

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON 25.10.2016

DATE OF DECISION:11.11.2016

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

A.S.No.29 of 2010

P.Murugan

... Appellant

Vs

1.Karuppammal

2.Mran

... Respondents

This appeal is filed under Order 41 Rule 1 and 2 of C.P.C. Against the decree and the judgment dated 28.10.2009 rendered in O.S.No.606 of 2008 on the file of the First Additional District Judge, Coimbatore.

For Appellant	: Mr.S.Subbiah
For Respondents	: Mr.M/sKingstun & J.Gerold for RR 1 and 2

J U D G E M E N T

The unsuccessful plaintiff in O.S.No.6006 of 2008 on the file of the I Additional District Judge, Coimbatore is the appellant. The respondents are his mother, Karuppammal and his brother Maran.

2. According to the plaintiff his father namely, Palani Navithan had married first defendant in the suit namely, Karuppammal and out of wedlock

two sons have born namely, the plaintiff himself and the second defendant Maran. The said Palani Navithan died on 24.9.2006 leaving behind the aforesaid three persons as his legal representatives. The plaintiff had sought to issue for partition and separate possession of his 1/3 share contending that the suit properties are the properties of Palaninavithan.

3. It is the specific case of the plaintiff that the 1st item of the suit properties was purchased by the said Palani Navithan in the name of his wife Karupppammal under a sale deed dated 28.03.1949. As regards the suit schedule IInd item, the plaintiff would contend that it was allotted to the first defendant Karupppammal by virtue of partition deed dated 11.10.1954 executed between the said Karupppammal and Karuppa Navithan. According to the plaintiff suit schedule 3rd Item was purchased under a sale deed dated 21.05.1959 in the name of the first defendant by the said Palani Navithan.

4. The plaintiff would further allege that the consideration for the purchase in the name of the first defendant were paid out of the joint family funds. The plaintiff would also plead a oral understanding/oral partition between himself and second defendant, in and by which, they had agreed to enjoy the suit properties equally. The plaintiff expressing apprehension that the defendants are attempting to create some documents, taking advantage of the fact that the suit properties were purchased in the name of the first defendant, has sought for the relief of partition and separate possession of his 1/3 share.

5. The defendants 1 and 2 resisted the suit contending that the claim of the plaintiff to the effect that the suit properties were either purchased by Palani Navithan in the name of the first defendant or out of the joint family funds in the name of the first defendant is false. The claim relating to the source of purchasing money as well as oral partition said to have taken place have been denied by the defendants and the claim continuous enjoyment was also disputed.

6. According to the first defendant, she would claim that she had purchased item Nos.2 and 3 of the suit properties, out of her own funds, which, she earned by doing coolie work and milk business. According to the defendants, the entire land in S.No.172 is self acquired property of the first defendant as per the sale deed dated 28.3.1949 and the partition deed dated 11.10.1954. It is also contended that item No.3 was purchased by the first defendant from one Muthusamy on 21.05.1959. It is also claimed that the first defendant had executed a settlement deed dated 17.04.2008 with reference to item Nos.2 and 3 of the suit properties in favour of the second defendant and pursuant to the same, the second defendant is in possession of the property.

7. It is the case of the defendants that the properties in S.Nos.166/1 and 167/2 were purchased by the plaintiff and second defendant jointly on 24.08.1973. A suit for partition has already been filed in O.S.No.262 of 1988 before the Sub Court, Tirupur.

8. On the above pleadings, the defendants have sought for dismissal of the suit. The learned 1st Additional District Judge, Coimbatore, upon perusal of the pleadings, framed the following issues for determination in the suit:

1)Whether the plaintiff is entitled to 1/3 share in all the suit properties?

2)Whether the plaintiff is entitled to preliminary decree as prayed for?

and

3)To what other reliefs, the plaintiff is entitled to?

9. On the side of the plaintiff, two witnesses were examined and 12 documents were marked. On the side of the defendants also two witnesses were examined and Ex.B1 was marked.

10. Upon consideration of oral and documentary evidence, the learned 1st Additional District Judge, Coimbatore came to the conclusion that the suit properties, belonged to Karuppammal absolutely and the theory of the plaintiff that the said properties were purchased either by Palani Navithan in the name of his wife or from and out of the joint family funds in the name of the first defendant was rejected. The learned 1st Additional District Judge, Coimbatore also came to the conclusion that the plaintiff cannot seek any relief without seeking to set aside the settlement deed dated 17.04.2008, said to have been executed by the Karuppammal in favour of the second defendant. On the above findings the learned 1st Additional District Judge, Coimbatore dismissed the suit.

