



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved On : 18.09.2018

Delivered On : 26.11.2018

CORAM

THE HONOURABLE MRS. JUSTICE R. THARANI

C.R.P. (PD) (MD) No.1131 of 2015

and

M.P. (MD) No.1 of 2015

A.142-1337 Srivilliputtur
Co-operative Urban Bank Ltd.
Srivilliputtur,
Virudhunagar District. ... Petitioner/ 3rd Defendant

Vs.

1.R.Pon Sethu
2.P.Radhakrishnan
3.R.Shebaga Devi ... Respondents/Plaintiff and Defendants 1 & 2

Prayer : This revision petition is filed under Article 227 of Constitution of India, to allow the Civil Revision Petition and to strike off the plaint in O.S.No.124 of 2015 on the file of Sub Court, Srivilliputtur.

For Petitioner :Mr.A.Arumugam

For R-1 :Mr.N.Vallinayagam

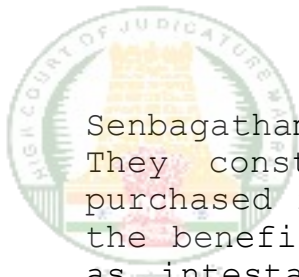
For R-2 & R-3 :No appearance

O R D E R

This petition is filed against the order, passed in O.S.No.124 of 2015 on the file of the Sub Court, Srivilliputhur.

2.The petitioner is the third defendant in the suit. The first respondent is the plaintiff and the second and third respondents are the defendants in the suit.

3.The first respondent herein filed a suit against the defendants, wherein, it is stated that the property originally belonged to one Mariammal, who inherited the property from her father V.Subramanian Chettiar and she has executed a registered deed, dated 14.12.1956 in favour of Senbagathammal. It is stated that Senbagathammal is the sister of plaintiff's paternal grand father by name Ponnai Thevar. Senbagathammal has no issues.



Senbagathammal and her husband were dependants of Ponnaiah Thevar. They constituted a Hindu Joint Family. The suit property was purchased from and out of the money provided by Ponnaiah Thevar for the benefit of the Joint family and Ponnaiah Thevar died on 1958, as intestate. The first defendant is the only son of Ponnaiah Thevar, after the death of Ponnaiah Thevar, Senbagathammal and her husband were running the business. The plaintiff and the second defendant are the son and daughter of the first defendant/Sethu Thevar. Sethu Thevar died on 1970. It is stated that the defendants are having each 1/3rd share in the property and the suit was filed for partition.

4. On the side of the petitioner/defendant, it is stated that Benami transaction is not maintainable. The first defendant borrowed some amount from the third defendant and the third defendant bring the property for sale and that under the Tamil Nadu Co-operative Societies Act and under the Benami Transaction (Prohibition) Act, the claim of the plaintiff is not maintainable.

5. On the side of the petitioner, it is stated that even though the purchase is made prior to 1988, the purchase is hit by the Benami Transaction (Prohibition) Act. A judgment of the Hon'ble Supreme Court published in (1995) 1 CTC 568 in R.Rajagopal Reddy & others Vs. Padmini Chandrasekharan is cited.

6. On the side of the petitioner, it is further stated that the plaint has to be rejected under Section 4 of the Benami Transaction (Prohibition) Act. A judgment of this Court published in (2010) 2 CTC 705 in E.Yesodammal Vs. E.Govindan is cited.

7. On the side of the petitioner, it is further stated that the plaint can be struck off under Article 227 of the Constitution of India, an alternative remedy under C.P.C. is not a bar to invoke the jurisdiction under Article 227 of the Constitution of India, to prevent abuse of process of law and to prevent the miscarriage of justice and to prevent grave injustice. A judgment of this Court published in (2010) 4 CTC 690 in Southern and Rajamani Transport Private Limited Vs. R.Srinivasan is cited.

