

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 30.07.2018

Judgment Pronounced on : 21.08.2018

CORAM: THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

A.S.No.1171 of 2004 & A.S.No.293 of 2005
and

CMP.Nos.8392 of 2006, 9747 & 9748 of 2017
in A.S.No.1171 of 2004

1.G.Jayagopal (Deceased) ...Appellant/2nd Defendant
2.J.Yasodha
3.J.Krishnamoorthy
4.J.Srinivasan (Died)
5.J.Dillibabu
6.J.Rajkumar
7.S.Dhilagavathi
8.Minor S.Keethivasan
9.Minor S.Sangeetha ... Appellants in both appeals
[Minors Represented by Mother/Natural
Guardian Dhilagavathy]

[Appellants 2 to 6 are brought on record as LRs of deceased
sole appellant Vide order of Court dated 24.08.2007 in
CMP.Nos.8507 & 8508 of 2006]

[Appellants 7 to 9 are brought on record as LRs of deceased
4th appellant Vide order of Court dated 05.09.2017 in
CMP.No.14968/2017 in A.S.No.1171/2004 and
CMP.No.14969/2017 in A.S.No.293/2005]

Vs

1.G.Madhangopal
2.G.Chandrakanthammal
3.A.Anjali (Deceased)
4.B.Kuppammal
5.R.Devi
6.A.Raja
7.G.Rajavelu ... Respondents in both appeals

[Respondents 4 to 6 are brought on record as LRs of deceased
third respondent Vide order of Court dated 17.08.2017 made in
CMP.Nos.1803, 2459 & 2460 of 2017 in A.S.No.1171/2004 and
CMP.Nos.1804, 2461 & 2462 of 2017 in A.S.No.293 of 2005]

[Respondent 7 impleaded Vide Court order dated 27.07.2018 made
in CMP.Nos.7080 & 7081 of 2018 in A.S.No.1171/2004 & A.S.293 of
2005)

Prayer in A.S.No.1171 of 2004:- Appeal Suit filed under Section 96 of CPC, to set aside the judgment and decree dated 25.04.2003 made by the learned Additional District Judge, Fast Track Court No.V, Chennai in O.S.No.4073/2002.

Prayer in A.S.No.293 of 2005:- Appeal Suit filed under Section 96 of CPC, to set aside the judgment and decree dated 08.07.2004 made by the learned Additional District Judge, Fast Track Court No.V, Chennai in I.A.No.307/2003 in O.S.No.4073/2002.

For Appellants : Mr.V.Raghavachari
(in both appeals) for Mr.Ma.P.Thangavel
For Respondents : Mr.K.Thiagarajan [R1] - No appearance
(in both appeals):Ms.Rajeni Ramadoss [R7]

JUDGMENT

These twin appeals are preferred, one against the preliminary decree passed in O.S.No.4073 of 2002 on the file of Additional District Judge [Fast Track Court No.V], Chennai, and the other appeal against the final decree passed therein. Parties would be referred to by their rank before the trial Court.

The Pleadings:

2. The material facts, based on which the plaintiff has set the tone of this suit, may now be stated:

- The suit property is described as a plot of 3,900 sq.ft. comprised in T.S.No.23, Block No.62, Kodambakkam Village. A certain Govindarajulu Naidu and Chandhrakanthammal had two sons and a daughter. Their elder son is Jeyagopal, younger son is Madangopal and their only daughter is Anjali. On 21.02.1957, the suit property was purchased jointly in the names of Chandrakanthammal and Jeyagopal.
- Claiming $\frac{1}{4}$ share in the suit property, the other son, Madangopal had laid the suit property against (a) his mother Chandrakanthammal (b) his brother Jeyagopal (second defendant) and (c) his sister Anjali. The plaintiff would contend that the suit property was purchased by his father Govindarajulu Naidu with his funds and out of love and affection for his wife Chandrakanthammal and his elder son Jeyagopal. He would further allege that Govindarajulu Naidu had utilised the sale proceeds of the property which Chandrakanthammal possessed at Padappai, and also the proceeds from the sale of her jewellerys. The building in the suit property was thus constructed entirely by his father. On 09.02.1971, Govindarajulu Naidu died intestate. Thereafter, differences arose between the brothers, hence he laid the suit, seeking partition of $\frac{1}{4}$ share in the suit property.

