

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.09.2018

CORAM

THE HONOURABLE MR. JUSTICE N. KIRUBAKARAN

AND

THE HONOURABLE MR. JUSTICE S. BASKARAN

A.S. No. 490 of 2017

&

C.M.P.Nos. 15604 of 2017 & 13749 of 2018

Mrs. Delphine Mary

..Appellant/Defendant

Vs.

1. Saleth Mary

2.Mrs. Alphonsa

1.

..Respondents/Plaintiff

Prayer: Appeal as against the judgment and decree passed in O.S. No. 19 of 2012 dated 17.03.2017 by the Principal District Court, Tiruvarur.

For Appellant :: Mr.J. Antony Jesus

For Respondents :: Mr.P. Sesubalan Raja

J U D G M E N T

(Judgment of the Court was delivered by N. KIRUBAKARAN,J.)

The appeal has been preferred by the defendant as against the judgment and decree dated 17.03.2017 passed in the suit filed by the respondents for partition of the properties belonging to one Parisutham Nadar, husband of the 1st respondent and father of the appellant as well as the 2nd respondent.

2. The suit "A" Schedule, " B" Schedule and "C" Schedule properties belong to the father Parisutham Nadar, having been purchased by him and he died intestate on 11.12.2001 leaving behind the appellant as well as the respondents to inherit the properties. Therefore, the suit for partition has been filed.

3. The younger daughter of Parisutham Nadar, namely, the appellant herein was shown as the defendant, who contended that not only "A" schedule, "B" schedule and "C" schedule properties, but also "D" schedule property, ie., land and house bearing Door No.4, Nirmala Nagar, Vallam Road, Thanjavur Town also belongs to Parisutham Nadar, having purchased the said property in his wife's name, the 1st respondent herein. Therefore, all the properties have to be included for partition. It is the further case of the appellant/defendant that "D" Schedule property was purchased by Parisutham Nadar and not by his wife, as she did not have any income and was only a housewife. On the side of the plaintiffs (respondents herein), 2 witnesses were examined and on the side of the defendant (appellant) herein, 3 witnesses including the appellant were examined. On appreciation of pleadings and evidence, the Trial Court decreed the suit with regard "A" schedule, "B" schedule, and "C" schedule properties and held that "D" schedule property is the absolute property of the 1st respondent, who settled the property in favour of the 2nd respondent as early as on 30.12.2002. The said decree and judgment is being challenged before this Court.

4. Heard Mr.J. Antony Jesus, learned counsel for the appellant and Mr.P. Sesubalan Raja, learned counsel for the respondents.

5. Learned counsel for the appellant would very vehemently argue that "D" schedule property was purchased by Parisutham Nadar, father of the appellant in the name of his wife, namely, the 1st respondent, out of his own income and the 1st respondent did not have any income to purchase the said property. He would refer and rely upon the evidence of D.Ws 2 and 3 to contend that the funds were provided only by Parisutham Nadar and not by the 1st respondent. He would rely upon the judgment of the Honourable Supreme Court rendered in Binapani Paul V. Pratima Ghosh and others reported in (2007) 6 SCC 100 to contend that whether it is a benami transaction or not has to be decided only by the Court based on evidence and circumstances of the case. Another judgment was also relied upon by the learned counsel for the appellant rendered in Controller of Estate Duty, Lucknow Vs. Aloke Mitra reported in (1981) 2 SCC 121 to contend that the practice of purchasing the property in the name of wife by the husband is regarded as benami transaction in India by which the beneficial interest in the property is with the husband although the ostensible title is with the wife as per Section 40(3) of Transfer of Property Act. Yet another judgment relied on by the learned counsel for the appellant is the one reported in (2013) 9 SCC 152 (Vathsala Manickavasagam and Others V. N. Ganesan and another) to contend that the purchase of the property in the name of his wife by Parisutham Nadar could not be held to be a valid gift in favour of his wife even though it was purchased in

the name of his wife. Making the above contentions, he would submit that as far as "A" schedule, "B" schedule and "C" schedule properties are concerned, there is no dispute with regard to one-third share granted by the Trial Court. However, the suit itself had been filed with mala fide intention by the respondents only to see that the 1st respondent/mother's share is also settled in favour of the 2nd respondent/elder daughter and to deny the share of the mother in case of her death, to the appellant, even though the respondents are in possession of the properties.

