or



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the transferee, being already in possession continues in possession in part performance of the contract;

(iii) that the transferee has done some act in furtherance of the contract; and

(iv) that the transferee has performed or is willing to perform his part of the contract."

62. In *Sardar Govindrao Mahadik v. Devi Sahai*, reported in **MANU/SC/0253/1982 : 1982 (2) SCR 186**, it was reiterated that to qualify for the protection of the doctrine of part performance, it must be shown that there is an agreement to transfer of immovable property for consideration and the contract is evidenced by a writing signed by the person sought to be bound by it and from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty. The written agreement was *sine qua non* for the applicability of the equitable doctrine of part performance enshrined in Section 53-A of the Act.

63(a) In view of the decision of the Hon'ble Supreme Court in *Moolchand's case*, *Nathulal's case* and *Sardar Govindrao Mahadik's*



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case cited supra, this court found that the written agreement was *sin qua non*

for the applicability of the equitable doctrine of part performance enshrined in Section 53-A of the Act. However, in the instant case, there is no written agreement and it is only an oral agreement. Hence, in view of the decision of the Hon'ble Supreme Court cited supra, the statutory requirement to claim the benefit under Section 53-A of the Transfer of Property Act is a necessary requirement and oral agreement is not contemplated in the statute and there must be a written agreement to proceed delivery possession to the defendant by the plaintiff.

63(b) In the absence of any written agreement, which is *sine qua non* for the applicability of equitable doctrine of part performance enshrined in Section 53 of the Act, I have no hesitation to hold that one of the statutory fulfilment of the condition as laid down by the judicial decision cited above, this court holds that the plaintiff cannot be treated to be in possession of the property pursuant to the agreement of sale between the parties. Hence Ex.A20-photographs showing that the suit property, adjacent land of the appellant under Exs.A11 to A15 cannot advance the case of the plaintiff.



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64. Though during the discussion from the Trial court order, this court finds that an Advocate Commissioner was appointed to note down the physical features of the suit property in I.A.No.233 of 2007, for the reasons best known, the Advocate Commissioner's report and the rough sketch were not marked by none of the parties before the Trial Court.

65. Due to non-satisfaction of the statutory requirement, as discussed supra, this Court holds that the plea of part performance of agreement, possession was handover to the plaintiff hereby stands negatived, answered in negation against the plaintiff.



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66. Whether the plaintiff is ready and willing to perform his part of contract is the test to be satisfied by the plaintiff so as to make him eligible for specific performance of the suit sale agreement (Ex.B2)

67. In the suit for specific performance, based on oral agreement, for the reasons stated supra, oral agreement between the parties has been upheld in the preceding paragraphs, for the reasons recorded therein. The plea of readiness and willingness has been specifically pleaded in the plaint. In the written statement, the defendant had denied the plea of the plaintiff including the readiness and willingness.

68. With regard to readiness and willingness on the part of the plaintiff, PW1 has deposed in his evidence about his readiness and willingness and conveyed the same through PW2 and PW3, brother's son and sister's son of DW1 respectively and also filed Ex.A17-demand draft for Rs.2,00,000/- in favour of the defendant issued by Bank of India R.S Puram Branch, Coimbatore and another demand draft-Ex.A18 for Rs.3,00,000/- in



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favour of the defendant issued by Bank of India and Statement of Plaintiff's account for the period between May 2007 to January 2008 issued by Bank of India which was marked as Ex.A19. On that score, the defendant, as DW1 has marked Ex.B19-copy of Savings Bank Passbook in Central Bank of India, Coimbatore and Ex.B20- copy of Savings Bank Passbook of 1st defendant in Canara Bank, Irugur Branch.

69. The plaintiff, both in his pleadings as well as evidence as PW1 would categorically depose that they have expressed their willingness to complete the sale transaction through PW2 & PW3 and also made further payment on 18.05.2007 & 23.05.2007. According to the plaintiff, the date of agreement is 05.09.2006. The terms of the agreement namely period of completion is four months. Further payment was made, as stated above for which Exs.A17 to A19 were marked to prove deposit of demand drafts for Rs.2 lakhs and Rs.3 lakhs. Ex.B4-legal notice by defendant was issued by the defendant on 23.06.2008, i.e. eleven months after filing of the suit and almost one year after the credit of the amount, assumes significance.



