

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 19.11.2019  
PRONOUNCED ON : 12.12.2019

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

A.S.No.219 of 2013

N.Udayakumar ...Appellant/1<sup>st</sup> Defendant

Vs.

1.Rajam Nallaya

2.N.Ramkumar

3.N.Vanithakumar

4.S.Maheswari

...Respondents 1 to 3/Plaintiffs

...4<sup>th</sup> Respondent/2<sup>nd</sup> Defendant

Prayer: Appeal Suit filed under Section 96 of Civil Procedure Code r/w Order 41 Rule 1 & 2 of C.P.C. as against the judgment and decree dated 23.04.2010 in O.S.No.308/2004 on the file of the Additional District Judge, Namakkal (Fast Track Court).

For Appellant : Mr. S.Kalyanaraman

For Respondents: Ms. Uma Maheswari

for M/s.C.Jagdish

JUDGMENT

Aggrieved over the judgment and decree dated 23.04.2010, passed in O.S.No.308/2004, on the file of the Additional District Judge, (Fast Track Court), Namakkal, the first defendant has preferred the first appeal.

2.For the sake of convenience, the parties are referred to as per their rankings in the trial Court.

3.Suit for partition and permanent injunction.

4.Briefly stated, according to the plaintiffs, the plaintiffs 2 and 3 and the first defendant are the sons and the second defendant is the daughter of the first plaintiff and the deceased Nallaya and the deceased Nallaya came from Ceylon and settled at Namakkal and there engaged in the occupation of repairing watches and he had acquired the suit properties and also running a watch shop described in the items 4 to 6 of the suit properties and during his life time, Nallaya had entered

into an agreement of sale with the owner of the first item of the suit properties, namely, Selvadurai and Selvaraj, sons of Muthusamy gounder and one Kaliannan, son of Perumal, had obtained decree in O.S.No.227 of 90, on the file of the Subordinate Court, Namakkal as regards the first item of the suit properties and endeavoured to execute the decree by bringing the abovesaid property for sale and on coming to know of the same, Nallaya had arranged his son, namely, the third plaintiff and thereby, the third plaintiff had obtained the made over of the decree from Kaliannan on 03.04.1993, which has been passed in O.S.No.227 of 90 and the first item of the suit properties was brought for sale and in order to retain the first item of the suit properties with the family, according to the plaintiffs, Nallaya had directed his eldest son, namely, the first defendant to purchase the suit properties in the Court auction and since as per the horoscope of Nallaya, he should not purchase any property in his name, accordingly, the first item was endeavoured to be purchased in the name of the first defendant and after the same, it has been arranged that the first defendant should transfer the same to Nallaya and accordingly, the first item had been purchased in the Court auction by the first defendant only for the benefit of Nallaya and the watch business described in the items 4 to 6 had been looked after by the plaintiffs 2 and 3 and the first defendant and the same had been in the joint possession and enjoyment of the plaintiffs and the first defendant and the suit properties are not the separate properties of the first defendant and they are the joint family properties and the on the demise of Nallaya, the plaintiffs are each entitled to 1/5<sup>th</sup> share in the suit properties and the first defendant had started claiming that the suit properties are his separate properties without any basis and attempted to alienate the same and hence, according to the plaintiffs, they had been necessitated to lay the suit against the defendants for appropriate reliefs.

5. The first defendant resisted the plaintiffs suit contending that the relationship between the parties is correct and according to him, Nallaya was not engaged in watch business on coming to Namakkal from Ceylon and also not admitted that Nallaya had entered into the agreement of sale with Selvadurai and Selvaraj, the owners of the first item of the suit properties and further disputed that Nallaya had made arrangement to secure the made over of the decree obtained in O.S.No.227 of 90, in the name of the third plaintiff and based on the same, the third plaintiff brought the first item for sale and also disputed that the first defendant had purchased the first item in the Court auction sale for the benefit of the family. The first defendant also disputed that the items 4 to 6 had been run by Nallaya and they are the joint family properties. According to the first defendant, in the Court

auction sale conducted with reference to the first item of the suit properties, no doubt, the third plaintiff had obtained the made over of the decree in his favour and pursuant to the same, brought the said properties for sale and it is only the first defendant who had purchased the said property out of his own funds and secured the possession of the same and all these events had happened after the demise of Nallaya. Therefore, the case of the defendants that the first item is the joint family property is false. Further, according to the first defendant, the item 4 to 6 are the separate properties of the first defendant and the said business had been run by him exclusively and the plaintiffs are not entitled to claim any share in the same and admitted that the items 2 and 3 of the suit properties are the joint family properties and not put forth any objection for partitioning the same as put forth by the plaintiffs and for the reasons aforestated sought for the dismissal of the plaintiffs suit.

