



S.A(MD)No.1050 of 2006

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: **29.07.2024**

CORAM

THE HON'BLE MR.JUSTICE S.SOUNTHAR

S.A(MD)No.1050 of 2006

M.S.Thomas (Since Deceased) ... Plaintiff

1.S.Stella Mary

2.T.Aruljothi Anburaj

3.T.Arulkala

4.T.Arulcheliyan

5.T.Mathew Mahimai Raj ... Appellants/Respondents 2 to 6
LRs of the Deceased Plaintiff

Vs.

M.S.Saleth (Died) ... Respondent/Appellant
Defendant

2.S.Arockiyaammal

3.S.Saleth Kolath Rani

4.S.Maria Arul Kulanthairaj

5.S.Michel Raj

6.S.Savarimuthu

7.S.Minnalkodi



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8.Sister. Marshal Karoline

... Respondents 2 to 8

(Respondents 2 to 8 are impleaded as LR's of the deceased sole respondent vide Court order, dated 20.06.2023 made in M.P(MD)No.1 of 2010 in S.A(MD)No.1050 of 2006)

PRAYER : Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree passed in A.S.No.93 of 2004 on the file of the Sub Court, Periyakulam, dated 20.06.2006, reversing the judgment and decree passed in O.S.No.71 of 2000 on the file of the District Munsif cum Judicial Magistrate, Bodinayakanur, dated 16.03.2004.

For Appellants : Mr.M.Mohamed Ibram Saibu
for M/s.Ajmal Associates

R-1 : Died

For R-2 to R-8 : Mr.S.Anand Chandrasekar
for M/s.Sarvabhauman Associates

JUDGMENT

The plaintiff in the suit for partition is the appellant herein.

2. The plaintiff filed a suit against his brother seeking partition of his half share over the suit property. The suit was decreed by the Trial Court. Aggrieved by the same, the defendant preferred an appeal. The First Appellate Court allowed the appeal and dismissed the suit.



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Aggrieved by the same, the plaintiff is before this Court.

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3. According to the plaintiff, he and the defendant are sons of one Savarimuthu Udaiyar. The other son of Savarimuthu Udaiyar, namely, Manuvel got divided in the year 1952 itself. It was claimed by the plaintiff that suit properties had been in possession and enjoyment of the plaintiff and defendant and there was an agreement between them in the year 1973, where under first defendant agreed to discharge all the family debts on or before 30th day of Tamil month of Ipasi in the year 1973. It was also agreed that incase of discharge of family debts by the first defendant as agreed, the plaintiff shall relinquish the share in the suit property in favour of the defendant. It was also agreed that plaintiff and defendant shall pay maintenance to father Savarimuthu. The arrangement entered into between the parties was reduced into writing and a document, dated 07.09.1973 was signed by all the parties. It was claimed by the plaintiff that document, dated 07.09.1973 was not valid and the same was not acted upon. It was also claimed by the plaintiff that defendant failed to discharge the family debts as per the terms of agreement, dated 07.09.1973. It was further claimed by the plaintiff that as the first defendant failed to discharge the family debts, the property



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continued to be in joint possession of the parties. Later, taking advantage of the agreement, dated 07.09.1973, defendant demanded execution of registered relinquishment deed in his favour. Therefore, the plaintiff was constrained to file a present suit seeking partition.

4. The defendant filed his written statement and claimed that document, dated 07.09.1973 executed by the parties was a relinquishment deed in favour of the defendant. It was claimed by him that he has been in possession and enjoyment of the property exclusively from 07.09.1973 by paying tax to the Government. It was also claimed by the defendant that he discharged the family debts as per the terms of document, dated 07.09.1973. It was also claimed by the defendant that arrangement, dated 07.09.1973 was acted upon and the defendant had been in possession and enjoyment of the suit property from 07.09.1973 onwards and as such, the acquired right over the suit property. On these pleadings, the defendant sought for dismissal of the suit.

5. Before the Trial Court, the plaintiff was examined as P.W.1 and 16 documents were marked as Exhibits A.1 to A.16. The defendant was examined as D.W.1 and 3 documents were marked on his side as



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Exhibits B.1 to B.3.

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6. The Trial Court on appreciation of evidence available on record came to the conclusion that Exhibit B.1 agreement was not acted upon and consequently, decreed the suit as prayed for. Aggrieved by the same, the defendant preferred an appeal in A.S.No.93 of 2004 on the file of the Sub Court, Periyakulam. The First Appellate Court held that plaintiff failed to prove that first defendant did not act in accordance with terms of Exhibit B.1 and discharge the family debts and hence, reversed the findings of the Trial Court and allowed the appeal. Aggrieved by the same, the plaintiff has come by way of this Second Appeal.

7. At the time of admission, this Court formulated the following substantial questions of law for consideration by an order, dated 07.11.2006:

"I. Whether the Lower Appellate Court is right in law in construing Exhibit B.1 the alleged release deed, dated 07.09.1973 by which the shares of the deceased plaintiff and his father Savarimuthu Udayar in the suit properties were purportedly released in favour of the respondent as a release deed transferring title of the suit properties in favour of the respondent, while Exhibit B.1



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is only a conditional agreement for release which does not amount to a deed of transfer of immovable property?

