

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 26.11.2018

Judgment Pronounced on : 30.11.2018

CORAM: THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

S.A.No.198 of 2008
and MP.Nos.1 & 2 of 2018

1.Dominic Xavier
2.Mudiappan
3.Santhanameri

... Appellants/Defendants

Vs

1.Jayamery (Deceased)
2.G.David
3.G.Jayaseela Sunder
4.Josephin Clara
5.G.Rajan
6.Mary Prema

... Respondents/Plaintiff

[Respondents 2 to 6 are brought on record as LRS of the deceased sole respondent Vide order dated 05.10.2018 in CMP.No.4735 to 4737 of 2018]

Prayer :- Second Appeal filed under Section 100 of Code of Civil Procedure, against the judgment and decree dated 02.12.2005 made in A.S.No.38 of 2004 on the file of the Subordinate Court, Arni, Thiruvannamalai District, reversing the judgment and decree dated 13.12.2002 made in O.S.No.437 of 1996 on the file of the District Munsif Court, Polur, Thiruvannamalai District.

For Appellants : Mr.A.R.Suresh
for Mr.A.Rajendiran

For Respondents: M/s.Devadason & Sagar for R2
Mr.Arun Anbumani for R3 to R6

JUDGMENT

The defendants 1 to 3 in O.S.No.437 of 1996 on the file of District Munsif Court, Polur, Thiruvammalai District, have come forward with the present appeal challenging the decree in A.S.No.38 of 2004, by which, the First Appellate Court (Subordinate Court, Arani, Thiruvannamalai District) has decreed the suit, reversing the decree dismissing the suit passed by the trial court

2. The brief statement on material facts, on which the plaintiffs rest their action are:

- The plaintiff's father Rajendran and defendant's father Mariyasoosai were brothers. There are two items of properties that the plaint describes, one in the "A" Schedule and the other in the "B" Schedule, (of which there is no dispute over the B schedule property). These properties were jointly purchased and enjoyed by Rajendran and his brother Mariyasoosai.
- On 26.07.1951, under Ext.A1, Rajendran purchased some properties, and he later sold it under Ext.A-2 dated 25.04.1954, and with the sale proceeds thereof, he purchased both the items of plaint properties under two separate sale deeds (Ext.A3 and Ext.A4), in the name of Mariyasoosai. So far as the property in Ext.A-3 is concerned, Mariyasoosai purchased half of the properties but the sale consideration was provided by Rajendran. In fact, the stamp paper was purchased in the name of Rajendran and he had signed as a witness too in the said sale deeds. Similarly, as regards the other property covered under Ext.A4 too, the property was purchased again by Mariasoosai, but towards sale consideration he had executed only a promissory note for ? 1,000/-. Here again the stamp papers were purchased in the name of Rajendran and yet again he signed as a witness.
- Mariyasoosai and his wife have died subsequently, and had left their young children, the defendants herein, to the care of Rajendran. Rajendran had later discharged the loans of Mariasoosai, and had been caring the properties too. He had been paying the tax and rates payable on the property. The patta (Ext.A5) and Tax receipts (Ext.A6 series) would indicate that the properties stood jointly in the names of Rajendran and Mariasoosai.
- As years rolled by, cordiality shared by the plaintiff and the defendants was replaced by differences and enmity, that ultimately culminated in the partitioning of the

properties in 1984 in the presence of the panchayatdars. In this partition, 'A' schedule property was allotted to the plaintiff and B schedule property was allotted to the defendants. A simple mortgage executed by the first defendant on 27-08-1990 (Ext.A7) by securing the B schedule property for the loan obtained evidences this fact.

While so, sometime in 1993, the defendants forcibly dispossessed the plaintiff of her possession over "A" Schedule property, which has resulted in the plaintiff coming forward with the present suit for declaration of title for recovery of possession.

3. The written statement was filed by the 2nd defendant and was adopted by other defendants. Denying the plaintiff's case generally, the defendants in essence have claimed title over the 'A' Schedule property and also asserted long and continuous possession and enjoyment of the property.

4.1. Before the trial court, the plaintiff had examined herself as PW1. She also examined PW2, Iyyannan. PW3 was a tenant of the 'A' Schedule property under Rajendran. For the defendants, defendants 1 and 2 were examined as DW1 and DW2. Besides, they have also examined certain Pushparaj as DW3.

4.2. On appreciating the evidence before it, the trial Court dismissed the suit. In its judgment, the trial Court has disbelieved the case of alleged partition said to have taken place in 1984, and has also disbelieved the case of the defendants claim of possession over 'A' Schedule property. Aggrieved by the said decree, the plaintiff has preferred A.S.No.38 of 2004 before the Subordinate Court, Arni. The First Appellate Court, however has reversed the decree of the trial Court, and the First Appellate Court believed plaintiff's case of an oral partition in 1984 and has arrived at this conclusion primarily on the fact that the patta for the property stood in the name of Rajendran. सत्यमेव जयते

5. This appeal is admitted on the following substantial questions of law:

a) Whether the findings of the lower appellate Court are not erroneous and perverse especially when even in the documents relied on by the respondent/plaintiff i.e. Exhibit A.3 and Exhibit A.4 the sale deeds, the mode of payment of sale considerations which shows that the respondent plaintiff had not purchased the property in the name of the appellants' father?

b) Is not the respondent estopped from claiming right under Exhibit A.3 and Exhibit A.4 and the respondent being an

attesting witness of the execution of the said two sale deed and the judgment of the lower appellate Court is contrary to law and decision reported in 2003 (2) M.L.J. Page 99?

