THE HONOURABLE SMT. JUSTICE M.G. PRIYADARSINI

A.S.No.111 OF 2020

JUDGMENT:

Aggrieved by the judgment and decree dated 17.12.2019 in O.S.No.1358 of 2013 (hereinafter will be referred as 'impugned judgment') passed by the learned III Additional District Judge, Ranga Reddy District at L.B.Nagar (hereinafter will be referred as 'trial Court'), the defendant No.3 preferred the present appeal to set aside the impugned judgment.

2. For the sake of convenience, the parties hereinafter are referred to as they are arrayed before the trial Court.

3. The brief facts of the case, which necessitated the appellant to file the present appeal are that, the plaintiff Nos.1 and 2 filed suit for partition and rendition of rent accounts in respect of suit schedule properties against the defendant Nos.1 to 3. The averments of the plaint in brief are as under:

a) The plaintiff No.1 purchased the plot bearing No.109 admeasuring 267 square yards in Sy.No.87 to 89 situated at Gaddi Annaram (now Hanuman Nagar), Chaitanyapuri Colony through registered document dated 07.05.1992 from K. Krishna Reddy and thereafter with the financial assistance of himself

and defendant No.1, he has constructed five shops and thereafter obtained municipal door No.3-77/D. The defendant Nos.2 and 3 are the parents of plaintiff No.1 and defendant No.1. Thereafter, defendant No.1 filed O.S.No.429 of 2005 on the file of learned I Additional Senior Civil Judge, R.R. District against them and defendant Nos.2 and 3 seeking partition of the said property knowing fully well that the same was exclusive property of plaintiff and defendant Nos.2 and 3. The matter ended in compromise and award passed on 05.04.2006 and in terms of compromise the plaintiffs were allotted two rooms towards southern side of the house, one mulgi towards western side and one small mulgi existing under the steps, while defendant No.1 retained big hall, one mulgi towards western side, which is attached to hall and another room towards northern side, which is also attached to the hall besides pooja room, which is on northern side.

b) Defendant Nos.2 and 3 were jointly allotted two mulgies towards northern side for life time interest and thereafter the same shall be partitioned equally among the plaintiff No.1 and defendant No.1. Their sisters relinquished their rights in the said property, though he has purchased the plot with his own

funds and even then does not want to challenge the award passed.

c) After compromise decree in the year 2007, the defendant No.1 made a proposal with plaintiff No.1 to jointly construct first, second and third floors and a pent house on the fourth floor on the said property with the funds contributed equally. The plaintiff No.1 agreed for such proposal and accordingly three residential portions each were constructed on the first, second, third and on the pent house on fourth floor. Though entire building was constructed by contributing the funds jointly, the defendant No.1 was enjoying the rents unilaterally by letting out the portions to the tenants. Defendant No.1 having collected rents from the shops allotted to the plaintiff in the ground floor in the said compromise decree, has been depositing only meagre amounts in the accounts of the plaintiff. The defendant No.1 staying along with defendant Nos.2 and 3 in a residential portion in the ground floor, including the portion allotted to the plaintiff No.1 without paying any rents. Thus, the plaintiff is entitled for 50% share in the first, second, third floors and fourth floor pent house along with undivided share of land to an extent of 40%, which comes to 106.8 square yards.

The defendant No.1 did not come forward to partition the said properties though several requests were made.

d) In the month of March, 2012 the defendant No.1 made a proposal to sell the entire properties to him for a sum of Rs.60,00,000/- and also entered into an agreement of sale on 21.03.2012 and in terms of agreement, a sum of Rs.5 lakhs has been paid towards part sale consideration and thereafter, balance sale consideration of Rs.55,00,000/- has to be paid within sixty days and if failed to pay, then whatever amount paid towards part sale consideration need not be refunded.

e) The defendant No.1 by virtue of compromise decree, admitted that the plaintiff No.1 has got 40% in the said property, but in fact, the said agreement itself is invalid, since the same was executed by and between him and defendant No.1 without the consent of parents (defendant Nos.2 and 3) though they were holding 20% of share. Then legal notice was issued on 03.10.2013 to the defendant Nos.1 and 2 calling upon them to effect partition entitling 50% and for rendition of accounts, but even then the defendants did not come forward. Hence, the suit.

