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S.A.(MD)No.65 OF 2017

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 30.10.2024

PRONOUNCED ON : 08.05.2025

CORAM

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A.(MD)No.65 of 2017 AND

C.M.P.(MD)No.1289 of 2017

N.Nagarajan

... Appellant / 1st Respondent /
1st Defendant

Vs.

1. R.Perumalsamy Naidu (Died) ... 1st Respondent / Appellant /
Plaintiff

2. A.Samsudeen ... 2nd Respondent / 2nd Respondent /
2nd Defendant

3. A.Mohamed Moosa ... 3rd Respondent / 3rd Respondent /
3rd Defendant

4. A.Sheik Dawood ... 4th Respondent / 4th Respondent /
4th Defendant

5. Muthulakshmi

6. Subbulakshmi

7. Ramakrishnan

8. Subburam

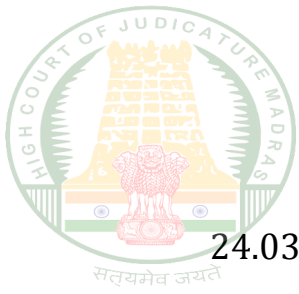
9. Adhilakshmi

10.Govindarajan ... Respondents 5 to 10

(R-5 to R-10 are brought on record as LR's of the deceased

1st respondent vide order dated 14.03.2018 in C.M.P.(MD)No.686 of 2018)

Prayer: Second appeal filed under Section 100 CPC, to pass
a decree and judgment setting aside the judgment and decree dated



24.03.2014 passed in the appeal in A.S.No.11 of 2012 on the file of the Additional District and Sessions Judge, Dindigul reversing the judgment and decree dated 08.02.2012 passed in the suit in O.S. No.85 of 2007 on the file of the Principal Subordinate Judge, Dindigul and dismissing the suit in entirety with costs throughout.

For Appellant : Mr.J.Barathan

For R-2 to R-4 : Mr.H.Lakshmi Shankar

For R-5 to R-10 : Ms.M.Benazir Begam

* * *

J U D G M E N T

The first defendant in O.S.No.85 of 2007 on the file of the Principal Sub Court, Dindigul is the appellant in this second appeal. The first respondent herein filed the said suit seeking partition of 53 cents in the suit schedule first item and 76 cents in the suit schedule second item and separate possession by metes and bounds. The trial Court vide judgment and decree dated 08.02.2012 dismissed the suit. Questioning the same, the plaintiff filed A.S.No.11 of 2012 before the I Additional District and Sessions Judge, Dindigul. The first appellate Court reversed the decision of the trial Court and granted



preliminary decree as prayed for. Challenging the same, the second appeal came to be filed.

2. The second appeal was admitted on 13.02.2017 on the following substantial questions of law:-

“a) When the trial Court had elaborately discussed various circumstances relating to the sale deed Ex.A.5 and had given a finding that Ex.A.5 is only a sham and nominal deed executed for some other purpose, whether the lower appellate Court committed an illegality in omitting to consider and discuss those findings and setting aside them without answering them?

b) When the appellant / first defendant had pleaded in his written statement that he had prescribed title to the suit property by adverse possession and has also let in oral and documentary evidence to that aspect, whether the lower appellate Court committed an illegality in omitting to frame a point for consideration under Order 41 Rule 31 of the Civil Procedure Code?

c) Whether the lower appellate Court committed an illegality in failing to follow the settled proposition of law that in a suit for partition, all the co-sharers are necessary parties and omitting to implead them is fatal to the suit?



d) When the trial Court had specifically given a finding that

the first respondent / plaintiff had admitted in his deposition about the non-impleading of other pangalis and hence, the suit is bad for non-joinder of necessary parties, whether the lower appellate Court committed an illegality in omitting to consider the said finding?

e) Whether the lower appellate Court had committed an error in misapplying the oral and documentary evidence of the appellant / first defendant for deciding title and not for adverse possession?"

3. The learned counsel appearing for the appellant reiterated all the contentions set out in the memorandum of grounds of appeal and called upon this Court to answer the substantial questions of law in favour of the appellant and set aside the impugned judgment and decree and restore the decision of the trial Court.

4. During the pendency of this appeal, the plaintiff passed away and his legal heirs were brought on record as respondents 5 to 10. The learned counsel for the legal heirs of the plaintiff submitted



that the impugned judgment and decree is well reasoned and it does not call for interference.