The Arguments

6.1 The learned counsel for the appellants submitted that admittedly, both "A" Schedule and "B" Schedule properties were purchased in the name of Mariyasoosai, that there could not have been any oral partition as alleged by the plaintiff since Rajendran did not have any pre-existing right or title either in "A" and "B" Schedule or any of the suit properties. Therefore, if at all plaintiff should get any title over the 'A' schedule property, that could only be under a registered document, but not otherwise. Therefore, the theory of oral partition cannot stand any scrutiny, notwithstanding the evidence of PW2 in this regard. If the case of the plaintiff based on the alleged oral partition cannot be sustained, then the plaintiff claiming title over 'A' Schedule property would be hit by Section 4 of the Benami Transactions (Prohibition) Act, 1988. And mere payment of kist by Rajendran would not create any title in him, since (a) they are not documents of title; and (b) admittedly, Rajendran had been taking care of both the defendants and their properties after the death of Mariasoosai, which necessarily would involve the former paying kist for the properties.

6.2. The learned counsel further contended that the suit for title is based on an alleged oral partition, and the burden is squarely on the plaintiff to prove the same Vide the ratio in Anil Rishi Vs. Gurbaksh Singh [2006 (4) CTC 524] and P. Panneerselvan Vs. A.Baylis [2005 (5) CTC 17], and where the same is not discharged, then it is not given to the plaintiff to rely on any weakness in the case of the defendants for sustaining her case. Reliance was placed on the ratio in Union of India and Others Vs. Vasavi Co-op. Housing Society Ltd. And Other [AIR 2014 SC 937]; Ramchandra Sakhaman Mahajan Vs. Damodar Trimbak Tanksale (Dead) and Others [(2007) 6 SCC 737].

7. The learned counsel for the respondents (the legal representatives of the deceased 1st respondent/plaintiff) have argued in unison that pleadings of the defendants in the written statement is so inadequate that it does not satisfy the requirements of Order VIII Rule 1 of CPC. Under Order VIII Rule 5 CPC, the denial must be specific, but in the written statement, nowhere the defendants pleaded those facts which the learned counsel for the appellants has now canvasses to build his arguments. Arguing further, they contended that the timing of Exts.A-2, A-3 and A-4 alongside the fact that the stamp papers for the purchase of the sale deeds in Exts.A-3 and A-4 in the name of Rajendran, were critical to indicate that the

sale consideration for the purchase of the suit properties could have moved only from Rajendran. Expatiating more on it, they argued that Rajendran sold the property under Ext.A-2 on 25-04-1954, but it was registered only on 22-07-1954. Secondly, the sale deed in Ext.A-3 along with Ext.A-4, though were executed on 14-04-1954, a few days before Ext.A-2, but was registered only on 22-07-1954, the very day on which Ext.A-2 sale deed too was registered. Thirdly, the patta stands in the name of the plaintiff and so are the tax receipts. They could not have been in the name of the plaintiff, if only there had not been a partition. These factors tilt the probability in favour of the plaintiffs, and accordingly the appeal deserves to be dismissed.

The Discussion and the Decision:

8.1 The basic, un-controverted fact is that both the suit properties covered under Exts.A-3 and A-4 were purchased in the name of Mariasoosai, and hence the defendants start with an advantage. Secondly, in a suit founded on title the burden is absolutely on the plaintiff to create a preponderating probability of her title through reliable evidence.

8.2. Here, the plaintiff cannot harp on the benami line of her pleading inasmuch as the suit was filed post Benami Transactions (Prohibition) Act, 1988, which Vide Sec.4 prohibits any pleadings founded on benami, subject to the exception provided therein. The plaintiff had hardly spared any effort through her pleadings to bring her case under the exceptions to the bar of pleading benami as provided in Sec.4(3) of the Act. This would mean that her only chance of succeeding in the suit rests on the proof of an oral partition that she pleads.

8.3. In establishing a partition, it may have to be stated that this court does not find the argument of the defendants/appellants that in every case of partition, parties thereto should necessarily have a pre-existing right in the properties to be partitioned. Law has recognised allotting properties to one who does not have a right in a family arrangement for the sake of securing peace within the family. However, turning to the plaintiff, and if her effort to prove oral partition in 1984 is considered, then it is essential to look into such evidence that might show how she had conducted herself in relation to the 'A' schedule property after the alleged date of partition. Here, except one tax receipt dated 09-02-1986, rest of the tax receipts in Ext.A-6 series are prior to 1984, and may not be useful. A solitary tax receipt two years after the alleged partition is too inadequate to conclude that there indeed was a partition. The oral evidence of P.W.2 and P.W.3 also do not advance the case of the plaintiff either. In particular, P.W.3's claim that he was a tenant under the plaintiff cannot be accepted without corroboration, and that

corroboration could have been easily provided by production of copy of the adangal for the relevant period, but it was not produced.

9. On an over all appraisal of rival evidence, this court finds greater merit in the case of the appellants/defendants and the substantial questions raised necessarily have to be decided in its favour.

10. In the result, this appeal is allowed and the judgment and decree dated 02.12.2005 made in A.S.No.38 of 2004 on the file of the Subordinate Court, Arni, Thiruvannamalai District, reversing the judgment and decree dated 13.12.2002 made in O.S.No.437 of 1996 on the file of the District Munsif Court, Polur, Thiruvannamalai District, is hereby set aside. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To:

- 1.The Sub Judge, Arni, Thiruvannamalai District.
- 2.The District Munsif, Polur, Thiruvannamalai District.
- 3.The Section Officer, VR Section, High Court, Madras.

+1cc to Mr.A.Rajendiran, Advocate sr.no.82200
+1cc to M/s.Devadason & Sagar, advocate sr.no.82455
+1cc to Mr.Arun Anbumani, Advocate sr.no.82184

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