

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 17.07.2019

CORAM: THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

S.A.No.660 of 2006

Selvamani

... Appellant / 1st Respondent / Plaintiff

Vs

1.Panneerselvam

.... 1st respondent / 1st appellant / 1st defendant

2.Selvadurai

... 2nd respondent / 2nd appellant / 2nd defendant

3.Karunanidhi (Deceased)

.... 3rd respondent / 2nd respondent / 3rd defendant

4.Suseela

5.Soorya

6.Abhinaya

..... Respondents

(Respondents 4 to 6 are brought on record as L.Rs of the deceased 3rd respondent Vide Order of Court dated 18.08.2017 made in MP.No.2 of 2014 in S.A.No.660 of 2006)

Prayer :- Second Appeal filed under Section 100 of the Civil Procedure Code, preferred against the decree and judgment dated 01.09.2005 rendered in A.S.No.74 of 2002 on the file of the Subordinate Judge, Ariyalur, reversing the decree and the judgment dated 12.07.2002 rendered in O.S.No.374 of 1999 on the file of the District Munsif, Jayankondam.

For Appellant : Mr.T.Velumani

For Respondents : No appearance

JUDGMENT

The present appeal is preferred by the plaintiff, who was successful before the trial Court in a suit for bare injunction, but suffered a decree dismissing the suit by the first appellate Court. Parties would be referred to by their rank before the trial Court.

2.1 The suit property is described as a block of 0.88 cents spread over Survey Nos.262/5B, 262/6 and 262/7. Plaintiff's paternal grandfather was one Saminatha Padayachi. His son was Govindasamy Padayachi, father of the plaintiff.

Govindasamy Padayachi was married to Panchavarnathammal and besides plaintiff, they had six other children. Of them, one of the children, Nehru had died issueless. Including the plaintiff, they had two daughters and the remaining three children are their sons. The sons are arrayed as defendants 1 to 3 in the suit.

2.2 According to the plaintiff, under Ext.A5, sale deed dated 17.06.1974, her mother Panchavarnathammal had purchased 46 cents in Survey No.262/5. Subsequently, under Ext.A6, sale deed dated 15.02.1975, she had purchased another 30.5 cents in the same survey number. Thus, Panchavarnathammal became entitled to 76.5 cents. The plaintiff's father had some 11.5 cents and the entire property came to be enjoyed by the Panchavarnathammal. Ext.A4 was the patta issued in favour of Panchavarnathammal for the entire 88 cents. While so, on 06.11.1997, under Ext.A1, Panchavarnathammal had settled the suit property in favour of the plaintiff. Subsequently, patta too was mutated in her name and Ext.A3 is the patta for the same. When the plaintiff faced some obstruction to her enjoyment of suit property at the hands of her brothers viz., the defendants 1 to 3, she laid the suit for injunction.

3. The defendants in their written statement had contended that their father Govindasamy Padayachi had held the properties in his capacity as the manager of the property, earned income out of it, and purchased the properties covered under Ext.A5 and Ext.A6, sale deeds, in the name of their mother Panchavarnathammal, that her mother is a nominal name lender, therefore, their mother did not have the right to execute Ext.A1, sale deed in favour of the plaintiff. They also disputed that Panchavarnathammal had not enjoyed any of Swaminatha Padayachi's property. It was further pleaded that on 20.11.1971 under Ext.B1, Swaminatha Padayachi and Govindasamy Padayachi along with the defendants who were then minors, had partitioned the entire family properties, wherein Swaminatha Padayachi was allotted the properties described in A-schedule to the partition and Govindasamy Padayachi was allotted the B-schedule property therein. On the demise of Swaminatha Padayachi in 1975, Govindasamy Padayachi succeeded to the estate of Swaminatha Padayachi as well. While so, in 1981 Govindasamy Padayachi had died intestate, whereupon his heirs namely his widow Panchavarnathammal and their children were jointly enjoying the suit property. Therefore, Panchavarnathammal did not have any exclusive right over any of the suit properties. The plaintiff was given marriage in 1981 and the plaintiff is permitted to be in occupation of a portion of the property and was allowed to put up residential building therein.