II. Whether the Lower Appellate Court is right in law in holding that Exhibit B.1 was acted upon and the respondent has become entitled to the suit properties, while no release deed was executed as stipulated in the release agreement?

III. Whether the Lower Appellate Court erred in observing that the suit for partition was filed after a period of nearly 20 years overlooking the legal position that a suit for partition of family properties between members of the family can be filed at any time, unless plea of ouster is raised and proved?"

8. The learned Counsel appearing for the appellant submitted the First Appellate Court committed a serious error of law in holding that plaintiff failed to lead any evidence to show that the first defendant did not discharge family debts. The learned Counsel submitted it is not possible for the appellant to prove the negative and it is incumbent on the defendant to lead positive evidence to show that he discharged the family debts and acted in accordance with the terms of Exhibit B.1.

9. The learned Counsel appearing for the respondent submitted that though defendant has not produced any document to show that he



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discharged the family debts in terms of Exhibit B.1, the plaintiff failed to lead any evidence that proceedings were taken by the third parties for recovery of the family debts and hence, the Court has to presume that family debts have been discharged by the defendants. The learned Counsel further submitted that failure of the plaintiff to demand partition for more than 25 years after Exhibit B.1 would suggest the same has been acted upon and the defendant has been exclusive possession of the suit properties.

10. It is not in dispute that plaintiff and defendant are brothers and there was an arrangement between them under Exhibit B.1. A perusal of Exhibit B.1 would suggest that defendant agreed to discharge the family debt to a tune of about Rs.36,270/- on or before 30th day of Ipasi in the year 1973. It was also agreed that if family debts are discharged by the defendants as per the terms of the agreement, the plaintiff and his father Savarimuthu Udaiyar shall execute a relinquishment deed in favour of the defendant. So Exhibit B.1 cannot be termed as a document relinquishing the plaintiff's share in the suit properties in favour of the defendant. It is only an agreement to relinquish the share in future date if defendant act in accordance with terms of Exhibit B.1. In other words,



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the defendant has to discharge the family debts as agreed and then get the proper relinquishment deed from the plaintiff and his father. Though defendant claimed that he discharged the family debts as per the terms of Exhibit B.1, he failed to produce any evidence to show that he discharged the family debts to the tune of Rs.36,270/-. The learned Counsel for the respondent submitted, the defendant discharged the family debts as per the agreement and due to the close relationship, no further steps have been taken for getting the registered relinquishment deed from the plaintiff. Exhibit B.1, an agreement to relinquish the rights of the plaintiff will not convey any right to the defendant. Exhibit B.1 is an un-registered document evidencing an agreement between the parties to relinquish the share in favour of the defendant on fulfilment of certain conditions. Therefore, it is incumbent on the defendant to prove that he fulfilled the conditions mentioned under Exhibit B.1 and discharged the family debts by leading positive evidence. Except interested testimony of the defendant, there is no evidence available on record to suggest family debts had been discharged by defendant. The First Appellate Court erroneously held that plaintiff failed to prove that defendant did not discharge the family debts as agreed under Exhibit B.1. It may not be possible for the plaintiff to prove the negative that defendant failed to



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discharge the family debts. It is for the defendant to lead positive evidence and prove that he discharged the family debts. However, the defendant miserably failed to lead any evidence to show that he discharged the family debts in terms of Exhibit B.1 and the same was acted upon. In such circumstances, the findings rendered by the Trial Court that Exhibit B.1 was not acted upon and the parties continued with joint possession of the property is acceptable to this Court. Exhibit A.5, dated 09.02.1986 is a joint patta stands in the name of the plaintiff and defendant. The plaintiff also produced certain kist receipts for payment of tax to the suit property. Therefore, there is no doubt that both the parties are in joint possession of the suit properties. Even assuming the defendant is in exclusive possession of the suit property, his possession can only be treated as for himself and also for the benefit of other co-owner. There is no evidence available on record to show that plaintiff completely ousted from the suit property. In such circumstances, there may not be any impediment for granting decree for partition of plaintiff's half share over the suit property. The substantial questions of law framed at the time of admission are answered accordingly in favour of the appellant and against the respondents.



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11. In nutshell, the Second Appeal stands allowed by setting aside the judgment and decree passed by the First Appellate Court. The judgment and decree passed by the Trial Court stands confirmed. There shall be no order as to costs.

29.07.2024

NCC : Yes / No
Index : Yes / No
Internet : Yes
BTR

To

- 1.The Sub Court,
Periyakulam.
- 2.The District Munsif cum Judicial Magistrate,
Bodinayakkanur.
- 3.The Section Officer,
Vernacular Record Section,
Madurai Bench of Madras High Court,
Madurai.



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S.SOUNTHAR, J.

BTR

Judgment made in
S.A(MD)No.1050 of 2006

Dated:
29.07.2024