11. Aggrieved by the said dismissal, the plaintiff has preferred the above appeal. I have heard Mr.S.Subbiah, learned counsel appearing for the appellant and Mr.S.Kingston Jerald, learned counsel appearing for the respondents. The following points arise for determination in the appeal:

1.Whether the plaintiff is entitled to 1/3 share in the suit property?

2.Whether the plaintiff has let in reliable evidence so as to dislodge the statutory presumption which arises under Section 3(2) (a) of the Benami Transaction (Prohibition) Act 1988?

3.Whether the conclusion of the Trial Court that the plaintiff cannot seek the relief of partition without seeking to set aside the settlement said to have been executed by Karuppammal in favour of the second respondent/2nd defendant on 17.04.2008 is correct?

12. Admittedly the suit properties stand in the name of Karuppammal. The plaintiff had taken two different pleas with reference to acquisition of the property and as regards Item No.1, the claim in paragraph-3 of the plaint reads as follows:

“... During the life time of father of the plaintiff, he purchased the 1st item of the suit property in the name of his wife on 28.03.1949”

With reference to the second item, he would claim that it was allotted to the 1st defendant in the partition deed dated 11.10.1954 entered into between herself and Karuppa Navithan. With reference to Item No.3, the plaintiff would claim that the said property was also purchased by his father on 21.05.1959 in the name of the 1st defendant and in later portion of the paragraph-4 of the plaint, the plaintiff would claim as follows:

“ Though the properties were purchased in the name of 1st defendant, the amount was spent or paid for it from the joint family funds by the father of the plaintiff as well as the plaintiff and the second defendant.”

13. Thus it could be seen from the plaint, the plaintiff himself is not clear about the source of purchase money and it is also admitted by the plaintiff in his oral evidence that he and the second defendant were minors at the time of said acquisition. Therefore, there is no question of any contribution by them for the purchase of any of the properties.

14. The very description of the property by the plaintiff in the plaint would go to show that the suit is just an attempt to browbeat the defendants.

15. A careful perusal of the records would reveal that the father of the plaintiff, Palani Navithan had sold a undivided half share in an extent of 4 acres and 30 cents in S.No.172 along with a house to the 1st defendant under Ex.A2 sale deed dated 28.3.1949. Thereafter, the 1st defendant entered into a

partition dated 11.10.1954 as evidenced by Ex.A3, wherein, the suit 1st item was divided between the 1st defendant and one Palainavithan and in the said partition an extent of 1 acre 82 cents along with a house property was allotted to 1st defendant. The plaintiff has shown the property as undivided extent purchased under the sale deed dated 28.03.1949 as item No.1 and the specific half share that was allotted to the first defendant in the partition deed dated 11.10.1954 as item No.2. The case of the defendants that Item Nos.1 and 2 are one and the same, is bound to be upheld.

16. In so far as Item No.3 is concerned, it is the categorical case of the defendants that it was purchased by the first defendant out of her own funds. A perusal of the evidence on record does not reveal or satisfy any of the requirements of a Benami transaction. The plaintiff, who was born in or about 1941, cannot claim any personal knowledge of the sources of the purchase money of the properties that were purchased during his minority.

17. Further, the plaintiff has not let in any evidence to establish the motive behind the purchase or the source of consideration or the nature of possession or the custody of title deeds etc. It should be borne in mind that the suit has been filed after enactment of Benami Transaction (Prohibition) Act 1988. The Hon'ble Supreme Court in *Rajagopal Reddiyar Vs. Padmini Chandrasekar* reported in **1996 SC 238**, has held that the provision of the Act would apply to a suit for proceeding initiated after 1988 and no person could

claim either by way of plaint or by way of defence that the properties that stand in the name of the ostensible owner are held Benami for the benefit of true owner. However, there are certain exceptions which allow a person to acquire property in the name of his wife or his unmarried daughter. The said exception is also not absolute and the same is qualified by the Statutory presumption created by Section 3(2) (a) of the said Act. The said provision reads as follows:

“ Nothing contained in Sub Section (1) shall apply to purchase a property by any person in the name of his wife or unmarried daughter and it shall be presumed, unless the contrary is proved that the said property had been purchased for the benefit of the wife or unmarried daughter”

The above statutory presumption would have to be dislodged by the plaintiff or the defendants who seeks partition of the property that has been purchased in the name of wife or unmarried daughter.

