



S.A.No.537 of 2008

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgement Reserved on : 11..04..2023

Judgement Pronounced on : 27..04..2023

Coram

THE HON'BLE MR JUSTICE V. LAKSHMINARAYANAN

Second Appeal No.537 of 2008

and

M.P.No.1 of 2008

Jayaraman

..... Appellant

-Versus-

1. Sreeramulu
2. B.Prakash
3. Kalyani Thulukanam
4. Gnanavel Loganathan
5. Thanappa Gounder

..... Respondents

Appeal filed under Section 100 of C.P.C. against the judgment and decree dated 27.07.2006 made in A.S.No.38 of 2005 by the learned Principal Subordinate Judge at Tindivanam, reversing the judgement and decree dated 07.03.2005 made in O.S.No.142 of 2001 by the learned Principal District Munsif at Tindivanam.

For Appellant : Mr.A.Thayaparan

For Respondents(s) : Mr.M.Dhamodharan for R1



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JUDGEMENT

The plaintiff is the appellant. He filed the suit for declaration that the suit schedule properties were his self acquisitions and for a consequential relief of injunction.

2. The suit schedule covers two items of properties viz., 3.31 Acres of land in S.No.131/2 of Venmaniyathur village in Tindivanam Taluk, Villupuram District and 3.40 Acres in S.No.14 of Kollar village of Villupuram District.

3. The case of the plaintiff is that he worked as a coolie in Madras Port Trust and had earned sufficient income for the purchase of the suit schedule properties. The cause of action for the suit seems to be the sale made by his siblings and his son, who are arrayed as Defendants 1 to 4, in favour of the 5th defendant. According to him, they do not have any right or title or interest over the suit properties and since they were creating records by the sale, he was constrained to come forward with the present suit that the properties were purchased from and out of his self acquisitions.



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4. Resisting the claim of the plaintiff, the defendants would submit that the plaintiff had 5 other siblings viz., (1) Sreeramulu (1st defendant), Balaraman, Elumalai, Raghuraman, and Kalyani. Balaraman had predeceased and therefore, his son Prakash was arrayed as the 2nd defendant. The 3rd defendant is the aforesaid Kalyani and the 4th defendant - Gnanavel Loganathan is the son of the plaintiff. As already premised, the defendants 1 to 4 had alienated the property in favour of Thanappa Gounder (5th defendant). The 5th defendant alone filed a written statement and this statement was adopted by the defendants 1 to 4. According to the defendants, the suit and other properties were jointly purchased by the father as the head of the family, pooling his income and the income of his sons, in the name of the eldest son, i.e., the plaintiff. They reply upon Ex.B4 to substantiate the same.

5. The suit came to be decreed by the trial court as prayed for. The appeal suit preferred therefrom came to be allowed. The suit was dismissed on the ground that the parties to the proceedings had entered into a koorchit (Ex.B4) dated 07.03.1978. Against this reversal finding, the plaintiff has preferred the present second appeal.



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6. The appeal was admitted by this court on 25.08.2008 on the following substantial questions of law:-

(1) Has not the lower appellate court committed error in law by placing reliance on Exhibit B-4 unstamped and unregistered koorchit considering it as admissible evidence to prove partition of immovable properties worth more than Rs.100/- ignoring the well settled principle of law is that the unstamped and unregistered document (koorchit) would become admissible in evidence only if it records separate possession of respective portion of properties by the co-owners and that partition should have taken place earlier?

(2) Having the defendants raised a pleading that the suit properties were purchased in the name of the eldest son of the family by means of joint funds as family property; is not the onus is on the defendants to prove the said fact and on failure to establish the same are not the defendants are barred to claim right over the property by operation of law of benami transaction?

(3) Has not the lower appellate court committed error in law by not rendering any finding as to whether the sale deeds executed in favour of the fifth respondent was only a sham and nominal documents as they are void ab initio?



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7. I have heard Mr.A.Thayaparan, learned counsel for the appellant and Mr.M.Dhamodharan, learned counsel for the 1st respondent.