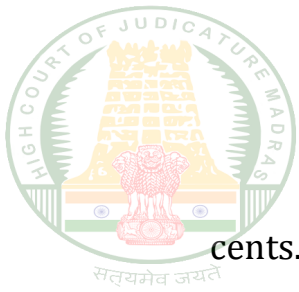
5. Respondents 2 to 4 herein figured as defendants 2 to 4.

They entered into a sale agreement with the appellant / first defendant. The first appellate Court had restrained the alienation in favour of defendants 2 to 4. The learned counsel for defendants 2 to 4 adopted the stand of the appellant's counsel. He also filed a detailed written notes and relied on a catena of decisions in support of his contentions. He called upon this Court to allow this second appeal.

6. I carefully considered the rival contentions and went through the evidence on record.

7. The case of the plaintiff is as follows:-

The suit properties originally belonged to the ancestors of the first defendant. The Tamil word employed in the plaint is “vagayara”. The suit first item is comprised in survey No.511 measuring an extent of 1 acre and 47 cents. The suit second item is comprised in survey No.509 measuring an extent of 2 acres and 17



cents. The first defendant sold 2/3rd out of half share in the suit first item and 2/3 share in the suit second item vide sale deed dated 14.05.1973 for consideration. The plaintiff was in possession and enjoyment of the suit items ever since. The first defendant approached the plaintiff on 03.10.2007 and took a photocopy of the sale deed dated 14.05.1973. The plaintiff came to know that the first defendant was intending to sell away the plaintiff's share also. He therefore instituted the present suit for partition and separate possession.

8. The first defendant filed written statement controverting the plaint averments. According to the first defendant, the sale deed executed by him in favour of the plaintiff was sham and nominal and was not intended to be acted upon. The suit was bad for non-joinder of other co-owners. Few other standard contentions were also taken. Based on the rival pleadings, the trial Court framed the following issues:-

“ 1. Whether the plaintiff is entitled to partition in the suit property?

2. Whether the plaintiff is entitled to preliminary decree as



prayed for?

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3. Whether the plaintiff is entitled to permanent injunction as prayed for?

4. Whether the suit is bad for non-joinder of necessary parties?

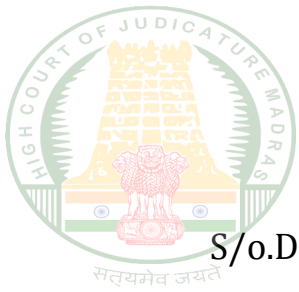
5. To what relief the plaintiff is entitled?"

9. The plaintiff examined himself as P.W.1 and three other witnesses were examined as P.W.2 to P.W.4. Ex.A.1 to Ex.A.15 were marked. The first defendant examined himself as D.W.1. One Azhagarsamy who was projected as a co-owner was examined as D.W.2. Ex.B.1 to Ex.B.8 were marked. As already mentioned, the trial Court vide judgment and decree dated 08.02.2012 dismissed the suit. But the first appellate Court reversed the said decision and decreed the suit as prayed for.

10. According to the learned counsel for the appellant and the learned counsel for the sailing respondents, one Shanmuga Velu Pillai executed Ex.B.1 sale deed dated 02.05.1917 in favour of four persons namely, Pethan Mathari, Muthayee, Pethan Mathari and



Muthayee conveying title of an extent of 3.52 acres (1.35 acres in S.No.511 and 2.17 acres in S.No.509). Under Ex.B.2 dated 09.03.1943, one Pethan Mathari sold the undivided half share of 83 9/16 cents (in S.Nos.511 and 509) out of 1 acre 67 1/8 cents (96 cents in S. No.511 and 70 cents in S.No.509) in favour of Muthayee. Under Ex. A.1 dated 24.09.1962, Pethan, S/o.Muthayee and Pethalu Ammal, W/o.Mariappan sold the undivided 2/3rd share of 49 cents in S. No.511 & 72 cents in S.No.509 in the undivided 1/2 share out of the 1.47 acres in S.No.511 and 2.17 acres in S.No.509 in favour of Mahammed Hanifa. On 10.07.1963, Mohammed Hanifa conveyed what was purchased by him under Ex.A.1 in favour of Nallu Thevar. Nallu Thevar in turn conveyed under Ex.A.3 dated 14.10.1966 in favour of one Nambirajan Naidu. Nambirajan Naidu conveyed what was purchased by him under Ex.A.4 dated 29.04.1971 in favour of the appellant Nagarajan. Under Ex.A.5 dated 14.05.1973, the appellant sold the same in favour of Perumalsamy Naidu, the plaintiff herein. The learned counsel for the appellant as well as the sailing respondents would point out that though Ex.B.2 was executed by Pethan Mathari, he was not Pethan Mathari, S/o.Alagiri Mathari who was one of the co-owners. Ex.B.2 was executed by Pethan Mathari,



