



A.S.(MD).No.110 of 2019

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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Reserved on : 19.12.2023

Delivered on : 23.02.2024

CORAM:

THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN

AND

THE HONOURABLE MR.JUSTICE P.B.BALAJI

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R.Thayah Nayakee

.. Appellant / Plaintiff

Vs.

1.M.Irulayee

2.P.Muthammal

3.P.Pushpavalli

4.S.Maragadham

5.Minor S.Kanaga Durga

.. Respondents / Defendants

Prayer:- Appeal filed under Section 96 r/w. Order 41 Rule 1 of the Code of Civil Procedure, against the judgment and decree, dated 21.03.2014, made in O.S.No.18 of 2005, on the file of the Additional District cum Sessions Judge, Dindigul.

For Appellant : Mr.K.P.Narayana Kumar

For Respondents : Mr.P.Selvakumar for R4& R5

: No appearance for R1 to R3



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JUDGMENT

(Judgment of the Court was made by P.B.BALAJI,J.)

The unsuccessful plaintiff in a suit for partition is the appellant before us.

2. For the sake of convenience, the parties are referred to as per their rank before the Tribunal.

3. The brief facts that are necessary for adjudicating the points involved in the above appeal are as hereunder:

The plaintiff sought for partition in respect of three immovable properties set out in schedule A, B, C in the plaint and in respect of D and E, movable assets. The case of the plaintiff is that the defendants 1 to 3 are her sisters, the defendants 4 and 5 are wife and daughters respectively of the brother of the plaintiff and the defendants 1 to 3, Late P.Sivasubramanian. The plaintiff's version, as set out in the plaint, is that the schedule mentioned properties were self acquired and absolute properties of Ponnaiah Pillai and Parvadhathammal, the parents of the



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plaintiff and the defendants 1 to 3. The plaintiff also contended that most of the properties were purchased by the father out of the income earned from his business, either in his own name or in his wife's name. During the life time of the brother of the plaintiff and the defendants 1 to 3, the properties were enjoyed by all of them as co-owners. That apart, the brother purchased item No.2 of 'A' schedule properties from the owners, for the benefit and enjoyment of the co-owners and in any event, the funds went from the nucleus of the joint family properties and income accrued therefrom. Consequent to the demise of the father viz., Ponnaiah Pillai, in the year 1965 and mother, viz., Parvadhathammal in the year 1967, the plaintiff is entitled to 1/5th share in each of the schedule mentioned properties and therefore, the suit for partition was instituted.

4. The defendants 1 to 3 supported the case of the plaintiff and in fact filed a counter claim praying that 1/5th share each in their favour is also to be decreed. The wife and daughter of the brother of the plaintiffs and the defendants 1 to 3, filed a separate written statement as well as an additional written statement meeting the counter claim.



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5. The crux of the defence set up by the defendants 4 and 5, is that even during the life time of the brother of the plaintiff and the defendants 1 to 3, Late Mr.Sivasubramanian, the plaintiff and the defendants 1 to 3 had executed a registered release deed, dated 02.05.1985 after receiving valuable consideration and therefore, the suit was not maintainable as the plaintiff and the defendants 1 to 3 had already relinquished all their interest in the suit schedule properties.

6. The trial Court framed the following issues:

1. Whether the plaintiff and the defendants 1 to 3 executed a release deed in favour of the 4th defendant's husband?
2. Whether the suit is bad for partial portion?
3. What other reliefs?

7. Before the trial Court, one Subramanian was examined as P.W.1 and 30 documents were marked as ExA1 to ExA30, on the side of the plaintiff. On the side of the defendants, the 4th defendant examined himself as D.W.1 and Rajaguru, who is the power agent of the 1st defendant was examined as P.W.2. One Krishnamoorthy was examined as



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P.W.3 and 10 documents were marked as Ex.B1 to Ex.B10. Four Court documents were marked as Ex.C1 to Ex.C4.

8. Pending the trial, in and by order dated 28.09.2018, in C.R.P. (MD)No.815 of 2018, a learned Single Judge of this Court directed that the report of the handwriting could not be received and consequently the evidence of D.W.3 as well as the Court exhibits marked in connection with the said expert's evidence were directed to be scrapped.

9. The trial Court, after discussing the oral and documentary evidence adduced by the parties, came to the conclusion that the plaintiff has suppressed the execution and registration of the release deed by her and the defendants 1 to 3 in favour of one Late Sivasubramanian, vide Ex.B3, original of which has also been marked as Ex.B4 and further held that the plaintiff has avoided to enter the witness box and instead of examining herself and offering herself for cross examination and only her husband was examined was not a competent witness to speak about the family circumstances of his wife, namely, the plaintiff and ultimately dismissed the suit.



