

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 06.08.2019

PRONOUNCED ON : 22.08.2019

CORAM

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

S.A.No.145 of 2016

Sampoornam

...Appellant/Plaintiff

Vs.

1. Nirmala
2. Santhi
3. Eswari
4. Saraswathi
5. Sridevi
6. Baby
7. Mohanraj

... Respondents/Defendants

Prayer:

Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 19.04.2013 in A.S.No.62 of 2010 on the file of the Court of the Principal Subordinate Judge at Erode confirming the judgment and decree dated 19.03.2010 in O.S. No.152 of 2007 on the file of the Court of the First Additional District Munsif at Erode.

For Appellant : Mr.S.Subramanian

For Respondents: No appearance/ set ex-parte
vide order dated 06.08.2019

JUDGMENT

In this second appeal, challenge is made to the judgment and decree dated 19.04.2013, passed in A.S.No.62 of 2010, on the file of the Principal Subordinate Court, Erode confirming the judgment and decree dated 19.03.2010, passed in O.S. No.152 of 2007, on the file of the First Additional District Munsif Court, Erode.

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

3. Suit for partition.

4. The case of the plaintiff, in brief, is that the suit property was purchased by Muniammal, the mother of the plaintiff and the defendants 1 to 3, by way of a registered sale deed, dated 07.11.1978 and put up a building thereon out of her earnings, savings and out of her Sridhana funds and Muniammal was enjoying the suit property as the absolute owner till her demise on 10.07.1981 and she left behind her husband Palanisamy and the plaintiff and the defendants 1 to 3 as her legal heirs. After her demise, Palanisamy, the plaintiff and the defendants 1 to 3 are each entitled to $1/5^{\text{th}}$ share in the suit property and they were in the joint possession and enjoyment of the suit property. After the demise of Muniammal, Palanisamy married the fourth defendant as his second wife and gave birth to the defendants 5 to 7. Palanisamy died intestate on 19.11.2006, leaving behind the plaintiff and the defendants as his legal heirs and therefore, the $1/5^{\text{th}}$ share of Palanisamy would devolve upon the plaintiff and the defendants equally. Thus, after the death of Palanisamy, the plaintiff and the defendants 1 to 3 would be each entitled to $9/40^{\text{th}}$ share in the suit property and the defendants 4 to 7 are each entitled to $1/40^{\text{th}}$ share and the fourth defendant had arranged for the marriage of her brother Chinnusamy with the third defendant and therefore, the defendants 3 to 7, with the active collusion of Chinnusamy, are attempting to grab the suit property and thereby, depriving the share of the plaintiff and the defendants 1 and 2 in respect of the same and as the defendants 3 to 7 had also refused to allot the share to which the plaintiff and the defendants 1 and 2 are entitled to, according to the plaintiff, she has been necessitated to lay the suit against the defendants as the defendants 1 and 2 were reluctant to join with the plaintiff in the laying of the suit and hence, prayed for appropriate reliefs.

5. The defendants 1 and 2 have admitted the case of the plaintiff and accordingly, prayed for the disposal of the plaintiff's suit as claimed.

6. The other defendants, namely, the defendants 3 to 7 resisted the plaintiff's suit contending that Muniammal had not acquired the suit property on her own, by way of the sale deed dated 07.11.1976 as put forth by the plaintiff and also disputed the claim of the plaintiff that Muniammal had put up the construction thereon out of her savings and Sridhana funds and according to them, the suit property belongs to the plaintiff and the defendants equally and they are each entitled to $1/8^{\text{th}}$ share in the suit property and disputed the case of the plaintiff that the defendants 3 to 7 are colluding with Chinnusamy and attempted to grab the suit property and according to them, on account of the family situation, Palanisamy had

acquired the suit property benami in the name of his wife Muniammal out of his own funds and Muniammal is only a housewife and she had no means or income to acquire the suit property and it is only Palanisamy, who had put up the construction in the suit property and further, also contended that the fourth defendant had also contributed for the construction of the building in the suit property and also would state that the documents in respect of the suit property are only standing in the name of Palanisamy and therefore, according to them, all the legal heirs of Palanisamy are entitled to equal share in the suit property. Hence, the plaintiff is not entitled to claim more share as put forth in the plaint and accordingly, prayed for the disposal of the suit determining that the plaintiff and the defendants are each entitled to 1/8th share in the suit property or for appropriate orders.

7. In support of the plaintiff's case, PWs 1 and 2 were examined, Exs.A1 to A5 were marked. On the side of the defendants, DWS 1 to 4 were examined. No document has been marked.

8. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the Courts below were pleased to declare that the plaintiff is entitled to obtain partition and separate possession of the 1/8th share in the suit property and accordingly, granted the preliminary decree in favour of the plaintiff. Challenging the same, the present second appeal has been preferred by the plaintiff.

9. At the time of admission of the second appeal, the following substantial questions of law were formulated for consideration:

(i) Whether the Courts below were right in looking into oral evidence which is contrary to the recitals contained in Ex.A1, the registered sale deed in the name of Muniammal which is in total conflict to Section 92 of the Indian Evidence Act?

(ii) Whether the Courts below were right in deciding the suit without considering the provisions contained under Sections 3 and 4 of the Benami Transactions (Prohibition) Act in a proper perspective?

10. The relationship between the parties is not in dispute. It is found that the plaintiff and the defendants 1 and 3 are the daughters of Palanisamy and Muniammal. After the demise of

Muniammal, it is found that Palanisamy had married the fourth defendant as his second wife and the defendants 5 to 7 were born to Palanisamy and the fourth defendant. As could be seen from the case projected by the respective parties, it is found that the suit property had come to be acquired in the name of Muniammal, by way of a registered sale deed, dated 07.11.1976, the copy of which document has been marked as Ex.A1. Now, according to the plaintiff, the suit property has been acquired only by Muniammal and it is also her case that it is only Muniammal, who had put up the construction thereon out of her own earnings and Sridhana funds and thus, according to the plaintiff, Muniammal is the absolute owner of the suit property and after her demise, Palanisamy and the daughters of Muniammal are each entitled to $1/5^{\text{th}}$ share in the suit property and further, according to the plaintiff, after the demise of Palanisamy, the plaintiff and the defendants are each entitled to equal share in the $1/5^{\text{th}}$ share of Palanisamy in the suit property and on the whole, according to the plaintiff, she and the defendants 1 to 3 are each entitled to $9/40^{\text{th}}$ share in the suit property and the defendants 4 to 7 are each entitled to $1/40^{\text{th}}$ share in the suit property and accordingly, prayed for the appropriate reliefs in the suit.

11. On the other hand, according to the contesting defendants, namely, the defendants 3 to 7, the suit property had been acquired only by Palanisamy benami in the name of Muniammal and further, according to them, Muniammal had no savings or income to acquire the suit property and further, it is put forth that it is only Palanisamy, who had put up the construction in the suit property and therefore, according to the defendants 3 to 7, on the demise of Palanisamy, both the plaintiff and the defendants 1 to 7 are each entitled to $1/8^{\text{th}}$ share in the suit property and thereby, challenged the claim of $9/40^{\text{th}}$ share in the suit property on the part of the plaintiff.

12. On a perusal of Ex.A1 sale deed, it is found that the same stands in the name of Muniammal. The contesting defendants have only pleaded the case of the benami qua the sale deed Ex.A1. Accordingly, in the light of the abovesaid defence put forth by the contesting defendants, it is for the contesting defendants to establish that the suit property had been actually purchased by Palanisamy benami in the name of Muniammal. However, other than the oral evidence adduced on the part of the defendants, there is no other material to sustain their case that the suit property had been acquired only by Palanisamy benami in the name of his wife Muniammal. With reference to the abovesaid plea of benami put forth by them, the contesting defendants have not established that the source of money had flown only from Palanisamy for the acquisition of the suit property and furthermore, they have also not clearly put forth

the motive of acquiring the suit property in the name of Muniammal and when from the available materials on record, it is found that as put forth by the plaintiff, it is only Muniammal who had been enjoying the suit property by putting up the construction thereon as the absolute owner thereof and when there is no reliable and convincing materials on the part of the defendants to hold that Palanisamy had contributed money for the acquisition of the suit property and had put up the construction thereon, in such view of the matter, the Courts below are found to have erred in upholding the defence version that the suit property had been purchased benami by Palanisamy in the name of Muniammal. In this connection, the counsel for the plaintiff, placed reliance upon the decision of the Apex Court reported in (2015) 15 SCC 556 (Om prakash sharma alias O.P. Joshi Vs. Rajendra prasad shewda and others), wherein, the factors to be considered as to the purchase of the property in the name of a married women with the funds alleged to have been provided by her husband has been considered in the following manner:

A. Property Law - Benami Transactions (Prohibition) Act, 1988, - S.2(a) - Purchase of property in the name of married woman with funds provided by her husband, whether benami - Determination of - Factors to be considered, summarised.