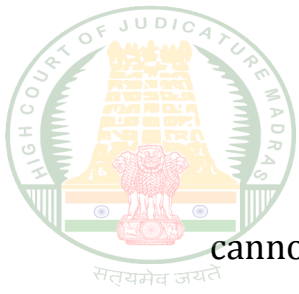
S/o.Dasi Mathari. In Ex.B.2 itself, there was no actual conveyance on title. In these circumstances, since Ex.A.5 based on which the plaintiff has filed the present partition suit is traceable only to Ex.B.2 and since Ex.B.2 itself is *void ab initio*, the plaintiff cannot claim any title. In fact considerable time of this Court was consumed on this aspect. I am not however swayed by the lengthy contentions advanced on that score. It is true that this plea was taken in the written statement itself. But the trial Court did not accept this contention put forth on the side of the first defendant. The trial Court noted that Ex.B.2 was an ancient document. It further noted that encumbrance certificate for the period from 1917 to 1943 was not produced. It gave a specific finding that it may not be possible to characterise Ex.B.2 dated 09.03.1943 as a void document. In other words, the defence put forth by the first defendant by characterising Ex.B.2 as void was not accepted by the trial Court. The first defendant did not file any cross objection before the first appellate Court challenging this finding. No substantial question of law has also been formulated in this regard when the second appeal was admitted. I therefore will proceed on the premise that Ex.B.2 is a valid document.



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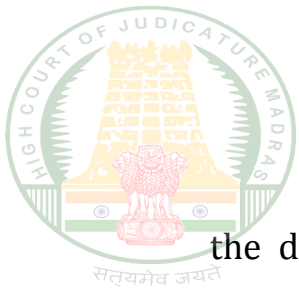
11. It is true that the first defendant had also not raised a plea of adverse possession. It is well settled that before projecting a plea of adverse possession, the title of the opposite party must be acknowledged and then there must be an assertion of hostility. In this case, the appellant had pleaded that the sale deed executed by him in favour of the plaintiff was only sham and nominal and that therefore, title continued to remain only with him. In these circumstances, the question of going into the plea of adverse possession does not arise at all. The second and fifth substantial questions of law are answered against the appellant.

12. The learned counsel for the appellant and the sailing respondents contended that the suit ought to have been dismissed on the ground of non-joinder of necessary parties. The learned counsel relied on a decision of the Hon'ble Division Bench reported in **100 LW 486 (Ramachandra Pillai A. V. Valliammal (died))**. The Hon'ble Division Bench had held that in a suit for partition, all the sharers are necessary parties and the suit would be liable to be dismissed for non-joinder of any one of them. This principle however



cannot be applied in the abstract. The first defendant in his written statement had only taken a plea that the suit is bad for non-joinder of necessary parties. He had not specifically mentioned as to who are the persons who ought to have been impleaded. The plaintiff had made it clear that he is seeking partition only in respect of the suit schedule items alone. In fact Ex.B.7 patta No.574 which deals with survey No.509/2, 509/4, 511/11, 511/3 and 511/7 measuring a total extent of 51.50 Ares stands only in the name of the appellant / first defendant. Likewise, patta No.580 in respect of survey No.509/5 and 509/7 stands in the name of Nagan who is none other than the appellant's father and it pertains to 19 ares.