4. In reply to the plaint averments, the defendant No.1 filed written statement contenting that the suit is not maintainable as it is barred under the provisions of Section 11 of the Code of Civil Procedure. It is further submitted that as per Lok Adalath Award, defendant No.1 and plaintiff got 40% share each and their parents (defendant Nos.2 and 3) have got 20% share in the suit property and as such the plaintiff‟s claim of 50% share does not arise. The plaintiff No.1 did not contribute any amount towards construction of first, second and third floors apart from pent house and that he has no means to contribute any funds and that plaintiff No.1 is living separately along with plaintiff No.2 (his wife) at Vanasthalipuram and that all the floors were constructed by defendant No1 out of his own funds. The rents have been distributing in terms of Lok Adalath award and therefore, the very suit itself is not maintainable and liable to be dismissed with costs.

5. Defendant No.2 reported died and the legal representatives were already on record.

6. The defendant No.3 filed written statement by contending that there is a compromise entered into between the plaintiffs and defendant Nos.1 and 2 and himself in the presence of

witnesses and the same was reduced into writing by way of partition agreement dated 03.07.2016 signed by all the parties, including her husband and defendant No.1 and a plan was already prepared and includes to it and however, the defendant No.1 has not signed the said document. After the death of her husband, there is change in the attitude of defendant No.1 but not only backed from the partition agreement and the plan enclosed, but also started ill treating her and pressurized her to support his case in this partition suit. Till this day, the defendant has been collecting rents from the tenants, barring negligible rents being paid to plaintiff No.1 and sought to decree the suit in terms of partition agreement dated 03.07.2016.

7. Based on the pleadings of both the sides, the trial Court has framed the following issues:

1. *Whether the suit schedule property is joint family property and liable for partition? If so, whether the plaintiffs are entitled to seek the relief of partition with half share in the schedule property, as prayed for?*
2. *Whether the plaintiffs are entitled to seek relief for rendition of accounts in respect of the schedule property from the defendant No.1 from October, 2010 till filing of the suit?*
3. *Whether the plaintiffs are entitled to seek for their half*

share with metes and bounds?

4. *To what relief?*

8. On behalf of plaintiffs, PW1 was examined and got marked Exs.A1 to A4. On behalf of defendants, DWs 1 and 2 were examined and got marked Exs.B1 to B63. The trial Court on appreciating the evidence on record, has decreed the suit preliminarily against the defendant entitling the plaintiffs 40% share over the suit schedule property and further the defendant No.1 is directed to render proper accounts in respect of monthly rents.

9. Aggrieved by the above said judgment and decree, the defendant No.1 filed the present appeal.

10. Heard both sides and perused the record including the grounds of appeal.

11. The first and foremost contention of the learned counsel for the defendant No.1 is that the trial Court committed grave error in finding that the plaintiff No.1 also contributed for construction of 1st, 2nd and 3rd floors and pent house, though plaintiff No.1 admitted that there is no documentary proof with him to prove that he also contributed for construction of upper

floors and pent house. The defendant No.1, who is examined as DW1, admitted in his cross examination that permission for construction of G + 1 taken jointly i.e., in his name, in the name of plaintiff No.1 and also in the name of his father. DW1 further admitted that plaintiff No.1 sold his share in the ground floor as well as three floors + pent house. It is pertinent to note that mere execution of agreement of sale under Ex.B63 does not amount to sale until and unless the defendant No.1 performs his part of contract in depositing the balance sale consideration of Rs.55 lakhs. If at all the plaintiff No.1 has not contributed any amount for construction of G + 1, certainly there was no necessity at all for the defendant No.1 to obtained permission not only his name but also in the name of plaintiff No.1 and his father. Furthermore, if at all the plaintiff No.1 has not contributed any amount for construction of G + 1, the defendant No.1 would not have admitted that plaintiff No.1 sold his share in the ground floor as well as three floors + penthouse. Even for the sake of arguments, if it is presumed that the plaintiff No.1 has not contributed any money towards construction, plaintiff No.1 would not get any share in such property and thereby defendant No.1 would not have uttered that plaintiff No.1 has got some share in the ground floor as

well as three floors + penthouse. The defendant No.1 has not adduced any evidence to substantiate that plaintiff No.1 has not contributed any amount towards construction of ground floor as well as three floors + penthouse.