- Suit property purchased from funds of J (M's husband) and J managing said property on behalf of M, but title/revenue records in name of M - Suit property, held, not necessarily benami - Fact that the property was managed by J which fact accords with the practice prevailing in a Hindu family where the husband normally looks after and manages the property of the wife, is another relevant circumstance that was correctly taken note of by the High Court to come to the conclusion that all the said established facts are wholly consistent with the ownership of the property by M - In present case, M was owner of suit property.

- Fundamental/accepted feature of Indian society at that time was that husband usually purchased property in wife's name to provide for her security because a Hindu widow at that time had a limited right to estate of a deceased husband under the Hindu Women's Rights to Property Act, 1937 - This fundamental feature finds recognition in S.3, Benami Transactions (Prohibition) Act, 1988.

Jaydayal Poddar V. Bibi Hazra, (1974) 1 SCC 3: Binapani Paul v. Pratima Ghosh, (2007)

6 SCC 100; Kanakarathanammal v. V.S.Loganatha Mudaliar, AIR 1965 SC271, applied Bhim Singh V. Kan Singh, (1980) 3 SCC 72, cited.

10. The purchase of property by a husband in the name of his wife is a specie of Benami purchase that had been prevalent in India since ancient times. Such a practice appears to have been prevalent on account of the position of Hindu women to succession until the enactment of the Hindu Succession Act and the amendments made thereto from time to time. In a situation where a Hindu widow had a limited right to the estate of the deceased husband under the Hindu Women's Right to Property Act, 1937, the purchase of immovable property by a husband in the name of the wife in order to provide the wife with a secured life in the event of the death of the husband was an acknowledged and accepted feature of Indian life which even finds recognition in the explanation clause to Section 3 of the Benami Transactions (Prohibition) Act, 1988. This is a fundamental feature that must be kept in mind while determining the nature of a sale/purchase transaction of immovable property by a husband in the name of his wife along with other facts and circumstances which has to be taken into account in determining what essentially is a question of fact, namely, whether the property has been purchased Benami.

13. Furthermore, the counsel for the plaintiff also placed reliance upon the decision of this Court rendered on 31.07.2017 in A.S.No. 955 of 2010 (S.Thirugnana Johnson Vs. J.Princy Linnet Dorathy, S.Julian) wherein, it has been held that the onus is heavy on the husband to prove the plea of benami transaction and the position of law has been outlined in the abovesaid decision as follows:

23. It is to be noted that the onus is heavy on the husband/plaintiff, who claimed benami transaction, not only to establish the source of money and also motive for purchase of the property. These are the important tests for determining whether the sale standing in the name of one person, is in reality for the benefit of another. The other circumstances that can be taken as a

guide to determine the nature of the transaction are:

1. the source from which the purchase money came;
2. the nature and possession of the property, after the purchase;
3. motive, if any, for giving the transaction a benami colour;
4. the position of the parties and the relationship, if any, between the claimant and the alleged benamidar;
5. the custody of the title deeds after the sale; and
6. the conduct of the parties concerned in dealing with the property after the sale."

The source of money, motive and the reasons why the property was purchased in the name of his wife as benami has to be established. The onus is on the person who pleads benami to prove the circumstances to dislodge the presumption. Therefore, it is for the plaintiff/husband to establish that the property was not purchased for the benefit of his wife, as per Section 3 (2) of the Act.

Considering the principles of law outlined in the abovesaid decisions qua the benami transaction put forth by the husband in respect of the property purchased in the name of his wife and when it is found that the defendants have miserably failed to establish that it is only Palanisamy, who had purchased the suit property by way of Ex.A1 and furthermore, when the contesting defendants have also failed to establish that the suit property had not been acquired for the benefit of Muniammal as provided under Section 3(2) of the Benami Transactions (Prohibition) Act, 1988, in such view of the matter, as contended by the plaintiff's counsel, the Courts below, without any basis, are found to have proceeded to accept the defence version mainly on the stray admission said to have been made by the plaintiff during the course of her cross examination. The plaintiff, during the course of her cross examination, has only averred that the suit property had been acquired in the name of Muniammal with a view to avoid the disputes that may be raised by her father's relatives and on that premise, we cannot hold that it is only Palanisamy, who had acquired the suit property benami in the name of his wife Muniammal. As abovenoted, when there is a presumption raised in favour of Muniammal that the suit property had been acquired only for her benefit as provided under the Benami Transactions (Prohibition) Act, 1988, and when with reference to the abovesaid transaction, the contesting defendants have not placed any materials to dislodge the same

