



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated : **10.06.2024**

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THE HON'BLE MRS.JUSTICE N.MALA

S.A(MD)No.198 of 2017

Zakeer Ussain
Through Power Agent M.Amanullakhan,
Komathipuram,
Madurai.

... Appellant /Plaintiff

Vs.

1.Syedhulbrahim
2.A.Rahamathulla
3.Sakeer Lasar
4.Alashmeena

... Respondents/Defendants

PRAYER:--

This Second Appeal is filed under Section 100 of the Civil Procedure Code, against the judgment and decree dated 15.11.2016 passed in A.S.No.19 of 2012 by the Additional District Judge, Ramanathapuram, confirming the judgment and decree dated 26.03.2012 passed in O.S.No.23 of 2010 by the Additional Subordinate Judge, Ramanathapuram.

For Appellants : Mr.D.Malaichamy
For R1 : Mr.A.Arumugam
for M/s.Ajmal Associates



For R3 : Dismissed
R2 & R4 : No Appearance

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JUDGMENT

The Second Appeal is filed against the concurrent judgments of the Courts below dismissing the suit for partition of the plaintiff's 1/2 share in the suit property.

2.The parties will be referred to as per the ranking in the Courts below.

3.The suit property was purchased by the plaintiff along with the first defendant and 12 others jointly for constructing Pallivasal. The total extent of land purchased under Ex.A1, dated 03.12.1986, was 8 acres 34 cents. The patta stood jointly in the name of 14 sharers and the property was handed over to the Mosque. On 25.12.1989, foundation for the Mosque was laid in a part of the property purchased and on 01.01.1997, the construction of the Mosque was completed in the name of “Al Maajithul Palaik”. It is the plaintiff's case that 4 acres 34 cents was used for the mosque and remaining 4 acres in S.Nos.70/1 and 70/2 was earmarked to be divided into equal shares to the 14 sharers, ie., the plaintiff, first defendant and 12 others. On 15.08.2003 an agreement was entered between 14 sharers and as per the agreement, 4



acres of lands were earmarked for division among the 14 sharers “equally”. The said agreement was entered between the 14 shares and 4 committee members of the Mosque. Thereafter, the lands were plotted and allotted to the 14 share holders on the basis of lots and each sharer got 2 plots. Plot Nos.12 and 18 were allotted to the plaintiff exclusively and plot Nos.2 and 26 were allotted jointly to the plaintiff and the first defendant and each obtained possession separately. According to the plaintiff, plot Nos.2 and 26 were jointly enjoyed by the plaintiff and the first defendant. While so, on 26.04.2006, the first defendant executed a sale deed in favour of his brother, the second defendant with respect to 1st item of the suit property i.e. plot No.26 western side and half of the southern side and half of the western side i.e. plot No.2 in the sale deed. In the said sale deed, it was recited that the first defendant was in possession of the remaining half share. It is the plaintiff's case that the first defendant has no right to sell the property with specific boundaries without any division by metes and bounds. On 01.03.2007, the second defendant executed a sale deed in favour of the 3rd defendant with respect to the plot No.26 to an extent of 6 cents. The third defendant executed an inam settlement in favour of the 4th defendant in respect of plot No.26. The 4th defendant in the month of November 2009 constructed a compound wall in the suit property and hence, the plaintiff was constrained to file the aforesaid suit for partition.



4. The defendants filed a written statement denying the plaintiff's averments.

The defendants did not deny the purchase of 8.34 acres for the purpose of the Mosque by 14 sharers and also the fact that 4.34 acres were earmarked for construction of the Mosque. It was also admitted that the remaining 4 acres was agreed to be divided among the 14 shares. According to the defendants, as per agreement, dated 15.08.2003, the 4 acres of land was agreed to be divided equally among the 14 sharers. On 15.08.2013, all the 14 sharers signed in the agreement along with the committee members of the mosque. According to the 1st defendant as per the agreement the lands were divided into 14 plots measuring 2.6 cents and 14 plots measuring 22 cents each. The first defendant was in possession and enjoyment of the suit property and he effected transfer of patta in his name. According to the defendants, the plaintiff had no right over the property and the plaintiff and his father created false documents to grab the defendants' property.