8. The leaned counsel for the appellant would argue that he has let in sufficient **oral** evidence for the purpose of proving that he had sufficient income for the purchase of the suit schedule properties. He added, in any event, the sale deeds standing in his name are sufficient proof that the properties are his self acquisitions. He would state that Ex.B4, being an unregistered and unstamped koorchit, is inadmissible in evidence to prove partition and therefore, the question of law should be answered in his favour. He would further submit that the defendants have failed to prove that they had sufficient income for the purchase of the suit properties and since they have not discharged that burden of proof, their claim to the properties should be disallowed. He would further state that the sale by the defendants 1 to 4 in favour of the 5th defendant is only sham and nominal and therefore, the same is *void ab initio*.

9. He would also plead that the defence is barred under the provisions of the Benami Prohibition Act and hence, prayed for allowing the appeal.



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10. Mr.M.Dhamodharan, the learned counsel appearing for the 1st respondent would very strenuously oppose these pleas. He would submit that Ex.B4 would show that the family had jointly purchased the properties and consequently, the plea of benami will not lie. He would further submit that though the plaintiff had denied the existence of Ex.B4 in his cross examination, during the cross examination of D.W.1, he had proceeded to urge that Ex.B.4 came in existence due to vitiating circumstances which implies that the document had in fact, been executed. Having accepted the existence of the document and having failed to prove the vitiating circumstances, the court would have to rely upon the same and dismiss the appeal.

11. I have carefully perused judgements of the trial court and the first appellate court and also the oral and documentary evidences adduced on either side. I am of the view that the second appeal should fail for the following reasons.

12. The plaintiff's case is that the properties have been purchased from and out of his self-acquisitions. Therefore, the burden is on him to prove that he had sufficient income in his hands for the purchase of the properties. The 1st property was purchased in the year 1961 under Ex.A1 and the 2nd property was



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purchased in the year 1967 under Ex.A.2. The appellant was not working in any Executive position but, he was a mere coolie in Madras Port Trust. He had admitted that he was earning Rs.2/- per day. He would further submit that from the accumulation of his income, he had purchased the properties for Rs.200/-. He would further state that out of Rs.200/- he had Rs.100/- which was saved from his income and the remaining sum of Rs.100/- he got by way of Bhogyam (போக்யம்). Sadly for the appellant, no proof has been let in with respect to the said Bhogyam. He has also not produced his salary slips, bank accounts or any other tangible evidence for the purpose of substantiating that he had sufficient savings in his hands, so as to purchase the suit schedule properties.

13. On the contrary, the evidence of D.W.1 would show that the family had agricultural lands and the children were studying in Chennai whereas the parents were staying in the native village. Apart from involving in agricultural activities, they were also rearing goats and cattle. The appellant had secured an employment in the year 1958 and he is said to have purchased vast extent of properties in 1961 and 1967.

14. I am not able to accede to the arguments of the learned counsel for the appellant that since the sale deeds stand in his name , I should presume that



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it was from and out of his self acquisitions.

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15. It is here the prayer in the plaint becomes relevant. The prayer sought for was for a decree declaring that the suit schedule properties are his self-acquisitions. When a party comes forward to the court that he had purchased the properties out of his self acquisitions, the initial burden is on him to let in some evidence to prove the same. Had he let in some evidence, then onus would shift to the defendants to rebut the case of the plaintiff. When there is no evidence at the beginning itself, the question of defendants proving the negative does not arise. The proof of self acquisition requires positive evidence.

16. The further proof now turns on Ex.B4. As rightly argued by the learned counsel for the appellant, Ex.B4 cannot be read as transferring title from the plaintiff to the defendants. The factum that the document is unstamped, thus, attracts Section 35 of the Indian Stamp Act. However, the plaintiff did not immediately raise an objection for the document being exhibited before the court. I would refer to the verdict of the Supreme Court of India in **Javer Chand and others v. Pukhraj Surana, 1962 (2) SCR 333**. The Court has held that “*once the court, rightly or wrongly decides to admit the*



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document in evidence, so far as the parties are concerned, the matter is closed”.