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WEB COPY 70. The suit is filed on 01.08.2007. Exs.B2-legal notice and Ex.B3-reply notice issued are pending suit. The defendant, after issuance of Ex.B2, issued legal notice under Ex.B4 to the Central Bank of India on 21.04.2008 by which time, he was already set exparte in the suit. After issuing Ex.B2-legal notice, the defendant filed petition to set aside the exparte order and subsequently filed written statement. Written statement was filed on 11.03.2009 assumes significance.

71. The learned counsel for the plaintiff, on the above factual background has contended that the defendant left the case unattended and she was set exparte. For the third minor defendant through the court appointed guardian filed the written statement on 26.03.2008. In order to make out the case for filing the written statement, the defendant had issued Ex.B2-legal notice on 23.06.2008 and written statement was filed only on 11.03.2009. On above factual background, the contention of the learned counsel for the plaintiff found to have force.



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72. The defendant has denied the knowledge of Ex.A17 & A18 namely demand drafts for Rs.2 lakhs & Rs.3 lakhs respectively. In this regard, her evidence is to the effect that she has not deposited the demand drafts given by the plaintiff in favour of the first defendant drawn on Central Bank of India. The plaintiff filed Exs.A17 & A18 to show that in furtherance to the oral agreement of sale, after the advance amount of further payment towards balance of sale consideration was paid to the extent of Rs.5 lakhs (2 lakhs + Rs.3 lakhs). In this connection, Ex.A19-statement of the plaintiff's account for the relevant period has been filed to substantiate that Ex.A17 & A18 was generated and emanated from account of the plaintiff.

73(a) Per contra, the defendant denied everything in the written statement. Exs.B19 & B20 are the notarised xerox copy of Savings Passbook and notarised xerox copy of 1st defendant's Savings Passbook wherein the demand drafts Exs.A17 & A18 has been given credit.



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WEB COPY 73(b) Exs.A17 & A18-demand drafts were issued during May 2007.

Suit has been filed on 01.08.2007. As the defendant was not coming forward to execute the sale deed after receiving the advance amount and further advance amount, the present suit was filed. The defendant remained exparte and an exparte order was passed. Before filing the application to set aside the said exparte order setting him exparte, he issued Ex.B2-legal notice on 23.06.2008 and thereafter he filed written statement on 11.03.2009 alongwith petition to set aside exparte order. Hence, I find that Ex.B2-legal notice is only an after thought so as to build up case in the written statement to raise the defence against the specific performance of suit wherein the defendant in the written statement has chosen to deny knowledge of deposit of the amount and also stated that she gave a complaint to the police and that complaint was received on 06.10.2009, as could be seen from Exs.B17 & B18 which is of the year 2009.

74. It is the specific evidence of DW1 that, on enquiry she made with the Bank as to when the demands drafts Exs.A17 & A18 were deposited in



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her account for which her Bank has not replied and filed Ex.B7 letter issued by Manager, Central Bank of India to the 1st defendant. For the reasons best known, she has not examined her own Bank Manager to elicit the fact, so as to give corroboration to her version as DW1. In this connection, it remains to be stated that she had summoned the Bank Manager of the plaintiff as DW2 – Mr.A.Chandrasekaran, in connection with Exs.A17 & A18. Had the said version of DW2 has deposed about the issuance of Exs.A17 & A18, for the reasons best known, the Bank Manager of the defendant was not examined except filing of Ex.B7 which indicate the second demand draft amount was kept separately after enquiry. In fact, this is regular Banking procedure to keep the amount disputed by their customers. That by itself will not advance the case of the defendant.

75. From the evidence of Ex.B19, Savings Account Bank Pass book of the 1st defendant, a part of the amount under Ex.A17 has been utilised by the defendant as she has withdrawn certain amount, assumes significance.



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76. The defendant, though would contend that somebody would have deposited the amount in her account, she has not given details as to how she came to know about the alleged deposit of amounts (Exs.A17 & A18) in her account. She has come forward with a new story that some brokers who knows her account might have deposited the amount. Such a vague reply in the cross examination does not advance the case of DW1, especially when the amount of Rs.5,00,000/- was deposited in her account by way of demand drafts. She could have summoned her Bank Manager to elicit who has deposited the amounts by showing the respective counterfoil for deposit of two demand drafts that is being maintained by the Bank. For the reasons best known, she has not opted to do so.