6. As far as "D" schedule property is concerned, he would submit that the plaintiffs did not include the "D" schedule property in the partition suit with mala fide intention and only at the instance of the appellant, suit schedule was amended and there is no reply statement filed by the plaintiffs as to how the averments made by the appellant are not sustainable. Therefore, he would submit that the decree passed by the Trial Court denying share to the appellant in the "D" schedule property has to be set aside.

7. On the other hand, Mr.P. Jesubalan Raja, learned counsel for the respondents would submit that the Trial Court rightly rejected the defence of the appellant and held that the "D" Schedule property is the own property of the 1st respondent. Moreover, D.W.s 2 and 3 are interested witnesses as they have got animosity with the respondents/plaintiffs and therefore, their evidence could not be looked into. He would rely upon the judgment of the Honourable Supreme Court rendered in Nand Kishore Mehra V. Sushila Mehra reported in CDJ 1995 SC 382 to contend that even if the property had been purchased in the name of the other person, the person, who is claiming to have purchased the property should show that the property has been purchased in the name of the other person for the benefit of the entire family. Therefore, he would submit that the Trial Court was right in passing a decree granting one-third share in "A", "B" and "C" schedule properties and holding that "D" schedule property is the separate property of the 1st respondent/mother.

8. Heard the parties and perused the records.

9. There is no dispute with regard to "A", "B" and "C" schedule properties as they were standing in the name of Parisutham Nadar, husband of the 1st respondent and father of the appellant as well as the 2nd respondent, who died on 11.12.2001. Since he died intestate on 11.12.2001, all the three legal heirs are entitled to inherit one-third share in the properties, which has been rightly given by the Trial Court. Therefore, the first

limb of the decree is sustained.

10. The real dispute is with regard to the "D" schedule property. Though "D" schedule property was not included in the suit filed by the respondents, as, according to them, it is the 1st respondent's self-acquired property, subsequently, it was added in the plaint schedule, at the instance of the appellant/defendant. The case of the appellant is that Parisutham Nadar only purchased the property in the name of the 1st respondent as he was a very big business man and the 1st respondent did not have her own source of income for the purchase of the property as she was only a housewife. However, as rightly pointed out by the Trial Court, P.W.1, namely, the 1st respondent herein, in her evidence categorically stated that out of savings of Rs.1000/- made by her and also jewellery and "D" schedule property was purchased in her name as per the evidence given by P.W.1, which is as follows:

"தஞ்சாவூரில் உள்ள வீடு எப்படி வாங்கப்பட்டது என்றால் என்னுடைய நகை, கிறிவாட்டுபணம் ரூ 1000./ம் மேற்கொண்டு பாக்கிதொகை எனது கணவர் கொடுத்து வாங்கியது."

Moreover, the value of "D" schedule property at that time, was only Rs.2,200/-. Therefore, it is clear that almost the entire value was paid by the 1st respondent and only the balance was paid by Parisutham Nadar. Therefore, it is found that the "D" Schedule property has been purchased from and out of the funds provided by the 1st respondent.

11. With regard to the petition filed by the appellant in C.M.P. No. 13749 of 2018 to mark an additional document said to have been written by the 2nd respondent's husband, who, expressed that "D" schedule property could be given to the respondents and in turn, the appellant is entitled to "A" schedule, "B" schedule and "C" schedule properties, the said document, on the face of it, could not be admitted in evidence as it is not signed by anybody and it is merely a scrap of paper, which contains neither the author of the letter nor the recipient of the letter. Therefore, the said petition is liable to be dismissed, as the said document is not admissible in evidence. Accordingly, C.M.P. No. 13749 of 2018 is dismissed.