3. In her written statement the first defendant Chandrakanthammal has pleaded that the suit property was purchased jointly in her name as well as in the name of her elder son Jeyagopal, that after the demise of her husband Govindarajulu Naidu, she and the second defendant have agreed to share the property equally with other heirs of Govindarajulu Naidu.

4. The second defendant, the appellant herein has filed his written statement, wherein he inter alia alleged that under the sale deed dated 21.02.1957, he had half share in the suit property and the remaining half share belonged to Chandhrakanthammal, and that the plaintiff has no locus standi to institute the suit during the lifetime of his mother.

What the Trial Court did:

5.1 The suit went for trial, and during the course of trial, the second defendant was set exparte on 17.03.2003. The first defendant Chandrakanthammal had participated in the suit and was examined as D.W.1 and she sailed along with the plaintiff.

5.2 On 22.04.2003, the second defendant had filed a petition in I.A.SR.No.232 of 2003 to set aside the exparte order passed against him. On 25.04.2003, the said application of the second defendant was returned and on the same day, the trial Court proceeded to pass the preliminary decree.

6.1 The second defendant would now challenge the preliminary decree passed in the suit, in A.S.No.1171 of 2004 and this appeal was laid on 18.10.2004. On 23.12.2004, this Court had passed an order of interim order, staying the decree of prohibitory injunction that the trial Court had passed against the second defendant in CMP.No.19943 of 2004.

6.2 In the meantime, the plaintiff Madanagopal had filed I.A.No.307 of 2003 for passing a final decree, and on 08.07.2004, the final decree too came to be passed. Challenging this final decree, the second defendant has filed A.S.No.293 of 2005. In this appeal, the second defendant / appellant had taken out CMP.No.4642 of 2005, seeking an order of interim stay of all further proceedings and on 06.04.2005, this was ordered.

6.3 During the subsistence of this stay order, on 08.12.2006, the first defendant Chandrakanthammal had sold a share of the property to a certain Rajavelu, a third party to the litigation. While things stood thus, on 24.08.2011, both the appeals were dismissed for default. Subsequently, thereafter the third defendant Anjali and plaintiff Madanagopal too have executed separate sale deeds in favour of the same Rajavealu successively Vide sale deeds dated 07.12.2011 and 23.12.2011

respectively.

6.4 On 14.09.2017, this Court Vide its Orders in CMP. 14798 of 2017 and 14799 of 2017 restored both the appeals. Since Rajavelu had purchased a fraction of the property from others, he got himself impleaded as seventh respondent in both the appeals. It is from here the rights of the parties are required to be decided.

7. Points for consideration:

- a) What is the share to which the appellant is entitled to?
- b) Whether the sales in favour of 7th respondent are valid?

The Arguments:

8. The learned counsel for the appellant submitted :

- a) Under the sale deed dated 21.2.1957, the first defendant was entitled to only one-half share in the suit property, that the other half belonged to this appellant/second defendant, and hence, irrespective of whether the second defendant had participated in the trial or not, the trial Court ought not to have passed a preliminary decree by treating Madangopal and Anjali as co-sharers, and should not have passed a preliminary decree reducing the share of the appellant to $\frac{1}{4}$.
- b) Even according to the plaintiff, the property was purchased by his father, out of love and affection for his wife and son, and this would mean that even if the statement is presumed to be true, the father did not intend to reserve the benefit of such sale to himself. There is no pleading to bring the purchase of the suit property within the meaning of Section 3 or Section 4 of the Benami Transactions (Prohibition) Act, 1988. This would only mean that the suit property is only the joint property of the first and the second defendants, and the plaintiff has no locus standi to institute the suit during the lifetime of the mother.
- c) The plaintiff has claimed only $\frac{1}{4}$ share in the property, to which the mother has consented and therefore, when the mother executed the sale deed in favour of Rajavelu on 08.12.2006, she could transfer only $\frac{1}{4}$ th share, as per the final decree passed. So far as the plaintiff and the third defendant are concerned, they could not claim any right in the suit property since the property is only a personal property of the mother and the appellant.
- d) On 19.11.2008 Chandrakanthammal died, and on her death, her remaining $\frac{1}{4}$ share devolved equally on all his three children, which would imply that so far as the sale deeds which the plaintiff and the third defendant had executed is

concerned, the total share transferred will be less by 1/12 share. In other words, the second defendant would be entitled to 7/12 share.

