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A.S.No.138 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.06.2025

CORAM:
THE HONOURABLE Dr. JUSTICE G.JAYACHANDRAN

A.S.No.138 of 2022
and
C.M.P.No.5002 of 2022

Rajendran

.. Appellant

Vs.

Arumuga Kondiyar (Deceased)

Cause title accepted and consequently bringing on record the respondents 4 and 5 as Lrs of the deceased 1st defendant viz (Arumuga Kondiyar) vide Court order dated 18.02.2022 made in C.M.P.No.2363 of 2022 in A.S.Sr.No.100664 of 2021 (CVKJ)

1. Ravichandran
2. Muralidharan
3. Mohan Raj
4. S.Santhanalakshmi
5. M.Bharathi Devi

.. Respondents

PRAYER: Appeal Suit is filed under Section 96 read with 41 Rule 1 & 2 of C.P.C, to set aside the judgment passed in O.S.No.14 of 2013 dated 07.01.2021, on the file of Additional District Judge, Mayiladuthurai and decree the suit with costs throughout.

For Appellant : M/s.Abhinav Parthasarathy

For Respondents : Mr.N.C.Ashok Kumar for
Mr.A.Veeramany for R1 to R3
No appearance for R4 & R5



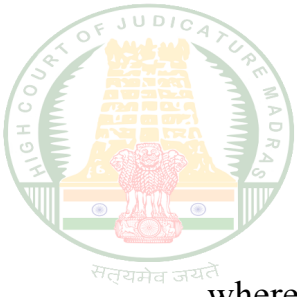
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JUDGMENT

Appeal is filed by the unsuccessful plaintiff who has instituted suit against his father and purchaser of the property from his father contending that the property purchased with the joint contribution of himself and his father being unilaterally sold by the father and therefore his half share in the suit property to be declared.

2. The case of the plaintiff is that he along with his father purchased Item No.1 of suit property on 30.08.2001 and Item Nos.2 to 4 on 16.12.2009. Though it was purchased in the name of his father, he has contributed money for the said purchase and it had been enjoyed as a joint family property. When his father tried to alienate the property to meet out the medical expenses, he did not consent for that since the property had the prospect of fetching higher value in future. However, without his concern, his father has sold away the property in favour of defendants No.2 to 4 under three different sale deeds for much lesser value with the help of relative by name Kumaravel. The suit for partition candidly conceded by the father who was arrayed as the first defendant,



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whereas the purchasers of the property contested the suit.

3. Based on the pleadings, the trial Court had framed the following issues:-

(i) Whether half of the portion of the suit property is the exclusive property of the 1st defendant or not ?

(ii) Whether the plaintiff is entitled to get the relief of portion in the suit property as prayed for or not ?

4. Plaintiff was examined as P.W.1, one Babuji was examined as P.W.2, eleven documents were marked as Exs.A1 to A11, Father of plaintiff, Arumuga Kondiyar was examined as D.W.1 with the aid of Advocate Commissioner, the second defendant was examined as D.W.2 Kumaravel who alleged to have mediated the sale transaction examined as P.W.3, ten documents were marked on the side of defendants as Exs.D.1 to D.10.



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5. The Court below after appreciating the evidence dismissed the suit holding that the plaintiff had failed to prove contribution, joint accession and joint possession of the property. The suit property stands in the name of first defendant and eventhough the first defendant had pleaded that he had only half share of the property, the recital of the title does not indicate so. As well he has not disclosed in the covenant of the sale deeds that he has only half share in the property while conveying the property to defendants 2 to 4. Therefore the suit is liable to be dismissed.

6. Challenging the judgment and decree, the present appeal is filed on the ground that the Trial Court ought to have given due credence to the documents relied by the plaintiff as well as the evidence of D.W.1 along with his written statement.

7 D.W.1 in his pleadings as well as in his evidence had categorically deposed that the property was purchased with the contribution of his son i.e., the plaintiff and his wife and the property was enjoyed jointly along with the plaintiff. He had further deposed he intend

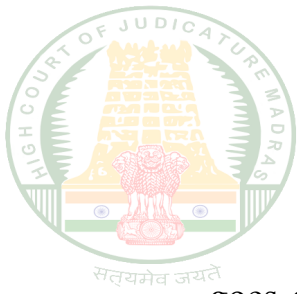


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to sell only half of his share to the defendants 2 to 4, but for under value the entire property has been conveyed under the sale deed. Exs.A1 to A3 and such sale is hit by the principles of 'non est factum'. The trial Court omitted to appreciate that the content of the document is substantially contradicted by oral evidence. The ambiguity in the written document explained through oral evidence hence same is admissible under proviso to Section 92 of the Evidence Act, 1872.

8. The learned counsel appearing for the appellant relying upon judgments of Hon'ble Supreme Court wherein the principles of 'non est factum' being explained contended that the sale deeds marked as Exs.A1 to A3 was obtained by mis-representation and also for under value. Hence it need not be challenged separately since it is void *ab initio*. Further he would also submit that D.W.1, the vendor had clearly stated in his written statement that Exs.A1 to A3 sale deeds were obtained under mis-representation for under value. The said pleading were not controverted by any reply statement or by cross examination of D.W.1. Therefore, he would submit that un-controverted pleading amounts to admission and



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goes against the defendant. Hence the Trial Court judgment need to be reversed.

9. Per contra the counsel appearing for the respondents would submit that it is collusive suit between the father and son to defeat the right of bonafide purchasers of the property who were arrayed as defendants 2 to 4. After executing the sale deeds Exs.A1 to A3 with full knowledge and consent and having received the full sale consideration on 03.06.2010, the present suit is instituted by the vendor through his son after four years. This is after unsuccessful in launching criminal prosecution against the purchasers. The first defendant being the absolute owner of the property, he with full knowledge, consent and taking consideration had alienated the property, and had not questioned it at any point of time till date. However, through his son, he had attempted to extract money through this vexatious litigation. This attempt been foiled by the defendants 2 to 4 by adducing necessary evidence.