17. Section 35 is in the nature of penal provision and has far reaching consequences. The parties to a litigation where such a controversy is raised, have to be extremely alert. The party challenging the admissibility of a document has to be alert to see that the document is not admitted in evidence by the court. The court has to judiciously determine the matter as soon as the document is tendered in evidence and before it is marked as an exhibit in the case. The record in the case before the Supreme Court discloses the fact that the hundis were marked as Exs.B.1 & B.2 and bore the endorsements “admitted in evidence under the signature of the court”. It is not, therefore, one of those cases where the document has been inadvertently admitted without the court applying its mind to the question of admissibility. Once the document has been marked as exhibit in the case and the trial has proceeded all along on the footing that the document was an exhibit in the case and has been used by the parties in examination and cross examination of their witnesses, section 36 of the Indian Stamp Act comes into operation. Once a document has been admitted in evidence, as aforesaid, it is not open either to the trial court itself or court of appeal or revisional court to go behind that order. Such an order is not



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one of those judicial orders which are liable to be reviewed or revised by the same court or court of superior jurisdiction.

18. The principle of law which flows from this judgement is that if a document has been marked in evidence, it is not open to the parties to subsequently argue that the same is unstamped and unregistered. Section 35 of the Indian Stamp Act operates as a total bar unlike the exception granted by the proviso to section 49.

19. Mr.A.Thayaparan, the learned counsel for the appellant would argue that though the document has been admitted in evidence, he had objected to the same. This argument does not hold water as not only the document was admitted in evidence but also used in the chief examination as well as cross examination by both the plaintiff as well as the defendants. As pointed by the Supreme Court, once it has been used by the parties in chief and cross examination, Section 36 would operate. Consequently, the arguments that the document was not stamped in accordance with law does not appeal to me.

20. Having put the technical objection on Ex.B4 aside, I now look into the document. I am not going to read Ex.B4 as a document extinguishing the



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right of the appellant and transferring the same to the respondents. I am reading Ex.B4. Its workers only for the purpose of coming to a conclusion that the properties were acquired by the family jointly. The document also shows that the parties fell apart and by virtue of Ex.B4, the family had entered into certain arrangements. Had the defendants filed a suit claiming title on the basis of Ex.B4, I would have certainly rejected their case. However, I would like to point out the following words found in Ex.B4:

“1978ம் வருமட் மாசு மாதம் 7ந் தேதி திண்டிவனம் தாலுக்கா வெண்மணயாத்துர் கிராமத்திலிருக்கும் ஊத்துக்காட்டான் குமாரர் ஸ்ரீராமலுக்கு மேற்படி கிராமத்திலிருக்கும் மேற்படி ஊத்துக்காட்டான் குமாரர் ஜெயராமன் எழுதிக் கொடுத்த கூர்சீட்டு என்னவென்றால் இதுவரையிலும் நாம் அபிபத்த குடும்பத்தார்களாக இருந்து வந்தோம். இனிமேல் அவ்விதம் இருக்கக் சரிபடாததால் ஒருவருக்கொருவர் தகராறு செய்ததின் பேரில் இதனடியில் கையொப்பம் இட்டிருக்கும் பஞ்சாயத்தார் செய்த ஏற்பாட்டின்படி நான் என் பேரில் பொதுவாய் கிரையம் வாங்கி அனுபவித்து வரும் சொத்துக்களை மேற்படி என் சகோதரருக்கும் ஒரு பாகத்தை பாகச்சாரப்படி அனுபவித்து கொள்ளும் பொருட்டு இந்த கூர்சீட்டு எழுதிக் கொடுத்திருக்கிறேன்.”.

21. This document concedes to the fact that the purchases have been made due to the joint exertion of all the members of the family. It is on record that subsequent to this document, the parties had negotiated and entered into mortgage deeds in which both the plaintiff as well as the 1st defendant were parties. If the 1st defendant did not have any right as stated by the learned



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counsel for the appellant, there would be no necessity for joining the 1st defendant as a party to the mortgage deeds. One aspect which constraints me to hold against the appellant is that the appellant in the witness box was in total denial mood. He denies Ex.B4 which is to be expected, but would also deny his signature in a registered mortgage deed which was jointly executed by the plaintiff/appellant along with the defendants/respondents.

22. The reading of his cross examination shows highly artificial defence that was taken by him especially about generating Rs.100/- by way of bhogyam but no evidence for bhogyam has been let in. If this is the position that he has taken in his chief examination his stand in cross examination makes his case worse.

23. In cross examination of the 1st defendant on 10.06.2004, he has put a question as to the date on which Ex.B.4 had been entered into. He has also asked whether the properties were divided and enjoyed pursuant to Ex.B.4. I am extracting the same for ready reference:

“1978ல் தான் கூர் சீட்டு எழுதப்பட்டது, பாகம்
பிரிக்கப்பட்டது. பத்திரமாக எழுதி ரிஜிஸ்டர் செய்து
கொள்ளவில்லை.”