12. It is the specific case of the defendant No.1 that plaintiff No.1 intended to alienate his share of property to defendant No.1 under Ex.B63 and in pursuance of the same the defendant No.1 paid part consideration of Rs.5,00,000/- out of total sale consideration of Rs.60,00,000/-. If at all the plaintiff No.1 has not contributed any amount towards construction, the defendant No.1 would not have been any transaction between plaintiff No.1 and defendant No.1 under Ex.B63. In the cross examination of plaintiff No.1, the learned counsel for the defendant No.1 gave a suggestion that as PW1 suffered loss in his shares business, he took Rs.3,00,000/- from his parents and at that time he executed an agreement of sale in the year 1991 by agreeing to sell away southern portion of the schedule house as per the Lok Adalath. But this fact was not stated by the defendant No.1 in his written statement. It is settled law that without pleadings, adducing any amount of evidence is a futile exercise.

13. The learned counsel for the defendant No.1 contended that the trial Court ought to have seen that the defendant No.1 can pay the balance sale consideration even at the time of registration of the sale deed and thus, the default clause does not operate. Defendant No.1 in support of his contentions got examined DW2, who alleged to have attended centering work for construction of three floors and pent house in the suit schedule property. DW2 is also alleged to be the attesting witness to Ex.B63. DW2 pleaded ignorance as to whether Ex.B63 was cancelled for non compliance of terms and conditions mentioned therein. The learned counsel for the defendant No.1 relied upon an authority in **Nannapaneni Subbayya Chowdary and another v. Garikapati Veeraya and another**[1], wherein the High Court for the erstwhile State of Andhra Pradesh observed that it is open to one of the parties to make time as the essence of the contract by calling upon the other party who has been guilty of unreasonable delay to perform the contract within a stated time by giving him reasonable notice. He further relied upon a decisions in **Gomathinaraygam Pillai and others v. Palaniswami Nadar**[2] **and Govind Prasad Chaturvedi v. Hari**

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[1] AIR 1957 AP 307
[2] AIR 1967 Supreme court 868

Dutt Shastri and another[3], wherein the Honourable Supreme Court observed that fixation of the period within which the contract is to be performed does not make the stipulation as to time is the essence of the contract. In **Samineni Venkateswarlu and another v. Nagubandi Venkata Narasaiah (died) and other**[4] the High Court for the erstwhile State of Andhra Pradesh observed that though time was not the essence of contract initially by issuing notice time cannot be made as essence of the contract. In **S. Indira and another v. Netyam Venkataramana and others**[5] the High Court for the erstwhile State of Andhra Pradesh observed that in the absence of stipulation to the contrary in the agreement, time is not the essence of the contract. In **G. Ramanamma v. P. Chiranjeevi Rao**[6] the High Court for the erstwhile State of Andhra Pradesh observed that time fixed for performance not to be considered to be essence of contract. The learned counsel for the defendant No.1 relied upon an authority in **Messrs. Sriram Cotton Pressing Factory (P) Limited v. K.E.Narayana Swami Naidu**[7] and contended that the question as to whether time was the essence of contract is a question of law. The learned counsel

[3] AIR 1977 Supreme Court 1005
[4] AIR 1994 AP 220
[5] 1996 (3) ALT 1080 (DB)
[6] 2010 (4) ALD 799
[7] AIR 1965 Madras 352

for the defendant No.1 further relied upon decisions of High Court for the erstwhile State of Andhra Pradesh in **D. Suryanarayana and another v. I. Suryakanthamma and another**[8] and **Movva Tirupathaiah and others v. Movva Sivaji Rao and others**[9] and contended that question of law can be permitted to be raised in the appeal even though the said plea was not raised before the trial Court. It is pertinent to note that the defendant No.1 has filed I.A.No.2 of 2020 seeking amendment i.e., incorporating in the written statement that time was not essence of contract and this court has dismissed the said application on 10.11.2022 on the ground that in a partition suit such pleadings are irrelevant. It was further observed by this Court in the order dated 10.11.2022 that the agreement on which defendant No.1 is relying upon is an unregistered one and that delivery of possession was also not done. Admittedly, the defendant No.1 is depositing the rents into the account of plaintiff No.1 so far as his share of 40% is concerned. Thus, the defendant No.1 cannot claim that he is in possession of entire suit schedule property.