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10. Aggrieved by the dismissal of the suit for partition, the plaintiff has preferred the above appeal, challenging the decree and judgment of the appeal, on the following grounds:-

The trial Court failed to consider the oral and documentary evidence adduced by the plaintiff; the release deed - Ex.B3 was not proved by the defendants 4 and 5 in a manner known to law; there was no necessity for the plaintiff and the defendants 1 to 3 to execute Ex.A27 and ExA28, powers of attorney, dated 26.11.1996 and 26.11.1996 respectively, if Ex.B3 was true and genuine and that the trial Court erred in drawing adverse inference against the plaintiff.

11. We have heard Mr.K.P.Narayana Kumar learned counsel for the appellant and Mr.P.Selvakumar, learned counsel for the respondents 4 and 5. There is no appearance for respondents 1 to 3, who are the defendants 1 to 3 in the suit. The defendants 1 to 3 not only supported the plaintiff, but also independently filed a counter claim seeking their respective 1/5 shares to be decreed.



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12. On hearing the counsel for the parties, we frame the following points to be decided in the appeal:

I. Whether the release deed in Ex.B3 is valid and binding on the plaintiff and the defendants 1 to 3?

II. Whether the plaintiff and the defendants 1 to 3 are entitled to 1/5th share in the suit schedule properties?

13. The learned counsel for the appellant would canvass the various grounds raised in the memorandum of grounds of the First Appeal and state that when the execution and registration of the release deed Ex.B4 was denied by the plaintiff, the 4th defendant ought to have proved the said document as mandated under the provisions of the Indian Evidence Act. The defendants have not examined any of the attesting witnesses to the said document and therefore, the said document cannot be looked into. The counsel for appellant also attacked the various sale transactions that had taken place pending the suit on the ground of *lis pendens*.



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14. It is the further case of the learned counsel for the appellant that the brother was only a co-owner and he was managing and maintaining the properties only on behalf of his sisters as well and therefore, he could not claim any independent right.

15. The learned counsel for the appellant would place reliance on the decisions of this Court in ***Cannou Parimala Rani @ Mary Rosay Parimala Rani*** reported in ***2022-3-CTC-477*** and in ***Prithiviraj V. A.Muneeswaran*** reported in ***2023-3-CTC-593***. Both these decisions have been relied on only for attacking the sale transactions in and by which the defendants 4 and 5 have sold some of the properties in favour of the third parties.

16. The learned counsel for the appellant would also place reliance on the decision of the Hon'ble Supreme Court in ***Sebastiao Luis Fernandes (D) V. K.V.P.Shastri*** reported in ***2014-SAR(Civil) 266***. The said decision has been relied on for the purpose of showing that the burden of proof would only lie on the defendants 4 and 5 to prove the release deed.



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17. Per contra, the learned counsel for the respondents 4 and 5 would submit that the trial Court has considered the entire evidence available on record, both oral and documentary and come to the right conclusion that the plaintiff and the defendants 1 to 3 are not entitled to any share in the suit properties.

18. The learned counsel for the respondents 4 and 5 would place reliance on the decision of the Hon'ble Supreme Court in Civil Appeal No. 1725 of 2010 (*Iqbal Basith V. N.Subbulakshmi*), dated 14.12.2020, where the Hon'ble Supreme Court referring to Section 114(g) of the Indian Evidence Act, 1872, held that when the original defendants did not appear in person to depose and be cross examined in the suit, there was no reason not to draw an adverse inference against the defendant.

19. The learned counsel for the respondents 4 and 5 would also place reliance on the decision of the learned Single Judge of this Court in S.A.No.120 of 2008 (*Shenbagavalli V. Kallaichelvi*), dated 30.11.2020, where the learned Single Judge has discussed the scope of Section 120 of the Indian Evidence Act and competency of spouse to give evidence.



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20. We have paid our anxious and careful consideration to the rival submissions advanced by the learned counsel on either side. We have also gone through the judgments on which reliance is placed on. We have also independently applied our mind to the judgment and decree passed by the trial Court.

21. At the outset, we note that the plaintiff has totally suppressed the very factum of the execution of the release deed, in and by a registered deed in Ex,B3 and B4. Ex.B4 is dated 02.05.1985. The suit has been filed only in 2013. It is seen from oral and documentary evidence that in the interregnum period. The plaintiff and the defendants 1 to 3 especially from Ex.B2, have participated in the family function of their brother Late Sivasubramanian. It was next strenuously contended by the appellant, if the release deed was true and genuine, there would have been no necessity to execute powers of attorney in Ex.A27 and Ex.A28 in and by which in the year 1996. However, the learned counsel for the respondents 4 and 5 / defendants 4 and 5 would state that the said powers of attorney were not relating to the suit schedule properties, but, other properties and therefore, the contention of the learned counsel for the appellant did not merit



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acceptance. We have gone through Ex.A27 and Ex.A28 and find that the arguments put forth by the learned counsel for the respondents 4 and 5 is correct. The said powers of attorney were in respect of different properties.