77. As observed in all other previous points, here too she denied the alleged further payments. Hence, this court find that such a denial is a denial for the sake of denial to raise the defence in the written statement. As per Exs.A19, Exs.A17 and A18- demand drafts for the further payment of sale



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consideration has been duly reflected by debiting the said amount from the plaintiff's account, assumes significance.

78. The learned District Judge has rendered a finding that Exs.A17 and A18 were not proved which is erroneous. Exs.A17 and A18 – demand drafts for Rs.5,00,000/- in Toto was emanated from the plaintiff's account, as could be seen from Exs.A19-statement of accounts of the plaintiff and the said amount was duly credited into the account of the defendant, as could be seen from Exs.A19 and A20 and part of the payment of Ex.A17 has also been withdrawn by the defendant, as could be seen from Ex.B19. Hence, mere denial by the defendant is not sufficient, especially when Ex.A17 and A18 have been emanated from the account of the plaintiff.

79. On a combined reading of Exs.A17, A18 & A19, coupled with Exs.B19 and B20 and the oral evidence of DW2, Manager of the plaintiff's Bank, this Court is of the considered view that the plaintiff has successfully demonstrated further payment of sale consideration by him, in the manner known to law. When the defendant has raised a specific plea that she has not



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deposited the demand drafts, the burden of proof is upon her by calling upon the record from her own bank to show that who has deposited the demand drafts Exs.A17 and A18. Having failed to do so, the adverse inference has to be drawn against the defendant since the plaintiff cannot be called upon to prove the negative fact.

80(a) It is for the defendant to ascertain the fact that Exs.A17 and A18 were not deposited by her. The defendant has raised a contention that she had sent a notice under Ex.B4 to the Bank calling certain information regarding deposit of Rs.5 lakhs in her Bank Account for which her bank has replied dated 08.05.2008-Ex.B7 that the remitter's name is not available in the voucher.

80(b) It remains to be stated that Exs.A17 and A18-demand drafts are of the month of May 2007. After expiry of one year, she has made a request for remitter's name with the Bank and as per Ex.B7, the reply issued by the Manager, Central Bank of India to the first defendant, the remitter's name is not available in the voucher. On perusal of Ex.B3-reply dated 25.08.2008 to



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the Ex.B2-legal notice issued by the defendant, the plaintiff has given a categorical evidence that the demand drafts were handed over to the defendant. PW2 would depose that he saw the plaintiff handing over those demand drafts to the first defendant and further deposed that he does not know whether the first defendant had encashed or not.

81. The Trial Court has misread the evidence of PW1 in this regard. What was stated by PW1 is that demands drafts issued by the plaintiff towards part of sale consideration was deposited in her account is to the effect that it was deposited and not to the effect that it was deposited by the plaintiff. Further, it is seen that DW2 – Bank Manager of the plaintiff's Bank who was examined on witness summons would depose that he does not know who has taken the demand drafts for Rs.2 lakhs. A single sentence in evidence cannot be read with in isolation, his evidence has to be read in consonance with Ex.A19. Hence, on re-appreciation of the evidence, I find that the plaintiff has categorically and clearly proved that he has paid part of sale consideration. Further payment of Rs.5 lakhs under Exs.A17 & A18, at the request of the defendant, the second amount of Rs.3 lakhs was reversed from the



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defendant's account and kept as a separate excess amount. This action of the defendant is after filing of the suit and she was set exparte and just before filing of the written statement, assumes significance. Hence, I have no hesitation to conclude that the plaintiff has demonstrated further payment of Rs.5,00,000/- in terms of oral agreement between the parties and the same was deposited into the account of the defendant.