5. On the side of the plaintiff, the plaintiff examined himself as PW1 and marked Ex.A1 to Ex.A8 and on the side of the defendants, the first defendant examined himself as D.W.1 and no document was marked.

6. The trial Court after framing necessary issues, dismissed the suit. Aggrieved by the judgment of the trial Court, the plaintiff preferred an appeal in



A.S.No.19 of 2012 and the lower appellate Court after framing points for consideration, dismissed the appeal, thereby, confirming the judgment and decree of the trial Court. Aggrieved by the concurrent judgment of the Courts below, the plaintiff has filed the above Second Appeal.

7.The Second Appeal was admitted on 07.06.2017 and the following substantial questions of law were framed:

"1.Whether the Courts below have correctly fixed the burden of proof?

2.Whether the Courts below are wrong in casting negative burden on the plaintiff?

3.Whether the Courts below are right in not drawing adverse inference for non production of copy of Ex.A8 given to the first respondent?"

8.The learned counsel for the appellant submitted that the Courts below wrongly placed the burden of proof on the plaintiff and that burden cast on the plaintiff was a negative burden. The learned counsel further submitted that the Courts below erred in not drawing adverse inference against the defendants for not producing the copy of Ex.A8 given to the first defendant. The learned counsel further submitted that when the plaintiff had produced Ex.A8 evidencing the allotment of plot Nos.2 and 26 jointly with the first defendant, the Courts below should have shifted the burden on the



defendant. The learned counsel therefore submitted that concurrent Judgement of the Courts below is erroneous and deserves to be set aside.

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9.The learned counsel for the respondent on the other hand submitted that the Courts below rightly cast the burden on the plaintiff to establish his title to ½ share in the property as he claimed partition of his half share in the suit property. The learned counsel further submitted that as the allotment of share in Ex.A8 was disputed by the defendants, it was for the plaintiff to prove the validity of Ex.A8 produced by him. As the burden was on the plaintiff to prove the validity of Ex.A8 no adverse inference could be drawn against the respondents for non-production of their copy.

10.Heard the learned Counsels for both sides and perused the material records in the Second Appeal.

11.The admitted facts of the case are that the plaintiff, the first defendant and 12 others sharers purchased 8.34 acres of land vide sale deed, dated 03.12.1986 for the purpose of construction of mosque. The mosque was constructed on 4.34 acres leaving a balance of 4 acres. It is also the admitted case of the parties that the remaining 4 acres of lands were agreed to be plotted and divided equally between the 14 sharers and an agreement to that effect was entered into on 15.08.2003.



12.The vital documents in the case are Ex.A7 and Ex.A8. Under Ex.A7, the 14 sharers agreed to divide the 4 acres of land equally. It appears that the lands were divided into 28 plots, out of which 14 plots measured 2.6 cents each and remaining 14 plots measured 22 cents each. Ex.A7 is very clear that the division of the plots would be equal. Ex.A7 was signed by the plaintiff and all the sharers in the presence of the President of the mosque and witnesses, of which the plaintiff's father, power of attorney in the suit, also signed as witness. It is seen that on the same day, Ex.A8 was executed, whereunder each of the 14 sharers were allotted 2 plots each, i.e., one big plot of 22 cents and one small plot of 2.6 cents.

13.The first contention of the learned counsel for the plaintiff is that the Courts below wrongly cast the burden on the plaintiff and that the plaintiff was called upon to prove the negative. The plaintiff has filed the suit for partition and he claims $\frac{1}{2}$ share in the suit properties on the basis of Ex.A7 and Ex.A8, therefore the burden is only on the plaintiff to prove his entitlement to $\frac{1}{2}$ share. From Ex.A7 it is clear that the lands were to be divided equally between the 14 sharers. It is an admitted fact that the lands were divided into 28 plots 14 of which measured 22 cents and 14 plots measured 2.6 cents. As per Ex.A7 each of the sharers was equally entitled to 2 plots each one big and one small. From Ex.A8, it is seen that 13 sharers including the plaintiff were allotted two plots exclusively one big and one small. It was only the



defendants plot Nos.2 and 26, that were allotted to the plaintiff jointly with the first defendant. The first defendant has specifically pleaded that Ex.A8 was manipulated.