12. Much reliance has been placed by the learned counsel for the appellant on the evidence of D.W.s 2 and 3. D.W.2, Fr.Savarimuthu, though stated that he is the son of Parisutham Nadar's sister and that his uncle was a man of means and from out of his own funds only, he had purchased the property in the name of the 1st respondent, in the cross-examination, he categorically admitted that he does not know about the income of Parisutham Nadar and he does not know from whom he purchased the "D" Schedule property and what was the sale consideration. He had also admitted that Parisutham Nadar did not tell him that he

purchased "D" Schedule property from and out of his own funds in the name of his wife, namely, the 1st respondent. There is also clear evidence that "A", "B" and "C" schedule properties were maintained by D.W.2's brother and subsequently, they were taken over by the respondents. Therefore, the plea of enmity between D.W.2 family and respondents made by the learned counsel for the respondents, cannot be ignored.

13. As far as D.W.3 is concerned, he would state that Parisutham Nadar was his uncle and he was a man of means and there was no necessity for him to purchase the property in the name of his wife out of the funds provided by her. In the cross-examination, he had admitted that his father sustained loss in the business and he sold all his properties to Parisutham Nadar and also to the 1st respondent in 1960 and he did not even know about the death of Parisutham Nadar. He had further admitted that he did not know about the accounts of Parisutham Nadar and he did not know about the purchase of "D" Schedule property directly. Therefore, it is clear that D.W.3 did not have any direct knowledge about the transaction with regard to "D" Schedule property. Moreover, he did not even attend the funeral of his uncle Parisutham Nadar. This itself would exhibit that he has got no connection at all with the family of Parisutham Nadar and his evidence cannot be believed.

14. From the above, it is clear that from the funds as well as jewellery provided by the 1st respondent/wife, Parisutham Nadar had purchased "D" Schedule property. Moreover, "D" Schedule property had already been settled in favour of the elder daughter of the 1st respondent, namely, the 2nd respondent, as early as on 30.12.2002. If really, the appellant had any right, she would not have kept quiet and she would have initiated proceedings, especially, when the property was settled as early as in the year 2002. Besides, in the suit filed by the respondents, all these contentions have been made by the appellant, which are not sustainable. Moreover, it is seen from the evidence as well as pleadings that "D" Schedule property never acquired the character of joint family property at any point of time and the appellant cannot have any claim not only over "D" Schedule property, but over all the properties, as all the properties have been in possession of the respondents.

15. The appellant in her evidence had stated that she does not remember when she saw her mother, namely, the 1st respondent. From the above evidence, it is clear that the appellant does not know whether her mother is living and whether she is living with her sister or under the care of someone else. When that is the concern and care, the appellant has, for her mother, she cannot claim any right over the "D" Schedule property, which is standing in the name of her mother.

16. In the judgment relied upon by the learned counsel for the appellant, reported in (1981) 2 SCC 121, it has been held that "when a property is purchased by a husband in the name of his wife or by a father in the name of his son, it must be presumed that they are benamidars and if they claim it as their own by alleging that the husband or the father, as the case may be, intended to make a gift of the property to them, the onus rests upon them to establish such a gift". In this case, it is proved by the 1st respondent that the sale consideration was paid out of her funds and the said evidence of P.W.1 was not discredited by the appellant. Moreover, the appellant, in her evidence had stated that she came to know about the purchase of "D" Schedule property only at the last point of time. Therefore, she could not claim that the property was purchased by the father Parisutham Nadar in the name of her mother. As far as the other judgments relied on by the learned counsel for the appellant are concerned, there is no dispute with regard to the dictum laid down by the Honourable Supreme Court in the said judgments. However, the facts of the case are different. Therefore, the said judgments would not apply to the case on hand.