6.The second defendant has filed the written statement admitting the relationship between the parties and the joint enjoyment of the suit properties and according to her, the plaintiffs 2 and 3 and the first defendant had not accounted any income from the watch business described in the items 4 to 6 of the suit properties and she is entitled to the amount from the same as regards her share and accordingly, prayed for the allotment of her due share and income that she is entitled to receive from the same, with reference to her due share and accordingly, prayed for the dismissal of the suit.

7.On the basis of the abovesaid pleas set out by the respective parties, the following issues were framed by the trial Court for consideration:

1.Whether the deceased Nallaya had entered into a sale agreement with the owners of the first item of the suit properties and following the same had arranged for the obtainment of the made over of the decree passed against the first item of the suit properties from Kaliannan in the name of the third plaintiff and whether the first item of the suit properties had been purchased in the Court auction in the name of the first defendant out of the funds belonging to the deceased Nallaya?

2.Whether the items 4 to 6 are the properties belonging to Nallaya?

3. Whether the plaintiffs are entitled to claim partition and separate possession of 3/5 share in the suit properties as prayed for?

4. Whether the second defendant is entitled to claim 1/5 share in the suit properties as put forth by her?

5. To what relief the plaintiffs are entitled to?

6. To what relief the second defendant is entitled to?

8. In support of the plaintiffs' case, PWs 1 to 5 were examined, Exs. A1 to A19 were marked. On the side of the defendants, DW1 and 2 were examined, Exs. B1 to B3 were marked. Further, Exs. X1 to X7 were marked.

9. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial Court was pleased to declare that the plaintiffs and the second defendant are each entitled to 1/5<sup>th</sup> share in the items 1 to 3 of the suit properties and accordingly, passed the preliminary decree in the suit and dismissed the plaintiffs' suit as regards the items 4 to 6 of the suit properties. Impugning the same, the first appeal has been preferred by the first defendant.

10. The following main points arise for determination in this first appeal:

1. Whether the first item of the suit properties is the joint family property as alleged by the plaintiffs and the second defendant?

2. Whether the first item of the suit properties is the separate property of the first defendant as put forth by the first defendant?

3. Whether the plaintiffs and the second defendant are each entitled to obtain partition and separate possession of the 1/5<sup>th</sup> share in the first item of the suit properties as claimed by them?

4. To what relief the plaintiffs and the second defendant are entitled to?

5.To what relief the first defendant/appellant is entitled to?

Point Nos.1 to 3:

11.The relationship between the parties is not in dispute. The plaintiffs 2, 3 and the first defendant are the sons and the second defendant is the daughter of the deceased Nallaya and the first plaintiff. It is not in dispute between the parties that the items 2 and 3 of the suit properties are the joint family properties of the parties. The trial Court has held that the items 4 to 6 of the suit properties are the separate properties of the first defendant and that the plaintiffs and the second defendant are not entitled to claim any share in the same and accordingly, dismissed the plaintiffs suit as regards the abovesaid items. The plaintiffs have not preferred any appeal challenging the abovesaid determination of the trial Court nor preferred any cross objection in the present appeal impugning the same.

