

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 18.01.2017

Verdict on : 24.01.2017

Coram:

The Honourable Mr. Justice M.M.SUNDRESH

S.A.Nos.439 and 440 of 2015
& M.P.No.1 of 2015

K.Krishnan Palani ...Appellant in both appeals
(Plaintiff in O.S.No.1021/04,
1st Defendant in O.S.No.767/04)

Vs.

1.Santhakumari
W/o late K.Pichandi Murugan

2.P.Tamilselvan

3.P.Tamilselvi

4.P.Srinivasan ...Respondents 1 to 4 in both appeals
(LR's of the Defendant in
O.S.No.1021/04 & LR's of the
Plaintiff in O.S.No.767/04)

5.A.Pachaiyammal ...5th respondent in S.A.No.440 of 2015
(3rd Defendant in O.S.No.767/04)

Second Appeals are filed under Section 100 C.P.C., to set aside the judgment and decree dated 27.02.2015 made in A.S.Nos.107 and 108 of 2012 on the file of Sub Court, Vellore, confirming the judgment and decree dated 10.09.2012 made in O.S.Nos.1021 and 767 of 2004 respectively on the file of Principal District Munsif Court, Vellore.

For Appellant : Mr.S.Subbiah
in both appeals

For respondents 1 to 4 : Mr.S.William
in both appeals

COMMON JUDGMENT

S.A.No.439 of 2015 has been filed by the appellant being the plaintiff in O.S.No.1021 of 2004 seeking the relief of declaration declaring his title to the suit property and for handing over possession.

2. S.A.No.440 of 2015 has been filed by the appellant being the first defendant in O.S.No.767 of 2004, which was filed by the first respondent's husband, seeking the relief of partition and separate possession.

3. The parties are arrayed in the same position as mentioned in S.A.No.439 of 2014.

4. The appellant is none other than the brother of the first respondent's husband. It is the case of the first respondent, who is the wife of the plaintiff in O.S.No.767 of 2004, that the suit properties were ancestral/joint family properties. Though "B" schedule property, which is a house, stands in the name of the second defendant in O.S.No.767 of 2004, it has been purchased from the income of the joint family properties. "B" schedule property has been purchased by mortgaging "A" schedule properties. "A" schedule properties except item No.6 have been given to the second defendant without a right of exclusive alienation or encumbrance. The recitals are to the effect that any such alienation by the second defendant would not bind the others. But such an action can be adopted by all the persons together. After the mortgage amount of Rs.2000/- was received under Ex.A2, "B" schedule property was purchased under Ex.A3 for a sum of Rs.1500/-. The aforesaid mortgage was entered into on 27.08.1961 and the sale was effected on 14.09.1961 i.e., within a period of 17 days from receiving the mortgage amount of Rs.2000/-. The father of the appellant and the defendant in O.S.No.1021 of 2004 were admittedly working in the police department. Similarly, the first respondent's husband/plaintiff in O.S.No.767 of 2004 was also working in the police department. The "C" schedule property, which is stated to be item No.6 of the "A" schedule property, was given in favour of the third defendant.

5. It is the case of the first respondent, who is the wife of the plaintiff in O.S.No.767 of 2004, that the suit properties are joint family properties whereas, it is the case of the appellant that the "B" schedule property is the self acquired property of the second defendant viz., the mother of the parties. Ex.A3 is the sale deed in her name. The first respondent's husband viz., late K.Pitchandi Murugan, filed the first suit in O.S.No.767 of 2004 on 09.10.2000. During the

pendency of the suit, the second defendant since deceased, executed a registered Will under Ex.B1 dated 14.08.2001. She was not living with the plaintiff at the relevant point of time.