and furthermore, when the recitals contained in Ex.A1 sale deed do not point out that it is only Palanisami who had acquired the suit property by paying the consideration on his own and on the other hand, they only point out that the suit property had been acquired by Muniammal by paying the consideration recited therein and when it is noted that after the purchase of the suit property, Muniammal had been exercising absolute ownership over the suit property by putting up the construction thereon and when there is no material on the part of the contesting defendants that Palanisami had been in the exclusive possession and enjoyment of the suit property as the absolute owner thereof, in all, it is found that the Courts below had erred in holding that the suit property has been actually purchased by Palanisamy benami in the name of Muniammal and thereby, further erred in holding that both the plaintiff and the defendants are each entitled to 1/8th share in the suit property.

14. In the light of the abovesaid discussions, it is found that the plaintiff would be entitled to obtain partition and separate possession of 9/40th share in the suit property, considering the devolution of interest on the demise of Muniammal, the owner of the suit property and accordingly, the substantial questions of law formulated in the second appeal are answered in favour of the plaintiff and against the contesting defendants.

15. For the reasons aforesaid, the judgment and decree dated 19.04.2013, passed in A.S.No.62 of 2010, on the file of the Principal Subordinate Court, Erode confirming the judgment and decree dated 19.03.2010, passed in O.S. No.152 of 2007, on the file of the First Additional District Munsif Court, Erode are modified and accordingly, the preliminary decree is granted in favour of the plaintiff by declaring that she is entitled to obtain partition and separate possession of 9/40th share in the suit property. Accordingly, the second appeal is allowed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-

Assistant Registrar(CS IV)

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Sub Assistant Registrar

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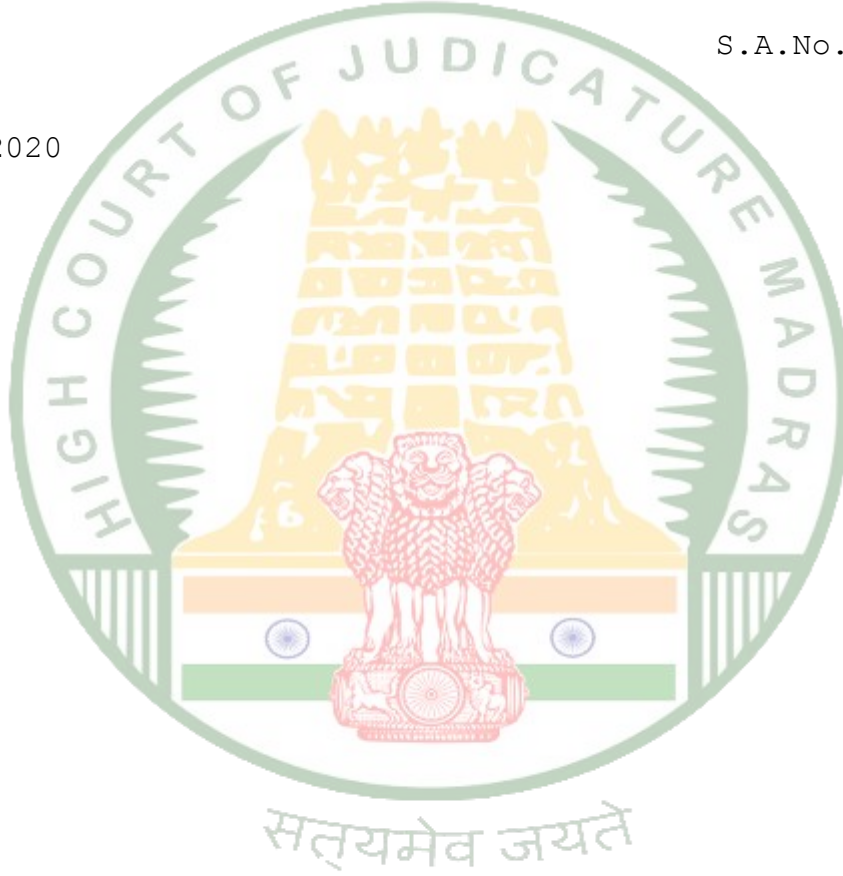
To

1. The Principal Subordinate Judge,
Erode.
2. The First Additional District Munsif,
Erode.
3. The Section Officer,
V.R.Section, High Court, Madras.

+lcc to Mr.S.Subramanian, Advocate, S.R.No.73483

S.A.No.145 of 2016

NMI (CO)
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