22. One another factor, we cannot ignore is that after the defendants 4 and 5 filed a written statement specifically stating that in and by a registered release deed, for consideration, not only the plaintiff, the defendants 1 to 3 also released and relinquished their share, neither the plaintiff nor defendants 1 to 3 have chosen to enter the witness box and give evidence. Interestingly, despite the defendants 1 to 3 supporting the plaintiff's case and seeking their 1/5th share, the only witness examined on the side plaintiff was the husband of the plaintiff. The trial Court has elaborately discussed the evidence of P.W.1 and found that he was not competent to speak about Ex.B3/Ex.B4, release deed, despite the flexibility available under Section 120 of the Indian Evidence Act. The trial Court has rightly drawn adverse inference against the plaintiff and the defendants 1 to 3 for not entering the witness box and testify to that Ex.B3/ Ex.B4 were not executed and registered by them. In this



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connection, the ratio laid down in ***Iqbal Basith's*** case squarely applies to the facts of the present case.

23. We do not find any infirmity in the findings of the trial Court drawing an adverse interference against the plaintiff and the defendants 1 to 3. Similarly the findings of the trial Court with regard to the reliance of evidence of P.W.1 is also well founded and the trial Court has discussed the evidence of P.W.1 with regard to the execution of Ex.B3/Ex.B4 and rightly found that his evidence did not inspire any confidence in the mind of the Court to negate the truth and validity of the registered release deeds.

24. The trial Court has also found that when D.W.1 has specifically stated that she was personally present at the time of execution of the release deed in Ex.B4, the plaintiff has not chosen to contradict or disprove the said claim of D.W.1 by letting in satisfactory oral or documentary evidence and held that the said release deed was true and genuine. We do not find any grounds to interfere with this findings as well.



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25. We also have taken note of the fact the suit came to be filed only after the life time of the brother of the plaintiff and the defendants 1 to 3, namely Sivasubramanian and during his life time, there was no demand seeking partition of the suit schedule property. This only further exposes the conduct of the plaintiff and the defendants 1 to 3 in not wanting to approach the Court until after the demise of their brother – Sivasubramanian. The plaintiff or the defendants 1 to 3 were the best persons, who could speak about the truth and genuineness of Ex.B4 release deed and consciously they have not challenged the said document by entering into the witness box and disputing their signatures in Ex.B4. Their conduct in evading the witness box despite the fact that the defendants 4 and 5 had set up an adverse claim that by a registered release deed, the plaintiff and the defendants 1 to 3 have released and relinquished of the property in favour of the said Sivasubramanian, leads to only draw an adverse interference against the plaintiff and the defendants 1 to 3. We do not see the requirement of proof of the said registered release deed in terms of Section 68 of the Indian Evidence Act, as contended by the learned counsel for the appellant for two reasons:

(i) firstly, the plaintiff has not even spoken about the said release



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deed in the plaint and even after the written statement filed by the defendants 4 and 5, they have not chosen to file a reply statement challenging the execution of the said release deed – Ex.B4.

(ii) secondly, Section 90 of the Indian Evidence Act would also come to work in favour of the defendants 4 and 5. Under Section 90 of the Indian Evidence Act, the Court can presume that a document, 30 years old was duly attested, Ex.B4 is dated 02.05.1985 and at the time of the said exhibit being marked during the course of trial by the 4th defendant, the said document was more than 30 years old and therefore, the Court can safely draw a presumption as to the truth and genuineness of its due execution and attestation under Section 68 of the Indian Evidence Act. Of course, this presumption could have been rebutted by the plaintiff and the defendants 1 to 3 by entering the witness box and challenging their signatures found in the said document. However, as we already noted, neither the plaintiff nor the defendants 1 to 3 have entered the witness box to give evidence and challenge the said Ex.B4. The findings of the Trial Court are well founded and do not warrant any interference.



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26. For all the above reasons, we answer the points determined for consideration in favour of the defendants 4 and 5 and against the plaintiff. The appeal fails and the judgment and decree of the trial Court is hereby confirmed. The Appeal Suit is dismissed. There shall be no order as to costs.

(T.K.R.J.) & (P.B.B.J)
23.02.2024

Internet : Yes
Index: Yes/No
Neutral Citation: Yes/No
Ls

To

1.The Additional District cum Sessions Judge,
Dindigul.

2.The Section Officer,
VR Section, Madurai Bench of Madras High Court,
Madurai.



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RMT.TEEKAA RAMAN, J.,
and
P.B.BALAJI,J

Ls

judgment in
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