14. In Ex.B63 at condition No.1 it was specifically mentioned

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[8] 2003 (2) ALT 759
[9] 2007 (5) ALD 32

that remaining amount of Rs.55 lakhs will be paid on or before 60 days or at the time of registration and in case the vendee fails to pay the agreed amount on or before the stipulated time this agreement of sale is null and void and the vendor need not have to return the advance amount. It is not incorporated in Ex.B63 that the balance sale consideration can be paid even after registration and in fact it was specifically mentioned that the balance consideration can be paid before 60 days or at the time of registration. As seen from the clause and as stated above, the balance sale consideration has to be paid before 60 days or at the time of registration. It is not the case of the defendant No.1 that he got issued legal notice to the plaintiff No.1 asking him to come forward to receive balance sale consideration and execute registered sale deed. Ex.B63 is dated 21.03.2012 and whereas the plaintiff has filed the present suit in the year 2013.

15. In the case on hand, in Ex.B63 it is clearly stipulated that the vendee has to deposit balance consideration within 60 days from Ex.B63 or at the time of registration. Moreover, the vendee i.e., defendant No.1 clearly admitted that since he failed to pay the balance sale consideration to the vendor i.e., plaintiff

No.1 he has been depositing the rents to the account of plaintiff No.1. Hence, the defendant No.1 in the case on hand is not ready and willing to perform his part of contract and thereby, the principle laid down in the above said decisions will not come to the rescue of defendant No.1. It is also pertinent to note that since the defendant No.1 failed to pay the balance sale consideration, the plaintiff No.1 got issued legal notice dated 03.10.2013 seeking partition and rendition of rent accounts. As rightly contended by the learned counsel for the plaintiff No.1, the case on hand is a suit for partition and rendition of accounts but not a suit for specific performance. We are here to deal with a case for partition and separate possession, thus, the above said decisions relied upon by the counsel for the defendant No.1 will not be of any help to the defendant No.1.

16. Since the defendant No.1 has not paid the balance sale consideration before 60 days from the date of Ex.B63 and since he did not even issue any legal notice to the plaintiff to come forward for registration in respect of suit schedule property, the default clause in Ex.B63 came into operation and thus, the defendant No.1 is not entitled for any refund of Rs.5,00,000/- alleged to have been paid by defendant No.1 and that apart the

agreement of sale under Ex.B63 also stands cancelled. However, it is pertinent to note that based on Ex.B63 the defendant No.1 alleged to have filed suit for specific performance of agreement of sale. But defendant No.1 failed to provide the case number, year of the case or at least the name of the court, wherein the said case is pending. It is the specific contention of the plaintiff No.1 that though defendant No.1 executed agreement of sale under Ex.B63 contending that he has paid Rs.5,00,000/- as advance, plaintiff No.1 has not received any amount much less Rs.5 lakhs and thus, the agreement is void as it is without consideration. It is also to be seen that the said agreement is void as it is executed without adding the parents, who have their share to an extent of 20% in plot No.109. Since the defendant No.1 neither paid the balance sale consideration within 60 days from Ex.B63 nor issued any legal notice to plaintiffs to register the suit schedule property in his favour immediately after expiry of 60 days from Ex.B63 or prior to the suit filed by the defendant No.1 against plaintiffs for specific performance of agreement, defendant No.1 cannot contend that the default clause in Ex.B63 does not operate.