9.1 Countering it, the learned counsel for the seventh respondent argued : the case of the plaintiff was that on 21.02.1957, Govindarajulu Naidu had purchased a vacant plot in the property and has constructed a building therein by utilising the sale proceeds of the jewels of the first defendant, and this the first defendant, the mother of the plaintiff had admitted in her separate written statement. If that is so, these properties are benami properties and under Section 3 of the Benami Transactions (Prohibition) Act, 1988, all the benami purchase made prior to the commencement of the said Act are saved. Reliance was placed on R.Rajagopal Reddy Vs. Padmini Chandrasekharan [AIR 1996 SC 238].

9.2. It is an admitted fact that the preliminary decree in this case was passed on 25-04-2003 and final decree was passed on 08.07.2004. The first defendant had executed a sale deed on 08.12.2006. However, both the appeal suits which the appellant had filed were dismissed for non-prosecution on 24.08.2011 and were restored to file only on 14.09.2017. It is in between the date of dismissal and date of restoration of the appeals, the other two sales from the third defendant and from the plaintiff were obtained by 7th respondent respectively on 07.12.2011 and 23.12.2011. Therefore, the sales are protected.

Of discussion and decision

10. Keeping all the facts substantially as constant, what would be the share to which the appellant/second defendant would be entitled to? According to the second defendant/appellant, as per the sale deed, he is entitled to half share in the suit property and according to 7th respondent, the appellant would be entitled to only $\frac{1}{4}$ share in the suit property, as per the preliminary decree. The controversy therefore revolve around in negotiating a dispute over $\frac{1}{4}$ share in the property.

11. The case of the plaintiff is not about not granting $\frac{1}{4}$ share to his brother, the second defendant, but denying him another $\frac{1}{4}$ share which the latter claims. His strategy to the extent it is disclosed by his pleadings is that the suit property was purchased by Govindarajulu Naidu in favour of his wife, the first defendant, and his elder son (the second defendant) with the funds of the first defendant for creating an inference that the property so purchased was for the benefit of the family. To sustain it, the seventh respondent now attempts to draw sustenance from the pleadings of the first defendant.

12. Here, one aspect requires to be considered. The suit was laid in 2002, more than a decade after the Benami

Transactions (Prohibition) Act, 1988, had come into force. Therefore, even if the plaintiff had to succeed, it is not just sufficient that he was supported by his mother, the first defendant, but he should also bring the purchase of the property made in 1957, within the exceptions provided in the said Act. In this context, this Court is not impressed with the submissions of the counsel for the seventh respondent. Her contention that all benami purchases made prior to the commencement of the Act would fall outside the scope of the Act appears to be a farfetched understanding of the very scheme of the enactment.

13. Under Sec 4 of the Benami Transactions (Prohibition) Act, there is a bar to plead benami both in the plaint as well as in the written statement. Then arose a controversy whether this bar under Sec.4 against pleading benami either in the plaint or in the written statement, will have retrospective effect to affect all pending cases where benami had been already pleaded. In *Mithilesh Kumari & Another Vs. Prem Behari Khare* [1989 (1) SCR 621], the Hon'ble Supreme Court has held that all the pending cases too would fall within the sweep of retrospective operation of the Benami Transactions (Prohibition) Act. It is this view that was overruled by a larger Bench of Supreme Court in *R.Rajagopal Reddy Vs. Padmini Chandrasekharan* [AIR 1996 SC 238] where it held that the pleadings in pending cases where plea of benami had been taken would not fall within the ambit of Act. In other words, neither the statute nor the authority cited indicate a proposition that Section 4 of the Act has no operation to all benami transactions that had taken place prior to the commencement of Prohibition of Benami Transactions (Prohibition) Act, 1988. If only it were, then Section 4 will lose all its sharpness and strength in dealing with benami transactions.