10. Regarding omission to cross examine D.W.1, the learned



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counsel appearing for the respondents submitted that D.W.1 was examined with the aid of Advocate Commissioner. The order passed by the Court appointing Commissioner to record evidence was challenged by the respondents. However, pending Revision petition, D.W.1 was examined. Thereafter to recall and re-examine D.W.1 the defendants 2 to 4 filed application and the same was allowed. However, when the Advocate Commissioner went to the place of D.W.1 to record the cross examination, D.W.1 was not in a position to depose. Hence the Advocate Commissioner returned the warrant mentioning that D.W.1 was not in good health and not responding to the question, hence he was not able to complete the mission. Therefore, the learned counsel for the respondents submit that since the testimony of D.W.1 could not be completed and he died subsequently, his testimony has to be eschewed.

11. The point for determination is whether Exs.A1 to A3 is void on applying the principles of non est factum. If so, whether the appellant is entitled for any share in the suit property.



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12. On a perusal of the record and evidence let in by the parties, this Court finds that there is no evidence to show that the sale consideration for purchase of the subject property in the year 1981 was paid from and out of any contribution by the appellant. Eventhough he has pleaded so, there is no evidence to substantiate his contribution. Mere admission of D.W.1, the father of plaintiff that the property was purchased with the contribution of the son is not sufficient to declare that the appellant is the co-owner of the property and have equal right in the property. More particularly after the father (DW1) sold away the entire property to third parties receiving consideration.

13. The learned counsel appearing for the appellant pegged his submission on the premise that the subject property is purchased out of joint family nucleus and therefore there need not be any proof for the contribution when P.W.1 and P.W.2 as well as D.W.1, the father of the plaintiff admit that the appellant had contributed his income for purchase of the property.

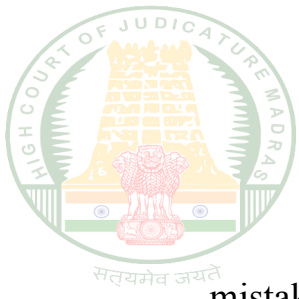


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14. This Court is unable to countenance such argument when the specific plea of the appellant / plaintiff is that the property was purchased in the name of the first defendant from and out of the earning of the first defendant and himself from the income he earned while he was working as a Superintendent in a Courier company, nothing pleaded how much he contributed for purchase of the property in 1981 and whether it was purchased by him and first defendant to be enjoyed as a joint family property or as exclusive property of his father (D.W.1). The plaintiff though he is the son of the defendant, he has no right or share in the self acquired property. The plaintiff had failed to prove he had contributed for purchase of the property. He had failed to prove that his father was only a new lender. Merely harping on the admission of the first defendant, the appellant seeks share in his property after the first defendant had alienated the property to DW.2 to D.W.4 representing that he is the absolute owner of the property purchased out of his income.

15. To apply the principles of 'non est factum', the person who take the said defence has to establish that the document was obtained by



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mistake or by misrepresentation without explaining the content or making the executant know about the content of the document. The plea of non est factum will not be available for a person who signed the document without taking the trouble to find out atleast the general effect of the document. It is also repeatedly held by the Courts that there must be radical difference between the document signed by the party and the presumption of the signatory about the content of the document. It must be of no fault of the signatory, a document by mis-representation must have been obtained.

16. In the case in hand, the first defendant admits that he had the intention to sell the property since he had the necessity to meet out his medical expense. He admits that his son did no consent for sale of property. Therefore, with the help of said Kumaravel he sold the property to D.W.2 to D.W.4 under Exs.A1 to A3. His case is that his intention was to sell only $\frac{1}{2}$ his share in the property and even for that he was not paid adequate consideration by the defendants 2 to 4. If his contention is true, he should have challenged the sale deeds which he never choose to do



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so. Only after four years of execution of sale through his son he wants to set up a plea of 'non est factum'. Neither D.W.1 nor his son P.W.1 (the plaintiff) had probablised through evidence that the signature in the documents were obtained by misrepresentation or by mistake and there is a radical or fundamental difference between what is signed and what he thought he was signing.

17. Further, while examining the testimony of D.W.1 as stated above, his evidence not completed. After allowing the application to recall and re-examine D.W1., due to the failing health of D.W.1 the Commissioner was not able to record the cross examination which was permitted by the Court. The deprivation of right to cross examine the witness is not due to the fault of the defendant but due to the ill health of the witness. May be, the defendants ought to have cross examined D.W.1 at the earliest point of time which they failed to do, but the failure cannot be put against them after the Trial Court has found fit to recall the witness and permitted the defendants to cross examine.



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18. Hence, whatever, evidence given by D.W.1 not subjected to cross examine by the contesting party. Hence it has to be taken with pinch of salt. On the whole, considering the facts and evidence, the plaintiff has pleaded joint contribution and claim the property as joint family property. However no evidence produced to prove it. Having failed to prove and substantiate the pleadings, trial Court has rightly dismissed the suit.

19. This Court finds no material to interfere with the findings of the Trial Court. Hence, the appeal stands dismissed. There shall be no order as to costs. Consequently connected miscellaneous petition is closed.

09.06.2025

Index: Yes/No
Speaking/Non Speaking order
Internet: Yes
Neutral Citation: Yes/No
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To

1. The Additional District Judge, Mayiladuthurai
2. The Section Officer, High Court of Madras, Chennai.

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DR.G.JAYACHANDRAN,J.

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