12. In the light of the abovesaid factors, now, according to the plaintiffs, the first item of the suit properties is the joint family property of Nallaya. Per contra, according to the first defendant, the first item is his separate property. To evidence that the first item is the joint family property of Nallaya, absolutely there is no material worth acceptance forth coming on the part of the plaintiffs. In this connection, the plaintiffs would plead that with reference to the first item, the deceased Nallaya had entered into an agreement of sale with the owners of the first item. Even the said agreement has not been placed for consideration. In this connection, the trial Court seems to have placed reliance upon the documents marked as Exs.X1 and X2 which is the demand notice issued to Nallaya by the Special Tahsildar, Urban Land Tax, Namakkal and the reply sent to the same by the deceased Nallaya. In the abovesaid communications, particularly, in Ex.X2, it is found that Nallaya had claimed that he had entered into an agreement of sale with reference to the first item with the owners of the said item and it is also stated by Nallaya that he has not acquired any ownership of the first item in the abovesaid communication. Based on the abovesaid communication sent by Nallaya, marked as Ex.X2, it is seen that the trial Court has proceeded that inasmuch as the abovesaid communication had been sent by Nallaya and Nallaya being in the occupation of the first item along with his family members, on that premise, proceeded to hold that Nallaya had acquired some interest or ownership over the first item. However, when the materials placed on record, particularly, Ex.X2 communication sent by Nallaya to the Special Tahsildar, Urban Land Tax, Namakkal, wherein, he himself had admitted that he has not acquired any title or ownership of the

first item and only had entered into the agreement of sale with the owners of the said property, in such view of the matter, merely on the occupation of the first item by Nallaya and his family members, it cannot be presumed that Nallaya had secured any interest or title over the first item based on the agreement of sale. As rightly put forth by the first defendant's counsel, agreement for sale by itself does not create any interest or charge on such property. In such view of the matter, merely because Nallaya had been in the occupation of the first item along with his family members right from 1990 onwards, however, when there is no material as to what further action Nallaya had initiated for securing the ownership of the first item based on the alleged agreement of sale and when with reference to the same, Nallaya is found to have not taken any steps till his demise, therefore, accordingly, from the alleged agreement of sale claimed by Nallaya in Ex.X2 and the occupation of the first item by him and his family members from 1990 by itself would not lead to the conclusion that the first item had been enjoyed as the joint family property of Nallaya and his family members as determined by the trial Court.

13.The factual matrix projected in the matter go to disclose that the first item of the suit properties had been in the occupation of Nallaya and his family members from 1990 onwards. However, when there is no material available on the part of the plaintiffs to evidence that Nallaya had acquired any legal authority over the same and enjoying the first item as belonging to him and his family and when with reference to the abovesaid claim of title, other than the agreement of sale, there is no other valid material projected on the part of the plaintiffs pointing to the same and as above noted, when Nallaya had not endeavoured to acquire the first item following the agreement of sale and meanwhile, the decree had been obtained against the first item by Kaliannan in O.S.No.227 of 90, on the file of the Subordinate Court, Namakkal and when the said decree had not been challenged by Nallaya as per law on the footing that he had taken the agreement of sale with reference to the first item and after the decree had been put in action by way of execution, it is found that the third plaintiff had obtained a made over of the decree in his favour and subsequent thereto, had proceeded to bring the first item for sale and according to the plaintiffs, inasmuch as the first item had been enjoyed as the joint family property by Nallaya and his family members, at the direction of Nallaya, the first item had been purchased for the benefit of the joint family by the first defendant. On that premise, the trial Court, based on the residential address of the third plaintiff and the first defendant available in the documents marked as Exs.X1 to X4, proceeded to hold that the first item had been purchased in the Court auction by the first defendant only for the benefit of the family. However, at the