4.1 The dispute went for trial and before the trial Court, the plaintiff has examined herself as P.W.1, her mother Panchavarnathammal was examined as P.W.2. This apart, they have also examined 5 other independent witnesses. For the defendants, the first defendant has examined himself as D.W.1 and he has examined two other witnesses. Both sides have produced documentary evidences, of which the material documents have already been referred to.

4.2 The trial Court has rejected the defense of the defendants that the properties purchased under Ext.A5 and Ext.A6 are family properties and also proceeded to hold that since one of the brothers of the parties namely Nehru had died issueless, his share in the family properties would necessarily devolve only on Class-1 heir namely Panchavarnathammal and therefore, the total extent over the suit property stands established and accordingly decreed the suit. It is necessary to emphasise here that Panchavarnathammal herself has been examined before the trial Court as P.W.2.

5.1 The defendants 1 and 2 preferred first appeal in A.S.No.74/2002 before the Sub Court, Ariyalur and the first appellate Court reversed the findings of the trial Court.

5.2. The first appellate Court has come to the conclusion that the properties covered under Ext.A5 and Ext.A6 sale deeds are already been in the subject matter of Ext.B1, partition deed and therefore, the sale in favour of Panchavarnathammal under Ext.A5 and Ext.A6 are invalid. In particular, it has held that the properties covered under Survey Nos.262/5B, 262/6 and 262/7 was allotted to Swaminatha Padayachi. So far as the remaining 11½ cents are concerned, the appellate Court held that it is a family property and that Panchavarnathammal did not have the right to alienate the same.

6. Felt aggrieved by the decree of the first appellate Court, the plaintiff has come forward in this appeal. This appeal is admitted on the following substantial questions of law :

1. When the property itself was purchased in the year 1974 and 1975, is not the finding that the property was the joint family property covered under the partition deed of the year 1971 is perverse?
2. When an individual claims that the property was purchased by him from his separate funds, can he make a claim that the properties are the joint family properties covered under the earlier sale deed?"

7. The learned counsel for the appellant made a pointed statement: The properties purchased under Ext.A5 and Ext.A6 are dated in 1974 and 1975 respectively, and under Section 4 of the Benami Transactions & Prohibition Act, 1988, the defendants are barred from taking a plea that the properties covered by Exts.A-5 and A-6 were purchased benami by their father. Nor is their case falls under any of the exception to Section 4 of the Act. It is also not the case of the defendants that the mother was holding the properties covered under Ext.A5 and Ext.A6 in any fiduciary capacity for her sons. This aspect, the first appellate Court had overlooked. Secondly, argued the learned counsel, that Swaminatha Padayachi was allotted only 17 cents in Survey Nos.262/5B and 262/7, whereas both the survey fields have got much larger extent, and this aspect too was overlooked. Thirdly, so far as the remaining 11.5 cents are concerned, as rightly held by the trial Court, Nehru's share in the property had accrued to Panchavarnathammal and definitely she has right to part with the property under Ext.A1.

8. The respondents/defendants have been served with notice, but they have not entered appearance.

9.1 This Court finds considerable merit in the submission of the learned counsel for the appellant. Both the trial Court and the first appellate Court had ignored the implications of the Benami Transactions (Prohibition) Act and in particular Section 3 thereof. Sec.3(2) in particular 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.