8. On the side of the petitioner, it is further stated that the High Court has the power under Article 227 of the Constitution of India to reject a original petition. A judgment of this Court published in (2006) 1 MLJ 160 in Sreedevi Vs. Vicharapu Ramakrishna Gowd is cited.

9. On the side of the petitioner, it is further stated that the third defendant is a Co-operative Society and the Co-operative Registrar is the Competent Authority, under Section 90 of the Co-operative Act to decide any issue regarding the loan transaction. It is further stated that the first defendant is a member of the Society and he has borrowed a loan from the Society and the loan was



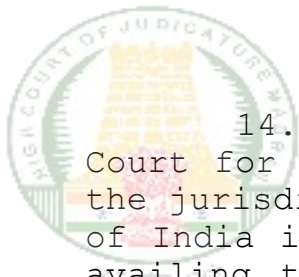
not discharged hence the property was brought for auction and the third defendant is entitled to bring the property for sale. The respondent instead of filing appeal before the Co-operative Registrar has filed the suit and that no claim petition is filed before the Co-operative Registrar under Section 143 of the Co-operative Societies Act and the Registrar is entitled to recover the loan amount with interest under Section 146 of the Co-operative Societies Act.

10. On the side of the petitioner, it is further stated that the contention of the plaintiff is that the first defendant without any legal necessity has borrowed the amount, but, there is no allegation levelled against the father and there is no allegation regarding any illegality in the transaction or no allegation against the immorality of the father. When there is no such allegations against the father, the presumption is that mortgage is for the welfare of the family and the transaction is legal. Even otherwise, father as the Manager of a Hindu Joint Family is entitled to alienate the property and this suit is an abuse of process of law. Moreover, the property is a self acquired property of the first defendant and the same was suppressed. The property was purchased from Senbagathammal by the first defendant and there is no question of Benami transaction, as Senbagathammal has sold the property to the first defendant. Even if the property is a Hindu Joint Family property under Section 101 of the Hindu Succession Act, father has the power to alienate the property including the share of the sons.

11. On the side of the respondent, it is stated that the suit was filed for partition and for declaration and issues were framed and the suit is ready for trial and that the suit property belong to one Ponnaiah Thevar and he enjoyed the same as Hindu Joint Family property and the plaintiff is having 1/3rd share in the property and the plaintiff is in joint possession. It is stated that after the death of Ponnaiah Thevar and Senabagathammal, the property vested with the plaintiff's father.

12. On the side of the respondent, it is further stated that without invoking under Order 7 Rule 10 of C.P.C., this Revision Petition was filed, under Article 227 of the Constitution of India, which is not maintainable. Constitutional remedy cannot be taken away by a statutory enactment. A judgment of the Hon'ble Supreme Court reported in (2011) 1 CTC 854 in Shalini Shyam Shetty and another Vs. Rajendra Shankar Patil, wherein, it is stated that no such writ can be filed under Article 227 of the Constitution of India.

13. On the side of the respondent, it is stated that when an alternative remedy under C.P.C is available, defendant could not avail the remedy invoking Article 227 of the Constitution of India and the same has to be used sparingly. A judgment of this Court published in (2015) 3 CTC 485 in T.K.Chithran and another Vs. C.Samsari @ Chithran and others is cited.



14. The petitioner has not filed any petition before the trial Court for rejection of the plaint under Order 7 Rule 10 of C.P.C., the jurisdiction of this Court under Article 227 of the Constitution of India is to be used sparingly and ought to have used only after availing the alternative remedy. Without going into the merits of the case, this Civil Revision Petition is dismissed and the petitioner is at liberty to file a fresh petition under C.P.C. and to avail the remedy available before the trial Court. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(cs-I)

/True Copy/

Sub Assistant Registrar(cs-III)

To

1. The Subordinate Judge,
Srivilliputtur

+1cc to Mr.A.Arumugam Advocate in SR.No.98478
+1cc to Mr.N.Vallinayagam Advocate in SR.No.96957

Order
made in
C.R.P. (MD) No.1131 of 2015
26.11.2018

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