time when the defendants had taken the abovesaid steps, Nallaya was not alive, therefore, as on date, the record we have is only the communication sent by Nallaya with reference to the agreement of sale entered into by him qua the first item and that apart, when there is no proof available as such for holding that Nallaya had acquired any valid title to the first item and when there is no material worth acceptance on the part of the plaintiffs to show that the third defendant had obtained the made over of the decree for the benefit of the joint family and out of the joint family funds and when there is no material available to show that the first defendant had purchased the first item in the Court auction for the benefit of the joint family and out of the funds belonging to the joint family and furthermore, when there is no material at all available, as such, to hold that the joint family consisting of Nallaya and his family members had possessed of adequate funds for the purchase of the first item in the Court auction in the name of the first defendant and on the other hand, when it is seen that the first defendant had been engaged in the watch business from the year 1988 onwards and running the business exclusively in his name described in the items 4 to 6 of the suit properties and obtaining consistent income and the abovesaid business had been running even prior to the settlement of Nallaya at Namakkal with his family members and when items 4 to 6 of the suit properties had been declared to be the separate properties of the first defendant and when they are held to be not the joint family properties belonging to the plaintiffs by the trial Court and the said determination of the trial Court had not been put to challenge by the plaintiffs or by the second defendant in any manner as above pointed out and in the light of the abovesaid factors, it is found that the first defendant was having sufficient income on his own to purchase the first item in the Court auction and when the plaintiffs have miserably failed to establish that the purchase money of the first item had flown from out of the joint family funds and when the parties are in unison only on the aspect that the items 2 and 3 of the suit properties are the joint family properties and when there is no material to hold that the items 2 and 3 of the suit properties had fetched any or sufficient income for the acquisition of the first item in the Court auction sale during the year 2002, in all, it is found that the trial Court seems to have accepted the plaintiffs' case on the mere basis that as the family members of Nallaya had been in the occupation of the first item at the relevant point of time, the same should be deemed to be joint family property and that the made over obtained in the name of the third plaintiff and the purchase of the first item in the name of the first defendant should be held to have been done for the benefit of the joint family. However, from the mere occupation of the first item by Nallaya based on the alleged agreement of sale would not confer any title or ownership of the

same in favour of Nallaya or his family members in any manner and when the first defendant had sufficient source of income for the acquisition of the first item of the suit properties at the relevant point of time, as above noted, there is no material for holding that the joint family had sufficient funds at the relevant point of time for the acquisition of the first item, all put together, it is seen that as rightly contended by the first defendant's counsel, the claim of the plaintiffs that the first item of the suit properties is the joint family property cannot be countenanced in any manner and accordingly, it has to be held that the first item is the separate property of the first defendant.

14. In this connection, the trial Court has also proceeded to hold that though the first item has been purchased Benami in the name of the first defendant, the same is only the joint family property. However, when it is seen that the purchase money for the acquisition of the first item had flown only from the own funds of the first defendant and other than the occupation of the said item by the family members at the relevant point of time, there is no material to hold that the joint family had any valid claim of title to the first item and when Nallaya had also not endeavoured to proceed further to acquire title to the first item based on the alleged agreement of sale said to have been entered into with the owners and when the plaintiffs have not established that the purchase money for the acquisition of the first item had flown only from the joint family funds and when that is not even the plea of the plaintiffs and also not established by them, in such view of the matter, when the requisite ingredients for determining the purchase of the first item in the name of the first defendant as Benami having also not been established by the plaintiffs, considering the totality of the circumstances, in my considered opinion, the trial Court has erred in holding that the first item is the joint family property purchased in the name of the first defendant Benami for the benefit of the joint family. In the light of the abovesaid discussions, the determination of the trial Court that the first item has been purchased in the name of the first defendant for the benefit of the joint family is found to be totally erroneous and unsustainable in the eyes of law.

15. For the reasons aforestated, I hold that the plaintiffs have failed to establish that the first item is the joint family property as alleged by them. I further hold that the first item is the separate property of the first defendant as put forth by him. I therefore hold that the plaintiffs and the second defendant are not entitled to claim any share in the first item of the suit properties as claimed by them. Accordingly, the point Nos.1 to 3 are answered.

Point Nos.4 & 5:

16. For the reasons aforesated, the judgment and decree dated 23.04.2010, passed in O.S.No.308/2004, on the file of the Additional District Judge, (Fast Track Court), Namakkal as regards the first item of the suit properties are set aside and in other aspects are confirmed and consequently, the suit laid by the plaintiffs is dismissed as regards the first item of the suit properties. Accordingly, the first appeal is allowed. Considering the relationship between the parties, there is no order as to costs. Consequently, connected miscellaneous petition, if any, is closed.

-s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

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To:

The Additional District Judge,  
(Fast Track Court), Namakkal.

Copy to:

The Section Officer,  
V.R.Section,  
High Court, Madras.

+1 CC to Mr.S. Kalyanaraman, Advocate sr 103481.

+1 Cc to Mr.C. Jagadish, Advocate sr 104255.

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A.S.No.219 of 2013

RSI (CO)

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