14. So far as Section 3 of the Act is concerned, it first prohibits benami transactions and then proceeds to make it an offence. It reads:

3. Prohibition of benami transactions :-

- (1) No person shall enter into any benami transaction.
- (2) Whoever enters into any benami transaction shall be punishable with imprisonment for a term which may extend to three years or with fine or with both.
- (3) Whoever enters into any benami transaction on and after the date of commencement of the Benami Transactions (Prohibition) Amendment Act, 2016, shall, notwithstanding anything contained in sub-section (2), be punishable in accordance with the provisions contained in Chapter VII.]

This provision obviously has only prospective operation.

See: R.Rajagopal Reddy Vs. Padmini Chandrasekharan [1995 SCC (2) 630] and Mithilesh Kumari & Anr. Vs. Prem Behari Khare [(1989) 1 SCR 621]. Therefore, the purchase made in the names of Chandrakantammal and the appellant in 1957 cannot be brought within Sec.3. And, so far as Sec.3(2) is concerned, it carves out an exception only to those benami transactions where property is purchased by a person in favour of his wife or unmarried daughter if the purchase has been for their benefit. The English Law recognises this as what is known as doctrine of advancement where the benefit of a transaction is considered as intending to benefit the person in whose name the property is purchased. Stricto sensu, a purchase made in the name of wife or unmarried daughter would be benami in character, but the legislature has exempted these purchases from falling within the prohibition of Sec 3(1) under Section 3(3), only if the person who advances the amount for such transaction intended that the benefit of the transaction should go to his wife or unmarried daughter. If, however, he claims that the intention is not to advance the benefit of the transaction to his wife or the unmarried daughter, as the case may be, then his very assertion that it is not so intended will expose him to the penal consequences under Section 3 of the Act and instantly will expose the transaction to the bar under Section 4 of the Act. In other words, while Section 3 enables a benami transaction for the benefit of the wife or unmarried of one who advances the funds for the purchase of the property, he is precluded from contending the contra that such purchase was intended for his own benefit.

15. So far as the purchase made in the name of the son is concerned, unless it falls within the statutory exemptions provided to Section 4 of the Benami Transactions (Prohibition) Act, 1988, the same cannot be put forward since the bar against pleading benami would instantly be invited.

16. Going by this, it has to be presumed that, to the extent Govindarajulu Naidu had purchased the property in the name of his wife Chandrakanthammal, the first defendant, it must be presumed for her benefit and it cannot be contended it is not for her benefit in a civil suit, since to do so, would invite the bar under Sec.4 of the Act. So far as the purchase in the name of appellant/second defendant is concerned, there is no pleading nor proof to bring the transaction within the meaning to Sec.4. Plainly, the second defendant would be entitled to half share and the first defendant mother would be entitled to other half.

17. The second point is about the transactions. Admittedly, the seventh respondent had purchased $\frac{1}{4}$ share from Chandrakanthammal on 08.12.2006, when this Court Vide order dated 06.4.2006 in CMP.4640/2006 and during the pendency of this

appeal, this would be hit by lis pendens. But the point here is not about lis pendens. The appellant himself claims title only to half share based on the sale deed. The situation such as this could have been averted if only the trial Court was little careful while passing the judgment. It is not so much about the trial Court returning the petition filed by the appellant in I.A.SR.232 of 2003 for setting aside the exparte order passed against the appellant, indicating its refusal to even take it on file, but it is about its non-application of mind to the exact right which parties would be entitled to as per the sale deed dated 21.02.1957 in the context of the Benami Transactions (Prohibition) Act, 1988. This has led to a consequence where judgment is not only erroneous in law but also opposed to law.