6.The trial Court decreed the suit filed in O.S.No.767 of 2004 holding that the suit property is a joint family property. The findings rendered by the trial Court are to the effect that the "B" schedule property has been purchased by the money derived from the mortgage deed effected with respect of Item Nos.1 to 5 of the "A" schedule properties. The fact that Ex.A3-sale deed has been effected within 17 days from the date of execution of Ex.A2-mortgage deed coupled with the fact that the father of the second defendant being a Government servant, was taken into consideration to hold that the "B" schedule property was a joint family property. Resultantly, the Will dated 14.08.2001 relied upon by the appellant has not been proved in the manner known to law. Inasmuch as the mother herself not having title, any subsequent Will executed by her also would not confer any title. The Will was executed by the second defendant two months prior to her death. Suspicious circumstance surrounding the Will was not dispelled except the third defendant, no other persons, who have stated to be in the Will, have been examined. The trial Court also found that Item Nos.1 to 5 of the "A" schedule properties have already been sold. Accordingly, the suit for partition was decreed insofar as the "B" and "C" schedule properties are concerned. Consequently, the suit filed by the appellant in O.S.No.1021 of 2004 was dismissed. Aggrieved over the same, appeals have been preferred in A.S.Nos.108 and 107 of 2012 by the appellant and the first respondent's husband. The lower Appellate Court concurred with the findings rendered by the trial Court by dismissing the appeals. Not satisfied with the concurrent findings rendered by the Courts below, the appellant has filed these second appeals by raising the following substantial questions of law.

1. Whether, in a pending suit, one of the parties to the suit having died, and when it was recorded the deceased left no legal heirs, despite the fact all the legal heirs of the deceased were already on record, such a recording of the event would make the suit abated, as against the deceased party to the suit in the absence of recording the legal heirs, for already parties to the suit?

2.When the property was purchased in the name of a female, out of the loan amount secured from a joint family property, whether such loan amount could be treated as an income from the nucleus of the joint family property so as to presume that the said property purchased in the

name of the female is a joint family property.

3. When admittedly, the kartha of the family was a Government servant, whether the amounts contributed by him from his terminal benefits, for the purchase of the property in the name of his wife, could be regarded as a joint family property.

4. Especially when, there was neither evidence nor any admission that there was surplus income so as to form a nucleus to purchase a property, whether the presumption made by the Court that the suit schedule - B property was purchased from and out of the income received from the joint family property is legal.

5. When the suit for partition, the pleadings and the evidence let in falling under Section 4 of the Benami Transactions (Prohibition) Act No.45 of 1988, is hit and as such, whether such a suit for partition is maintainable, even without any pleadings to that effect so as to attract Section 3 of the Act.

6. When there is a presumption under Section 3 of the Benami Act, that any purchase made by the husband in the name of his wife and unmarried daughter that the said property came to be purchased to benefit them, and also when, no evidence had been let in by the litigant to rebut the presumption, is not the finding of the Appellate Court is vitiated.

7. Is not the finding that Exhibit-B1 Will was not proved by examining any attesor is perverse when, DW2 an attesor to the Will Exhibit-B1 spoke to the execution and proved the Will.

8. When the executor of the settlement deed in favour of the beneficiary reserved a right of joining with the beneficiary in the event of alienation of it, under certain circumstances stipulated therein would lead to a conclusion that the settlement deed is a mere sham and nominal, especially when, there being no pleading or evidence to showing as to why the executor executed the settlement deed in favour of the beneficiary.

7. As the third defendant has not chosen to file the appeal against the "C" schedule property in O.S.No.767 of 2004, we are concerned only with the "B" schedule property mentioned therein.

8. The learned counsel appearing for the appellant submits that Section 4 of the Benami Transactions (Prohibition) Act, 1988, would attract the present case. "B" schedule property stands in the name of the mother viz., the 2nd defendant (since deceased). Therefore, the property is to be treated as self acquired property. Even assuming that the property is the joint family property, mere raising of the loan by mortgaging "A" schedule properties alone would not be sufficient to take away the character of being a self acquired one. The Courts below have committed an error in placing the onus on the appellant to prove to the contrary. Ex.B1 has been proved in the manner known to law by examining the third defendant being an attester. In support of his contention, the learned counsel has made reliance on the following decisions.

- 1.UNION OF INDIA AND ANOTHER V. INDUSIND BANK LIMITED AND ANOTHER ((2016) 9 Supreme Court Cases 720);
- 2.VELAPPAN V. S.DURAI SAMY AND OTHERS ((2012) 8 MLJ 776);
- 3.R.RAJAGOPAL REDDY (DEAD) BY LRS. AND OTHERS V. PADMINI CHANDRASEKHARAN (DEAD) BY LRS. ((1995) 2 Supreme Court Cases 630); and
- 4.SELVARAJAN AND TWO OTHERS V. GANESA NAICKER AND ANOTHER ((1992) 2 Law Weekly 402).