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Apart from that, in his cross examination, he has suggested that the document had come into force due to vitiating circumstances. I am extracting the same:

“வாதியை மிரட்டி வாங்கப்பட்டது பாக கூர்ச்சீட்டு என்றால் இல்லை, நிப்பந்தத்தின் பேரில் தான் வாதி அதில் கையொப்பம் இட்டுள்ளார் என்றால் இல்லலை. பஞ்சாயத்தார் கூடி தான் கையொப்பம் இட்டுள்ளார்..”

24. These two questions would show that not only Ex.B4 was used in the cross examination by the plaintiff but, also had suggested that the document was vitiated due to extenuating circumstances. When a party pleads the vitiating circumstances, the burden lies on him to prove that the vitiated circumstances existed.

25. Mr.A.Thayaparan, the learned counsel for the appellant would submit that the appellant had given a police complaint. But, unfortunately, that police complaint had not been filed before the court. Apart from that even it had been filed, I would have been barred from looking to it because, there cannot be any evidence without any foundational pleadings. Even a glance at the plaint would show, that there is no pleading with respect to vitiating circumstances. This leads me to come to a conclusion that Ex.B4 had come into existence in order to settle the disputes in the family and since the properties had been



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jointly acquired by the family, as stated in Ex.B.4, the case of the appellant/plaintiff has to fail.

26. The further contention of Mr.A.Thayaparan, learned counsel for the appellant that Benami Abolition Act should be made applicable to the present case also does not hold water. This plea is being taken for the first time in the second appeal and no new plea can be permitted in second appeal without there being any pleading or evidence to that effect. A plea of benami is not a pure question of law, but a matter which should be pleaded and proved. The defendants have not pleaded benami, but, they have only pleaded that the properties were acquired jointly from and out of the joint exertions of all the brothers and since the appellant is the eldest brother, the father had purchased the properties in his name.

27. By virtue of Ex.B4, the jointness in the family is accepted. Once such a state of affair is admitted, the burden lies heavily on the appellant to prove that they were his self-acquisitions. Having failed to do so, his plea must be rejected. I rely upon the judgement of Supreme Court of India in **Adiveppa v. Bhimappa and others, (2017) 9 SCC 586**. I am alive to the fact that it was rendered with respect to a joint family property. However, I apply to this case



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because the fact that the father of the plaintiff, Uthukaataan had purchased the properties from the joint contribution of all the members. It has been recorded under Ex.B.4 and it was the plaintiff who came forward with the case that the purchase of the properties were made from and out of his self-acquisition. So the duty to prove the same falls on him. Reading of the evidence shows he has miserably failed to substantiate the same.

28. The learned counsel for the appellant drew my attention to the judgement in **Vimala Chand Ghevarchand Jain v. Ramakant Eknath Jadoo, (2009) 5 SCC 713**, in particular, to paragraph 19, 20, 22, 33, 36. He argued that on account of the fact that the sale deed is registered, as held by the Supreme Court in this judgement, I have to hold that he is the owner of the property. That was a case which arose under entirely different circumstances. The father of the respondent in the appeal before the Supreme Court had executed a sale deed on 29.06.1978. Thereafter, he had argued that the sale was sham and nominal and it was executed as a security for money lending transaction. It was in those circumstances the Supreme Court had held that the deed of sale being a registered one, the onus of proof was upon the defendant to show that the deed was not in fact executed. The facts of this case is that the sale in favour of the appellant is not even denied by any of the parties to the



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suit. The plea is that the purchase in the name of the appellant was because he was the eldest member of the family. As already seen from Ex.B.4, the appellant and the respondents have agreed that the purchase of properties was out of joint efforts of the members of the family. It is one thing to say that the sale deed is denied and totally in other to say that the sale was out of the joint acquisition of all the members of the family. Hence, this judgement does not apply to the present case. In fact, the defendants agreed that the sale was executed hence, the view taken by the Supreme Court does not apply to the facts of the present case.