18. The counsel for the appellant made a feeble attempt when he submitted that the first defendant had only sold $\frac{1}{4}$ share in the suit property to 7th respondent, the remaining $\frac{1}{4}$ share necessarily cannot be dealt with by her daughter, nor by the plaintiff. If nothing flows in their favour, then there is still $\frac{1}{4}$ share remain to be divided. This Court rejects the same for any bonafide error as to the extent of right one deals with, should not necessarily lead to benefit another party unfairly. If only, one has to worry about it, it is the Revenue which might have lost something to the extent of $\frac{1}{4}$ share in the form of stamp duty. But the Revenue in the instant is profited when both the plaintiff and the third defendant had sold $\frac{1}{4}$ share in the property in favour of 7th respondent. Therefore, this Court holds 7th respondent would not be entitled to anything more than $\frac{1}{2}$ share in the suit property.

19. In conclusion, both the appeals are allowed and the preliminary decree dated 25.04.2003 is modified to the extent of $\frac{1}{2}$ share of the appellant/second defendant and the final decree dated 08.07.2004 is set aside as a consequence. I.A.307 of 2003 is remanded back to the trial court for passing a fresh final decree in terms of the preliminary decree now passed. No costs. Consequently, connected miscellaneous petitions are closed.

s/d-

Assistant Registrar(CO)

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Sub-Assistant Registrar

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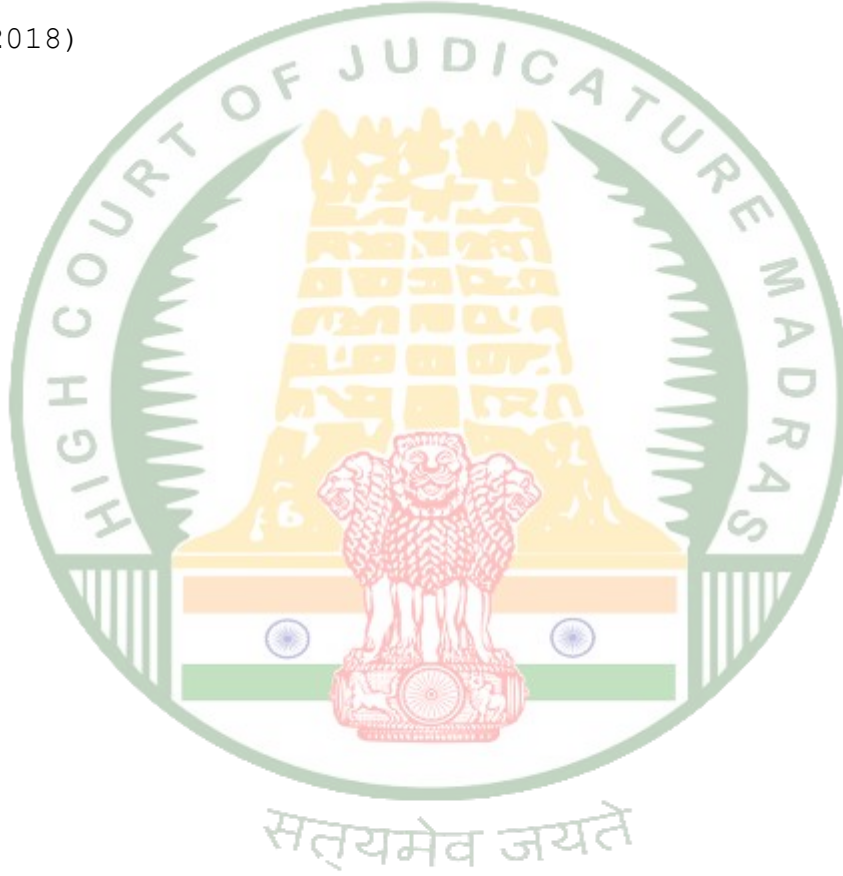
1.The Additional District Judge
Fast Track Court No.V
Chennai.

2.The Section Officer
VR Section
High Court, Madras.

+1 CC to Ms.Rajeni Ramadoss , Advocate sr 57414.
+1 CC to Mr.Ma.P. Thangavel, Advocate sr 57400

A.S.No.1171 of 2004 &
A.S.No.293 of 2005

SAI (CO)
SP(10/10/2018)



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