9. The learned counsel appearing for the respondents submits that no interference is required on a finding rendered on the fact that the "B" schedule property is a joint family property in exercise of the power under Section 100 of the Code of Civil Procedure. The fact that the father of the properties was working in the police department is not in dispute. Similarly, the execution of Exs.A1 and A2 are also not in dispute. The appellant has not removed the suspicious circumstance surrounding the Will. The second defendant was not in a sound and disposing state of mind being bed ridden aged about 82 years. The Will has been created during the pendency of the suit in O.S.No.767 of 2004. Even the appellant has admitted that "B" schedule property has been purchased from the mortgaged amount involving Item Nos.1 to 5 of the "A" schedule properties. The other properties in the "A" schedule stand sold by all the parties together and from the said amount, the mortgage was redeemed as even accepted by D.W.1. He also accepted that "C" schedule property is not a self acquired property of the father, but only an ancestral property. Thus, there is no basis for allowing these appeals.

10. The relationship of the parties and the execution of the document has not been disputed. Under Ex.A5, the properties

belonging to the joint family was settled in favour of the second defendant. This document clearly states that the properties cannot be sold by the second defendant on her own but only along with the other members of the family including the settlor. As per Ex.A1, the properties are joint family properties. Ex.A5 also speaks about partition between the husband of the second defendant and his brother. As rightly held by the Courts below, "A" schedule properties excluding item No.6 were mortgaged both by the Krishna Mandiri, the father of the parties in this appeal and his wife viz., the deceased second defendant. A sum of Rs.2000/- was obtained and even 17 days thereafter, the "B" schedule property was purchased in the name of the second defendant for Rs.1500/-. Thus, the Courts below have clearly held that it is the father of the appellant, who purchased the property in the name of his wife, as he was in the Government service at the relevant point of time. It is not, as if, the first respondent's husband/plaintiff in O.S.No.767 of 2004 has executed Ex.B1. From the evidence available on record both oral and documentary is very clear as found by the Courts below as "B" schedule property is nothing but joint family property. The Courts below have correctly assessed the available materials to come to the correct conclusion. It is not the case of the first respondent's husband/plaintiff in O.S.No.767 of 2004 that the second defendant was a co-parcener. On the contrary, it is the specific case that the suit "B" schedule property is the joint family property. Therefore, it is not, as if, he is claiming absolute title over the "B" schedule property but seeks to proclaim it as joint family property. Therefore, the rigour of Section 4 of the Benami Transactions (Prohibition) Act, 1988, cannot have any application to the case on hand. Hence, on that account, the decisions relied on by the learned counsel for the appellant do not help his case.

11. Coming to the Will relied upon by the appellant, the Courts below have rightly rejected it both on facts and law. In this case, the appellant and the third defendant on the one side and the first respondent is on the other side. Admittedly, the Will has been executed during the pendency of the first suit in O.S.No.767 of 2004. Even at that point of time, the first respondent's husband/plaintiff in O.S.No.767 of 2004 had made as party defendant. It is his case that the deceased mother was taken advantage of by the appellant. Though she could sign, a mere thumb impression alone was obtained in the Will Ex.B1. Except the defendant No.3, who merely made a statement, no other person has been examined to prove the Will. If it is the case of the appellant that the relationship between the first respondent's husband/plaintiff in O.S.No.767 of 2004 and his mother got estranged, the same has to be established in the

manner known to law. As rightly found by the Courts below even the said issue is incidental when once it is proved that the "B" schedule property is the joint family property and therefore, the deceased mother will not have any exclusive title. After all it is for the beneficiary of the Will to prove it in the manner known to law both under the Hindu Succession Act, 1956 as well as the Indian Evidence Act, 1872.

12. As discussed above, there is no dispute on facts with respect to Exs.A5, A1, A2 and A3. Therefore, this Court finds no perversity in the findings rendered by the Courts below that the "B" schedule property has been purchased from the source provided by the other joint family properties. After all the Court has to see the attending circumstance as a whole to come to a decision.

13. In the result, this Court is of the view that there is no substantial questions of law involved warranting interference. Accordingly, the second appeals stand dismissed. No costs. Consequently, connected miscellaneous petition is also dismissed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

raa

To

1.The Subordinate Judge,
Vellore.

2.The Principal District Munsif,
Vellore.

Copy to
The Section Officer,
V.R.Section,
High Court, Madras-104.

+1cc to Mr.Subbiah, Advocate, S.R.No.4505
+1cc to Mr.William, Advocate, S.R.No.4340

SV(CO)
RS(28/02/2017)

Common Judgment
in S.A.Nos.439 and 440 of 2015