17. The learned counsel for the defendant No.1 contended

that the trial Court erred in directing him to render an account for the rents, though he has been depositing Rs.11,00,00/- per month into the account of plaintiff No.1. It is the specific contention of the plaintiffs that defendant No.1 has been collecting rents from the shops allotted to the plaintiff No.1 in the ground floor in the said compromise decree and depositing meagre amount into the account of plaintiff No.1. DW1 deposed that the schedule property is situated to the main road in Chaitanyapuri Colony and that he has let out nine portions to the tenants and getting Rs.50,0000/- and that the watchman is residing in the penthouse. DW1 denied the suggestion that he is getting monthly rent of Rs.1,00,000/- for all the nine portions. Defendant No.3, who is the mother of plaintiff No.1 and defendant No.1 contended in her written statement that after the death of her husband, there is change in the attitude of defendant No.1 but not only backed from the partition agreement and the plan enclosed, but also started ill treating her and pressurized her to support his case in this partition suit. It is further stated in the written statement by defendant No.3 that the defendant No.1 has been collecting rents from the tenants, barring negligible rents being paid to plaintiff No.1 and sought to decree the suit in terms of partition agreement dated

03.07.2016. Though defendant No.1 contending that he has been paying rents to the plaintiffs in the ratio specified in Ex.A2, as per the contention of defendant No.3, defendant No.1 has been paying negligible rents to plaintiffs. Even as per the contention of defendant No.1, he has been paying rents to plaintiff No.1 to his extent of 40% share in the property. As per the contention of the defendant No.1 he is getting Rs.50,000/- towards rents and in such case, there is no explanation from the defendant No.1 as to in what proportion Rs.11,000/- is equal to 40% of Rs.50,000/-. Thus, there is an ambiguity as to whether the defendant No.1 has been paying proper rents into the account of plaintiff No.1 or not and thereby the trial Court has directed for rendition of accounts. Hence, the trial Court has not committed any error in granting relief of rendition of accounts.

18. Though DW1 deposed that he has constructed three floors and penthouse in the year 2007-08, he pleaded ignorance as to how much he spent for construction of those three floors and penthouse. DW1 deposed that he used to earn Rs.3,00,000/- per annum on his rice business and that he is an income tax assessee but he has no idea how much income he

has shown during the period 2005-2008. It is quite astonishing to note that DW1, who is earning Rs.3,00,000/- per annum can construct three floors and a penthouse in 2007-2008 over plot No.109, which is admeasuring 267 square yards, more particularly, when he does not have any idea as to how much income he has shown during the period 2005-2008 in the income tax returns. It is not the case of the defendant No.1 that he has obtained loan from some financial institutions or friends for pooling funds for construction of three floors and penthouse over plot No.109.

19. The defendant No.1 in one of the appeal grounds contended that the trial court ought to have seen that as plaintiff No.1 is entitled to the ground floor only and as the defendant No.1 did not pay the balance sale consideration and obtain the sale deed, he continued to deposit the rent on the share of plaintiff No.1 into his account. If at all the plaintiff No.1 has not contributed any amount towards construction of three floors and penthouse, then there is no explanation as to what is the necessity for the defendant No.1 to deposit rents into the account of plaintiff No.1. Since the defendant No.1 did not come forward to pay the balance sale consideration and as

the defendant No.1 is not paying proper rents into the account of plaintiff No.1, a suit for partition was filed by the plaintiffs to get their respective shares in the newly constructed three floors and penthouse constructed subsequent to Ex.A2.

20. It is also to be borne in mind that DW1 admitted that suit schedule property is in the name of plaintiff No.1 under Ex.A1 and in Ex.A1 sale deed there is no specific mention that the suit schedule property was purchased from joint family funds. It is not the case of the defendant No.1 that he has constructed three floors and penthouse over the share of property that was allotted to him under Ex.A2. It is an admitted fact that the three floors and penthouse were constructed over 267 square yards, over which not only the plaintiffs but also the defendants have rights as per Ex.A2. In such circumstances, even if it is presumed for the sake of arguments that plaintiff No.1 has not contributed any amount for construction of three floors and penthouse, defendant No.1 cannot deny the rights to the plaintiff No.1 over the newly constructed three floors and penthouse, more particularly, when the defendant No.1 alleged to have constructed three floors and penthouse not only over his share but also over the shares of plaintiff No.1 and their

parents i.e., defendant Nos.2 and 3. Merely because defendant No.1 is paying paltry rents to plaintiff no.1 and defendant No.3, he cannot claim ownership over the entire house constructed over plot No.109 admeasuring 267 square yards, over which the plaintiffs as well as defendants have common and joint rights as per Ex.A2.