9.2 Turning to the findings of the first appellate Court that the properties covered under Ext.A5 and Ext.A6 are the same properties allotted to the plaintiff's grandfather Swaminatha Padayachi and as Ext.A1 is concerned, this is not a case even the defendants have pleaded in the written statement. The line of pleading they have adopted in the written statement only indicates that the properties covered under Ext.A5 and Ext.A6 were purchased out of the surplus family income and no more. Turning to 11½ cents is concerned, this Court subscribes to the view of the defendants. It may have to be recorded that in the course of his arguments, the learned counsel for the appellant brought to the notice of the Court that in the testimony of D.W.1, it has come to light that the brothers have already dealt with substantial portion of family properties.

10. This Court finds that the first appellate court has short-circuited the process of appreciation of evidence, which not only leads to wrong conclusion on facts, but it has also ignored Sec.4 of the Benami Transactions (Prohibition) Act. Necessarily, this Court has to interfere with the decree of the first appellate Court. And, for the reasons already indicated, the substantial questions of law have to be decided in favour of the appellant.

11. In conclusion, this appeal is allowed and inasmuch as the defendants themselves have conceded in the pleadings that the plaintiff has been allowed to put up a construction, necessarily, the Court has to infer that the plaintiff is in possession of the property. Therefore, this Court confirms the decree of the trial Court and set aside the judgment and decree dated 01.09.2005 rendered in A.S.No.74 of 2002 on the file of the Subordinate Judge, Ariyalur. No costs.

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Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

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To:

1.The Sub Judge,
Ariyalur.

2.The District Munsif,
Jayamkondam.

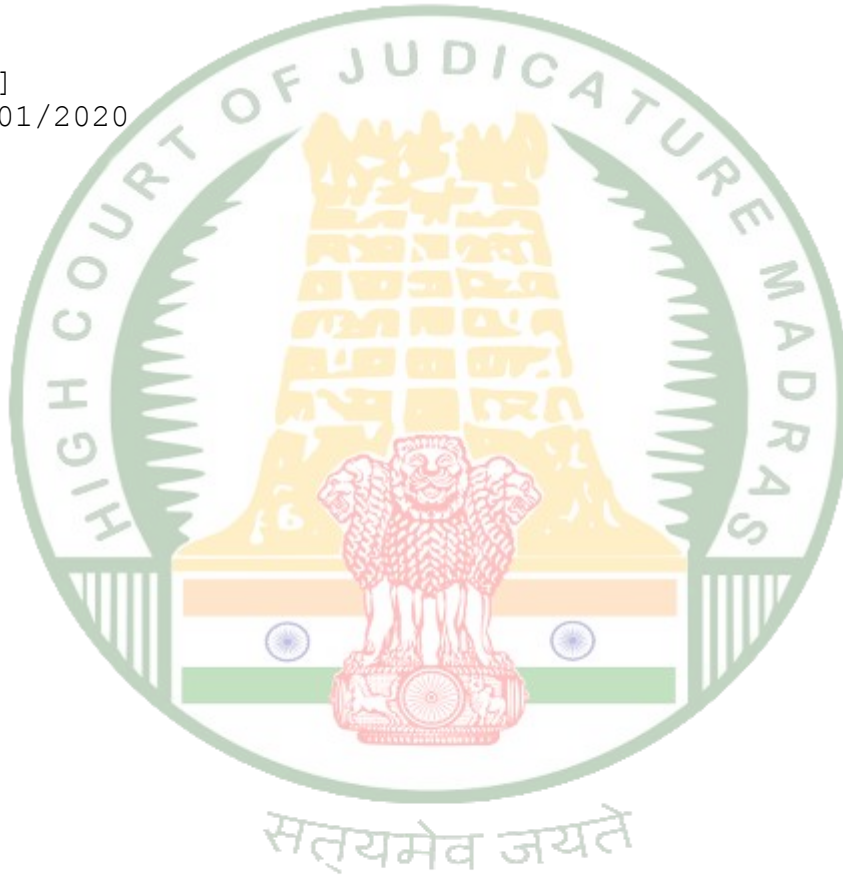
Copy to

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

+1cc to Mr.T.Velumani, Advocate Sr.60789

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