Therefore, when the plaintiff claims a right in the property on the basis of Ex.A8, it is for the plaintiff to show that Ex.A8 was a genuine document, moreso, when the first defendant contends that Ex.A8 runs counter to Ex.A7. In Ex.A8 14 columns are given and the names of the 14 sharers is given in SI.Nos.1 to 14. Against the name of each sharer, the plot Nos. allotted to the sharers and the signature of the sharers in acknowledgment of the allotment is found against the allotted plots. It is further seen from Ex.A8 that under SI.No.3 plots 2 and 26 were allotted to the first defendant and the first defendant's signature is found against the said plots in the middle of the row. SI.No.4 is the allotment of plot Nos.12 and 18 to the plaintiff and the signature against the said allotment is affixed by the father of the plaintiff, who is his Power Agent and through whom the plaintiff has filed the suit. A bare perusal of Ex.A8 shows that the plaintiff's father while putting his signature in Ex.A8 has affixed two signatures. One on the line dividing SI.Nos.3 and 4 and also in the middle of 4th row (SI.No.4). As rightly contended by the defendants a bare look at Ex.A8 reveals that there is some manipulation.

14.It is pertinent to point out here that Ex.A7 and Ex.A8 were executed on the same day and whereas in Ex.A7, the plaintiff has signed but in Ex.A8, the



plaintiff's father, the power agent signed. There is absolutely no explanation as why the plaintiff did not sign Ex.A8. It is further pertinent to note that Ex.A8 runs counter to Ex.A7 agreement only with regard to the allotment of plots of the first defendant.

In the light of the above facts, I find absolutely no infirmity or illegality in casting the burden of proof on the plaintiff by the Courts' below. I therefore find that the Courts below rightly cast the burden on the plaintiff and the plaintiff failed to discharge the said burden. The first substantial question of law is therefore answered against the plaintiff.

15.The Courts below on the basis of the evidence on record held that the plaintiff manipulated Ex.A8. The said finding is a finding of fact and it is based on proper appreciation of the evidence on record. The Courts below have given cogent and justifiable reasons for rejecting the plaintiff's contention that under Ex.A8, the plaintiff was allotted the suit property jointly with the defendants. As already stated there is absolutely no explanation or evidence by the plaintiff as to why there was a deviation in Ex.A8 with respect to defendants land alone when all the other 13 sharers including the plaintiff were allotted equal shares as per Ex.A7.

16.It is relevant to note that under Ex.A1, the larger extent of property of 8.34 cents was purchased jointly by the 14 sharers and further under Ex.A2, the patta



was transferred in the name of all the 14 sharers. Under Ex.A7 all the 14 sharers including the plaintiff and the first defendant agreed to divide the lands equally.

Under the circumstances, it is for the plaintiff to prove by cogent evidence the reason for deviation from Ex.A7. At this juncture it would also be pertinent to point out that at the time of hearing when the learned counsel for the plaintiff's was questioned on the deviation in Ex.A8 from the recitals in Ex.A7, the learned counsel fairly submitted that he had no explanation. The learned counsel further submitted that he had no quarrel on Ex.A7.

17.The plaintiff further contends that an adverse inference should be drawn against the defendants for not producing the copy of Ex.A8 that was given to the defendants. In my view, the said contention cannot be countenanced for the simple reason that the plaintiff has failed to prove the genuineness of Ex.A8. A bare perusal of Ex.A8, shows that Ex.A8 is manipulated. Therefore no adverse inference can be drawn against the defendants for not producing the copy of Ex.A8. If the plaintiff had proved the genuineness of Ex.A8, then the onus would shift on the defendants to prove their case. Further it is trite in law that the plaintiff has to prove his case and he cannot rely on the lacuna in the defendants case. Therefore the second substantial question of law is also answered against the plaintiff.



18. In view of the above discussion, I find no infirmity or illegality in the Judgments of the Courts below and accordingly, the same are confirmed. In the result, the Second Appeal is dismissed. There shall be no order as to costs.

10.06.2024

NCC : Yes /No
Index : Yes / No

VSD/ah

To

1. The Additional District Judge,
Ramanathapuram.
2. The Additional Subordinate Judge,
Ramanathapuram.
3. The Record Keeper,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.



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N.MALA, J.

VSD

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