21. It is to be seen that initially the plot No.109 was purchased in the name of plaintiff No.1 alone vide Ex.A1 and a house along with five shops were constructed with funds contributed by plaintiff and defendant No.1, however, defendant No.1 filed a suit for partition, which ended in compromise under Ex.A2. Even though the plot No.109 was exclusively standing in the name of plaintiff No.1, merely because constructions were made with joint funds of plaintiff and defendant No.1, the defendant No.1 has filed suit for partition. In the same manner, when the plaintiff No. 1 has filed the suit for partition on the same ground that he has contributed amounts for construction of three floors and penthouse, the defendant No.1 is refusing the same on the ground that the plaintiff No.1 has not contributed any amount and that he has not source of income. In the cross examination of PW1, the learned counsel for the

defendant No.1 gave a suggestion that PW1 has not done any business and he used to be like vagabond and he has incurred many loans. If at all plaintiff No.1 used to be like a vagabond, certainly the property vide Plot No.109 would not have been in the name of plaintiff No.1 under Ex.A1. Plaintiff No.1 in his cross examination deposed that he was doing shares and stokc broking business in the name and style of Sri Venkateshwara Consultancy at Hiamayathnagar since 1982. On the other hand, except stating that he is doing rice business, the defendant No.1 could not even mention the name of his rice business. A person, who is unable to establish his earning capacity, cannot question the earning capacity of others.

22. It is the contention of the defendant No.1 that trial Court ought to have seen that there was a partition by metes and bounds between the family members as long as back on 05.04.2006 and that the plaintiff can file a suit for specific performance of the contract but the suit for partition of the property is not maintainable. The learned counsel for the defendant No.1 relied upon a decision of the Honourable Supreme Court in **K. Armuga Velaiah v. P.R. Ramaswamy**[10]

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[10] 2022 (2) ALD P1 (SC)

and contended that once there is a partition, no suit for partition again is maintainable. In this regard, a suggestion was given to PW1 by the learned counsel for the defendant No.1 that suit schedule property in this suit and the schedule property in Ex.A2 award are one and the same. DW1 admitted that when O.S.No.429 of 2005 was filed it was only ground floor in the suit schedule property and that Ex.A2 compromise was in respect of portions partitioned in the ground floor. DW1 deposed that subsequent to Ex.A2 three floors + penthouse was constructed on the ground floor. Even as per the appeal ground No.3, as per Ex.A2 in O.S.No.429 of 2005 on the file of I Additional Senior Civil Judge, Ranga Reddy District there was a ground floor only and the plaintiff No.1 got two rooms and two mulgies only in the partition.

23. Thus, it is clear from the own admission of DW1 that whatever the partition that took place between the parties in O.S.No.429 of 2005 was with regard to ground floor and the said partition is no way connected to the partition sought for by the plaintiffs in this suit in respect of three floors and penthouse that were constructed subsequent to Ex.A2. As per the written statement of defendant No.1, the suit is barred

under the provisions of Section 11 of the CPC – *resjudicata.* In order to attract Section 11 of the CPC – *resjudicata*, the dispute between the parties, the cause of action, the property for which both the suits are filed shall be one and the same. In the case on hand, the schedule of property in O.S.No.429 of 2005 is only ground floor of plot No.109 and whereas the schedule of property in O.S.No.1358 of 2013 is three floors and a penthouse constructed on plot No.109 subsequent to Ex.A2. Thus, the question of attracting Section 11 of the CPC – *resjudicata* does not arise. Hence, the above contentions of defendant No.1 are untenable.