82. In view of the fact that the defendant had issued notice calling upon the Bank to furnish as to who has deposited the demand drafts, belatedly, after more than one year, the Bank has given a reply under Ex.B7 and the person who had issued Ex.B7 was not examined by the defendant to elicit the said fact as to why the Central Bank of India, namely the Bank of the first defendant is unable to give the details. The Trial Court has not appreciated the evidence in proper perspective and hence the contra finding recorded by the Trial Court hereby stands vacated and it is further held that the plaintiff has successfully demonstrated further payment under the oral agreement between the parties. The defendant, in his witness has admitted that “the plaintiff is a man of means”. As to the further payment, this court



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has upheld the plea of the plaintiff and the balance of consideration after further payment of Rs.5,00,000/- is Rs.11,50,000/-and the plaintiff is ready with the money and also made further payment and for instituting the suit within 2 months from the date of expiry of 4 months time fixed between the parties. Therefore, I have no hesitation to hold that the plaintiff has demonstrated his “readiness and willingness” and he is a “man of means” which was not disputed by the defendant either in the pleading or witness box. Hence, this Court finds that the plaintiff has demonstrated his “readiness and willingness”, as required under “Section 16(c) of the Specific Relief Act”.

83. The evidence of PW2 and PW3 cannot be termed as a self-serving statement since there is nothing in the cross examination to picturize PW2 and PW3 as enemical to DW1 and to sum up, this Court finds that the defendant has raised denial of pleas raised by the plaintiff and as discussed in the preceding paragraphs, this Court finds that the defendant was in the habit of denying further payment alleged in the plaint. However, she has also found to have suppressed the matter about the oral agreement and the Will, as discussed supra. Hence, I find that the conduct of the party, namely the



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defendant is that she wanted to evade the agreement entered into between the parties. As the plaintiff has successfully demonstrated Ex.A4-Will as true and genuine, as to its execution and genuineness has been proved, in view of the judicial pronouncement and further there is an oral family partition among the parties and there is an oral agreement between the parties and based upon the said oral agreement between the parties, the plaintiff has also made further payment of balance of sale consideration of Rs.5,00,000/- and the same was credited into the account of the defendant, she has audacity to say that she was not aware of the deposit after she was set exparte in the suit and before filing the exparte petition to set aside the exparte order and before filing the written statement, she has come up with a new story so as to give a story for the written statement. Hence, I am constrained to observe that the defendant is “trying to hide regular pumpkin in a mini meals”.

84. In view of the finding on the above points of determination, I find that the plaintiff having proved the pleadings and also his readiness and willingness, he is entitled for the decree. Accordingly, the points (v) to (vii)



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are answered in favour of the plaintiff and hence, the judgment and decree of the Trial Court is liable to be set aside.

85. Before departing, arguments of the learned counsel for the appellant was heard in part on two hearings. The erstwhile counsel for the respondent was present and the matter was adjourned to 24.06.2024 for the argument of the learned counsel for the respondent. On the next date of hearing, the learned counsel for the respondent reported no instructions from the client. Hence, the Registry was directed to print the name of the respondent/defendant in the cause list. After going through the pleadings and arguments of the learned counsel for the plaintiff, this Court directed the High Court Legal Services Committee to appoint an advocate from the panel of legal aid counsel for the respondent. Accordingly, Ms.Ambiga was appointed as legal aid counsel for the respondent and her argument were heard on 01.07.2024. After hearing her submissions, this Court thought it fit to take the assistance of a Senior Counsel and Mr.R.Singaravelan, Senior Counsel from Tamil Nadu Senior Advocate Forum for legalaid volunteered to argue this case. The argument of the learned Senior Counsel was heard on



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16.07.2024 and this Court places appreciation on record for the submissions made by the learned Senior Counsel Mr.R.Singaravelan and legal aid counsel Ms.Ambika.

86. In the result, **this appeal suit is allowed** setting aside the judgment and decree dated 29.08.2016 in O.S.No.657 of 2007 on the file of the IV Additional District Court at Coimbatore. O.S.No.657 of 2007 is decreed as prayed for. Time for deposit of balance sale consideration by the plaintiff is one month from the date of receipt of copy of this order and time for execution of sale deed is within one month thereafter. No costs.

13.08.2024

Index : Yes/No
Neutral Citation : Yes/No
rgr

To

1. The IV Additional District Court,
Coimbatore.

2.The Section Officer,
VR Section, High Court, Madras.

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RMT.TEEKAA RAMAN, J.

(rgr)

Pre-delivery Judgment in
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13.08.2024