17. In the judgment relied on by the learned counsel for the respondents reported in CDJ 1995 SC 382, it has been held that "it has to be made clear when a suit is filed or defence is taken in respect of benami transaction involving purchase of property by any person, in the name of his wife or unmarried daughter, he cannot succeed in such suit on defence unless he proves that the property, although purchased in the name of the wife or unmarried daughter, the same had not been purchased for the benefit of either the wife or the unmarried daughter, as the case may be, because of the statutory presumption contained in sub-section (2) of Section 3 of Benami Transactions (Prohibition) Act, 1988. Eventhough the facts of the case involved before enactment of the Act, still, the person, who claims that the property has been purchased as benami has to prove it. In this case, the appellant has miserably failed to establish the same and on the contrary, the 1st respondent/mother is able to prove that she only gave money for the purchase of "D" Schedule property.

18. Therefore, for all the reasons stated above, this Court confirms the finding given by the Trial Court granting a decree for partition in respect of "A", "B" and "C" schedule properties and that "D" schedule property is the independent property of the 1st respondent.

19. In the result, the appeal fails and the same is dismissed. No costs. C.M.P. No. 15604 of 2017 is closed.
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Sd/-
Assistant Registrar(CS V)

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Sub Assistant Registrar

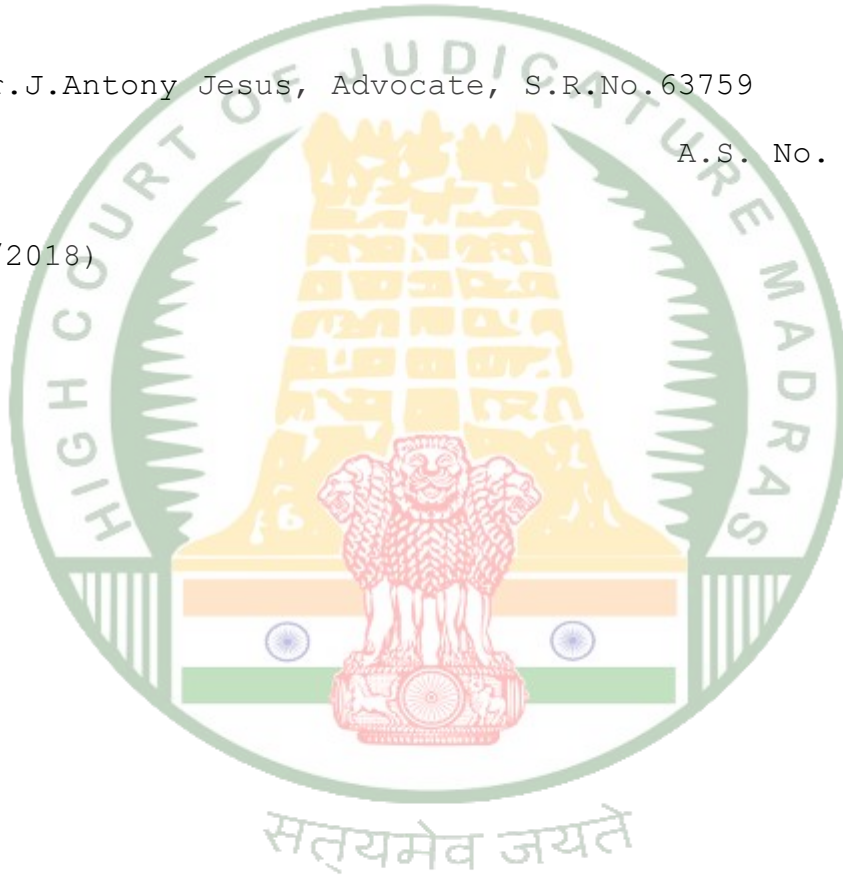
To

The Prl. District Court,
Tiruvarur.

+1cc to Mr.J.Antony Jesus, Advocate, S.R.No.63759

A.S. No. 490 of 2017

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GSP(15/11/2018)



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