24. The learned counsel for the defendant No.1 in support of his contention that the right of possession of the purchaser under the agreement of sale by Section 53-A of Transfer of Property Act shall be protected, has relied upon decisions in **Hamazabi and others v. Syed Kareemuddin and others**[11], **Gaddam Raju v. Gotikala Mary Kamala**[12], **Parasa Ranga Rao v. MAthe Sanjeeva Rao**[13], **Mahadeva and others v. Thana Bai**[14] and **Mohammed Masthan v. Abdul Rehman**[15]. However,

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[11] 2001 (1) AlD 44 (SC)
[12] 2020 (6) ALD 404 (AP)
[13] 2006 (5) ALD 237
[14] AIR 2004 SC 3954
[15] 2007 (5) ALD 274

as stated supra, when the defendant No.1 himself admitted in one of the appeal grounds that as he failed to deposit the balance sale consideration within the stipulated time, he has been depositing the rents into the account of plaintiff No.1. Since the defendant No.1 was not ready and willing to perform his part of contract, he is not entitled for protection under Section 53-A of the Transfer of Property Act. Moreover, as stated supra, the parties to Ex.B63 have not made the other parties i.e., defendant Nos.2 and 3, who are having 20% legitimate share in the schedule property, as parties to the said agreement and thereby the agreement between plaintiff No.1 and defendant No.1 is to be considered as void, more particularly, when their consent is not obtained either by plaintiff No.1 or defendant No.1. Hence, the defendant No.1 cannot take shelter under the principle laid down in the above said decisions.

25. In the chief examination affidavit, DW1 deposed that once plaintiff No.1 admitted that he has executed agreement of sale in favour of defendant No.1 the question of claiming share again does not arise. On one hand defendant No.1 is contending that the plaintiff No.1 has 40% instead of 50% and on the other hand contends that the plaintiff No.1 has no share at all in the

schedule property as he executed agreement of sale. Merely because the plaintiff No.1 has executed agreement of sale in favour of defendant No.1 in respect of his share in the suit schedule property, it cannot preclude plaintiff No.1 from claiming his share out of the joint property, more particularly, when defendant No.1 did not come forward to deposit the balance sale consideration as per the terms and conditions of Ex.B63.

26. The learned counsel for the defendant No.1 relied upon a decision in **K.V.Narayana Swamy Iyer v. K.V. Ramakrishna Iyer**[16] wherein the Honourable Supreme Court observed that there was no liability on the karta as managing member to render any account of any kind. In **Mst.Nepur Kuer v. Sheochand Sahu and others**[17] the High Court of Patna observed that no member of joint family can ask for an account as against the Kartha of the family of a preceding period, except for the purpose of determining the properties, including cash, in the hand of the kartha as to be available for partition. As can be seen from the chief examination affidavit of DW1, it is the defendant No.1 and defendant No.2, who have alienated their

[16] AIR 1965 SC 289
[17] AIR 1961 Patna 57

earlier agricultural land and purchased the Plot No.109. It is to be seen that defendant No.1 is not the kartha of the joint family of plaintiffs and defendants and in fact defendant No.1 is only a coparcener. The father of plaintiff No.1 and defendant No.1 i.e., defendant No.2 is very much alive as on the date of filing of the suit and he is the kartha of the joint family of defendant Nos.1, 3 and plaintiff No.1. As stated supra, there is substantial ambiguity with regard to the quantum of rents being collected by the defendant No.1 from the tenants and being deposited into the account of plaintiff No.1 and defendant No.3. Thus, the defendant No.1, who is one of the coparcener of the joint family, is liable for rendition of accounts.

27. Though the plaintiffs have claimed 50% share in the suit schedule property by way of partition, the trial Court has rightly awarded 40% share by adhering to the award passed under Ex.A2.

28. In view of the above facts and circumstances, this Court is of the considered view that the trial Court has elaborately considered all the aspects meticulously and arrived to an appropriate conclusion and thereby there are no merits in the appeal to set aside the impugned Judgment. Thus, the appeal is

devoid of merits and liable to be dismissed.

29. In the result, this appeal is dismissed. There shall be no order as to costs.

As a sequel, pending miscellaneous applications, if any, shall stand closed.

JUSTICE M.G. PRIYADARSINI

Date: 07.06.2024

Note: LR copy to be marked.
B/o. AS