29. The appellant would rely upon a classic judgement of a Division Bench of this Court presided over by A.S.Venkatachala Moorthy [as His Lordship then was] rendered in **A.C.Lakshmipathy and others v. A.M.Chakrapani Reddiar and others, (2001) 1 MLJ 1**. He would state that the document being unregistered, I cannot look into the same. That was not the purport of the judgement. It is very clear from the following sentence in paragraph 23 of the said judgement:-

“23. It is now fairly well settled that the co-owners can partition the immovable properties



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orally. But, however where a document is employed to effectuate a partition or any of the transactions specified in Section 17 of the Registration Act such document must be registered, notwithstanding with the transaction is one which the law does not require to be put into writing. Such unregistered document cannot be looked into to prove the terms of the partition. But, however the same if inadmissible in evidence for the purpose of creating, declaring, assigning, limiting or extinguishing a right to immovable property. The expression "collateral purposes" is no doubt a very vague one and the Court must decide in each case whether the parties who seek to use the unregistered document for a purpose which is really a collateral one or as is to establish the title to the immovable property conveyed by the document. But by the simple devise of calling it "collateral purpose", a party cannot use the unregistered document in any legal proceedings to bring about indirectly the effect which it would have had if it registered."

30. I have applied exactly the test laid down by Justice



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A.S.Venkatachala Moorthy. I am not reading Ex.B.4 as extinguishing the right of the appellant in the properties, but I am reading it for the collateral purpose of showing that acquisition was out of joint efforts.

31. The learned counsel for the appellant lastly relied upon a judgement of Justice Prabha Sridevan rendered in **Rengasami Reddiar and others v. M.K.Mummachi Reddiar and others, (2002) 1 MLJ 760**. The learned Judge in that case had followed the judgement of Justice A.S.Venkatachala Moorthy in **A.C.Lakshmipathy and others v. A.M.Chakrapani Reddiar and others, (2001) 1 MLJ 1**. The document which fell for subject matter of that case was one which divided the property *in praesenti* and therefore, this Court had held the documents as inadmissible. In the instant case, the appellant has not only permitted the document to be received in evidence but, has extensively cross examined DW1 on the said document. Having taken such a course, on the basis of legal advise, it is not open to him to turn around and argue that while he is entitled to cross examine D.W.1 on Ex.B4 and yet, this court should hold that the same is inadmissible. As I have already held Ex.B.4 is admissible for the collateral purpose to prove the jointness in purchase, the suit being one for declaration that the properties are self-acquisitions, Ex.B4 nihilates that prayer.



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Therefore, this judgement too is inapplicable to the facts of the present case.

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32. Lastly, the learned counsel referred to a recent judgement of the Supreme Court in **Korukonda Chalapathi Rao v. Korukonda Annapurna Sampath Kumar, 2021 SCC OnLine 847 (SC)**. In this judgement too, Justice K.M.Joseph has in para 29 held as follows:-

“29. The cardinal principle would be whether by allowing the case of the party to consider an unregistered document it would result in the breach of the mandate of the section 49 of the Registration Act.”

This judgement makes it clear that a court is entitled to look into the document, if the transaction for the purpose of which it is put forward does not require registration. Ex.B4, in the instant case by itself does not effect immovable property being a recording of a past transaction. Hence, there is no protection of S.49(1)(c) as it is not being used as the evidence of transaction effecting such property.

33. In the light of the above discussion, I answer all the substantial questions of law against the appellant/plaintiff and in favour of the



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respondents/defendants. I do not find any illegality or perversity in the judgement and decree of the first appellant court in reversing the judgement and decree of the trial court. The second appeal is liable to be dismissed and consequently the suit is also liable to be dismissed. As the parties are closely related, I am not inclined to impose cost in this second appeal.

In the result, This Second Appeal is dismissed and the judgement and decree dated 27.07.2006 in A.S.No.38 of 2005 on the file of the learned Principal Subordinate Judge at Tindivanam, in reversing the judgement and decree dated 07.03.2005 in O.S.No.142 of 2001 on the file of the learned Principal District Munsif at Tindivanam is confirmed. No costs. Consequently, connected MP is closed.

27..04..2023

Index : yes / no
Neutral Citation : yes / no
Speaking / Non Speaking Order
kmk

To

- 1.The Principal Subordinate Judge, Tindivanam, Villupuram District.
- 2.The Principal District Munsif, Tindivanam, Villupuram District.



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V.LAKSHMINARAYANAN, J.

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Pre Delivery Judgement
in
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