18. Upon a perusal of the evidence on record, I am unable to find any evidence that is capable of dislodging the statutory presumption. Even, PW2 has not spoken anything about the intention for the purchase of the property by the husband of the first defendant in her name. In view of the aforesaid settled position of law, the plaintiff without dislodging the statutory presumption, cannot sue for partition and separate possession. Thus point Nos.1 and 2 are answered against the plaintiff.

19. Point No.3. The learned Additional District Judge, after having held that the properties are absolute properties of Karuppammal had gone into the validity of the settlement dated 17.04.2008, said to have been executed by the said Karuppammal namely, the first defendant in favour of the second defendant. It is seen from the records that the settlement deed was not produced before the Trial Court and no issue regarding validity of the settlement deed was also framed by the Trial Court. However, the learned Ist Additional District Judge went on to hold that the plaintiff cannot seek the relief of partition, without seeking to set aside the settlement deed dated 17.4.2008.

20. Mr.S.Subbiah, learned counsel appearing for the appellant, would vehemently contend that such a conclusion of the learned Ist Additional District Judge, Coimbatore was uncalled for, apart from being illegal and unsustainable. I am inclined to agree with the said submission of the learned counsel appearing for the appellant.

21. The sum and substance of the pleadings is that the properties are belonging to the family and acquired either by the father in the name of the mother or out of the joint family funds in the name of the mother. Therefore, the plaintiff has pleaded that the first defendant is only a ostensible owner and has sought to establish the rights of the family and thereby seek partition. It should be pointed out that the plaintiff is not a party to the settlement deed

dated 17.04.2008. He need not to seek to set aside the same and he can ignore it. Therefore, the finding of the learned Ist Additional District Judge, Coimbatore to the effect that the plaintiff cannot seek for partition without seeking cancellation of settlement deed, in my considered view is erroneous and same is liable to be interfered with and is accordingly set aside.

22. Pending the above appeal, the first defendant died and a memo has been filed by the learned counsel for the appellant stating that the appellant himself and the second respondent are the legal representatives being the sons of the deceased first defendant. The said memo is recorded and the appellant and second respondent are recorded legal representatives of the deceased first respondent.

23. Mr.S.Subbiah, learned counsel appearing for the appellant would contend that on the death of the first respondent, being Class-1 legal heir, the appellant would be entitled to half share in the suit property and seeks a preliminary decree to that effect.

24. Mr.Kingston Jerald, learned counsel appearing for the respondents would vehemently oppose to the said plea and contend that their mother had already settled the property in favour of his client and if I am to accept the plea of Mr.S.Subbiah, learned counsel appearing for the appellant, he would be denied the right to prove the settlement deed in accordance with law. I find

considerable force in the argument of Mr.Kinston Jerald, learned counsel appearing for the respondent.

25. Therefore, recording of the appellant and the second respondent as legal heirs of the deceased first respondent is confined only to the proceedings in this appeal and shall not vest any right in them to the properties of the said Karuppammal.

26. Mr.S.Subbiah, learned counsel appearing for the appellant would contend that though a plea regarding settlement was taken in the written statement and DW2 was examined as attestor to the said settlement deed, the said document was not produced. Therefore, the execution of the settlement having not been established, he would be justified in seeking preliminary decree for half share in the suit properties.

27. I am unable countenance the said submission, for the reason that the validity or otherwise of the settlement was never in issue before the Trial Court and no issue was framed regarding the same. Apart from the above, it was the specific case of the plaintiff that Karuppammal, herself did not have title to execute the settlement deed and since Karuppammal was alive, the succession to her estate, had not opened when the suit was tried in the Trial Court to enable second respondent to prove the settlement, said to have been executed by his mother in his favour on 17.4.2008.

28. I am therefore of the view that the decision in this appeal should be confined only to the nature of the property and I do not propose to travel any further. In fine the appeal in A.S.No.29 of 2010 is dismissed confirming the judgement and decree of the trial court dated 28.10.2009. It is made clear that the finding of the learned Additional District Judge with reference to cancellation of the settlement deed is set aside and the properties are held to be the absolute property of the first defendant Karuppammal and the plaintiff is not entitled to partition as legal heir of Palani Navithan or as coparcener along with the said Palani Navithan and the second defendant and the question of succession of the estate to the deceased karuppammal (first respondent) is left open to be decided in appropriate proceedings.

29. In fine the appeal in A.S.No.29 of 2010 will stand dismissed subject to the observations made above. There shall be no order as to costs. Consequently the connected M.P.No.1 of 2010 and M.P.No.2 of 2012 are closed.

11.11.2016

Index : Yes/No

Internet: Yes/No

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To

The 1st Additional District Judge, Coimbatore.

R.SUBRAMANIAN,J

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Predelivery Judgement

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