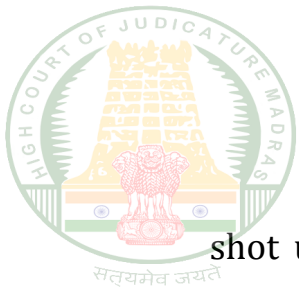
13. The appeal ground No.34 before the first appellate Court specifically highlights the point that the appellant in his cross examination had conceded that his pangali namely, Thanthoni vagayara have no right in the suit property and that they need not be impleaded as parties. The first defendant who raised a plea of non-joinder of necessary parties must specifically state the particulars of persons who ought to have been impleaded. This is an essential thing to enable the Court to decide as to how far their absence would affect



the decision in the suit. Thus, it is the duty of the defendants to furnish necessary particulars (ie.) names of the legal heirs who according to them have not been impleaded as parties. If the plaintiff had failed to implead the so called sharers, even after the defendants had filed the list, then the suit may have to be dismissed on the ground of non-joinder of necessary parties. In this case, the appellant did not file any such list of legal heirs who ought to have been impleaded. On the other hand, his own document Ex.B.7 indicates that patta No.580 and 574 in respect of the suit items are only standing in his name.

14. Therefore, the third and fourth substantial questions of law are answered against the appellant.

15. The learned counsel for the appellant / sailing respondents argued that the title documents based on which the partition suit has been laid are sham and nominal. The trial Court endorsed this defence by taking into account the fact that the sale consideration set out in Ex.A.5 and sale consideration set out in Ex.A.4 are same. Ex.A.4 was executed on 29.04.1971 and Ex.A.5 came into existence two years later. The trial Court could not have come to such a conclusion only on that ground. The land value might not have



shot up during the intervening period. It is not necessary that the subsequent transaction in respect of a particular piece of land should always reflect a higher sale consideration. Of course, land values fluctuate. There is no necessary rule that they should always be on the upward trend.

16. It is true that the revenue record was not mutated in favour of the plaintiff. This also cannot be a ground to come to the conclusion that Ex.A.5 is a sham and nominal document. The Madras High Court in the decision reported in **2012 SCC OnLine Mad 1745 (N. Thirugnanasambandam V. R. Sundararaj)** held as follows:-

“32. ... merely because the property continued to be assessed in the name of vendor, it cannot be presumed that the document, namely the Sale Deed is a sham and nominal document and no consideration was passed and no title passed under the document. In addition, to the payment of house tax receipts, something more has to be proved by the person, who claims that the document is only sham and nominal and no title passed under the document.”

17. The Hon'ble Supreme Court in the decision reported in **(1996) 6 SCC 223 (Sawarni V. Inder Kaur)** held as follows:-



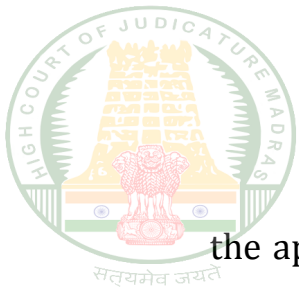
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“7. ... Mutation of a property in the revenue record does not create or extinguish title nor has it any presumptive value on title. It only enables the person in whose favour mutation is ordered to pay the land revenue in question.”

18. Ex.A.5 is a registered document. One Dhandapani who is none other than the brother of the plaintiff figures prominently in the written statement of the appellant. But the said Dhandapani was not examined by the defendant. Except the *ipse dixit* of the first defendant, there is no evidence to establish the claim that Ex.A.5 is a sham and nominal document. It is well settled that when the execution of a document is alleged to be sham and nominal, the onus to establish the same is cast on the person making the allegation. Nothing stopped the appellant from instituting the suit to get a declaration that Ex.A.5 is void and sham and nominal. I am of the view that the onus cast on the first defendant which was rather heavy was not at all discharged in this case. I therefore answer the first substantial question of law against the appellant.

19. The case on hand is fairly simple and straightforward. The appellant undoubtedly claims right over the suit properties. Ex.A.4 dated 29.04.1971 was executed in his favour. Subsequently,



the appellant had executed Ex.A.5 dated 14.05.1973 in favour of the plaintiff. The appellant does not dispute his signature or even the registration of the document. It is his only case that the transaction was entered into for certain other purposes. I have held that the explanation projected by the appellant has not been duly substantiated. When once Ex.A.5 is found out to be a true document, the plaintiff who is a purchaser under Ex.A.5 is entitled to seek partition of the property in terms of Ex.A.5. The first appellate Court rightly approached the issue and interference with the well considered decision is not called for. This second appeal is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

08.05.2025

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S.A.(MD)No.65 OF 2017

G.R.SWAMINATHAN,J.

PMU

To:

1. The Additional District and Sessions Judge,
Dindigul.
2. The Principal Subordinate Judge,
Dindigul.

S.A.(MD)No.65 of 2017

08.05.2025