

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 06.02.2020

Date of Verdict : 27.02.2020

CORAM

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

S.A.No. 1332 of 1998

Ramaswamy

...Appellant

Vs.

1. Subramaniam (Died)
2. Sadasivam
3. Angayammal
4. Pappathi @ Marakkal
5. Ponnayal @ Palaniammal
6. Kittayal @ Mayilathal
7. Muthayal
8. M.S.Munusamy
9. Kanchana
10. Latha

(Respondents 7 to 10 are brought on record as legal heirs of the deceased first respondent vide order of the Court dated 19.12.2019 made in C.M.P.Nos. 82 to 84 of 2009 in S.A.No.1332 of 1998)

...Respondents

Prayer :- This Second Appeal is filed under Section 100 of Civil Procedure Code against the judgment and decree dated 30.09.1997, in A.S.No.114 of 1996 on the file of the Principal District Court, Erode, reversing the decree and judgment dated 11.04.1996 in O.S.No.245 of 1990 on the file of the Subordinate Court, Gobichettipalayam.

For Appellant

: Mr.J.Prithivi

For Mr.Kaithamalai Kumaran

For Respondents

R1

: Died

R2 to R5, R10

: Not ready in notice

For R6 & R8

: Mr.V.Manohar

For R7 & R9

: Mr.S.Saravanan

JUDGMENT

This second appeal is directed as against the judgment and decree dated 30.09.1997, passed in A.S.No.114 of 1996 on the file of the Principal District Court, Erode, reversing the decree and judgment dated 11.04.1996 made in O.S.No.245 of 1990 on the file of the Subordinate Court, Gobichettipalayam.

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

3. The case of the plaintiff in brief is as follows :-

3.1. The suit is filed for partition. The plaintiff and the defendants are brothers and sisters. The suit properties are ancestral and joint family properties of their father Mariappa Thevar and his two brothers viz., Rama Thevar and Subbanna Thevar. The elder brother Rama Thevar sold out his share of their ancestral property in favour of Mariappa Thevar by the registered sale deed dated 15.03.1946 in document No.458 of 1946. His younger brother Subbanna Thevar also died as bachelor in the year 1948, as such his share also inherited by Mariappa Thevar, since he is the sole legal heir. The entire suit property have been derived and enjoyed in common by the plaintiff and defendants along with their father. The first defendant is living in item No.2 of the suit property. The plaintiff and the third defendant have been residing in the item No.1 of the suit property along with their father Mariappa Thevar.

3.2. While being so, their father died in the year 1974. Though their father's brothers died unmarried, but fear of their concubine and that possible future claims, their father screened the same by way of arrangement to one Muthu Gounder S/o.Arumuga Gounder, with an intention to get the same back with some consideration. After the death of the two brothers without legal heirs, their concubines demanded and pestering for money as such, their father thought it fit to purchase the property in the name of his elder son. Therefore, the first defendant is only a name lender, who is no wherewithal to purchase any property in his name. Thereafter, from the income derived from family and also earning from all the family members, they built up a terraced house in the item No.2 of the suit property. All the family members lived there in the house as such, the plaintiff is entitled for his share. Therefore, the plaintiff caused legal notice on 25.08.1987 to the first and second defendant for partition of the properties by means and bounds. Hence the suit.

4. Resisting the same, the first defendant filed written statement stating that originally the property belonged to one

Raya Thevar as his individual property. He had three sons and they have no right, title or interest over the suit property. During his life time, the suit property was mortgaged on 23.08.1922 to one Krishna Iyer and thereafter he pressed for payment and he assigned the mortgage deed in favour of one Ramalinga Gounder. The said Ramalinga Gounder insisted three sons for payment in which, one of the sons Rama Thevar relinquished his right over the suit property and gave up his 1/3 right as such he was not allotted any share in the property. Thereafter, his other brothers Mariappa Thevar and Subbana Thevar sold out the entire property along with other properties on 22.01.1935, for the valid sale consideration of Rs.500/- to discharge the antecedent debts of their father to Muthu Gounder and delivered the possession of the properties to him. From 1935 onwards, the said Muthu Gounder was in possession and enjoyment of the suit property.

4.1. Thereafter, the first defendant purchased the suit property from the said Muthu Gounder in the year 1935 and he is in possession and enjoyment of the suit properties. In fact, he is in possession and enjoyment of the suit properties to the knowledge of the plaintiff as such, the first defendant prescribed title by adverse possession. Therefore, the suit properties were not the joint family properties of three brothers and they never inherited the suit property from their father, since the other two brothers viz., Mariappa Thevar and Subbana Thevar already sold out the entire property to the Muthu Gounder. Hence the plaintiff is not entitled any share in the suit property.

4.2. The other allegations are completely denied as false and frivolous. Even during the life time of their father all the sons were living separately and they were eking out their livelihood separately. In fact, their father viz., Mariappa Thevar had no property and he was doing coolly work and maintaining his sons till their growth. Further the sale deed dated 15.03.1946 is not at all valid one alleged to be executed by Rama Thevar, since the said Rama Thevar had no title over the property to execute the sale and the property already sold out to one Muthu Gounder in the year 1935 itself.

4.3. The first defendant purchased the suit property and the adjoining 8½ cents, out of his own separate income from the said Muthu Gounder on 23.11.1959 for the valid sale consideration of Rs.500/- and he has been put in possession and enjoyment of the same since then. Thereafter it was conveyed to one Ayyammal with the sole purpose that in future, Mariappa Thevar or his descendants should not lay any claim over the properties that were subject matter of sale dated 23.11.1959. Further the suit

itself is barred by limitation and prayer for dismissal of the suit.

5. The other defendants filed separate written statement and supported the case of the plaintiff and claimed that the entire suit property is the joint family property and they are also entitled to have their respective shares.

6. On the side of the plaintiff, he examined P.W.1 & P.W.2 and were marked Ex.A.1 to Ex.A.39. On the side of the defendants, they examined D.W.1 & D.W.2 and were marked Ex.B.1 to Ex.B.15. On perusal of the evidence on record and on considering the oral and documentary evidences adduced by the respective parties and the submission made by the learned counsel, the trial Court decreed the suit and allotted 1/7 share in the suit property to the plaintiff. Aggrieved over the same, the first defendant preferred an appeal suit in A.S.No.114 of 1996 and the first appellate Court modified the judgement and decree passed by the trial Court and allotted 15/21 shares in favour of the first defendant and the plaintiff and other defendants are entitled to have 1/21 share in the suit property. Aggrieved by the same, the plaintiff come forward with the present second appeal.

7. At the time of admission of the second appeal on 30.10.2003, the following substantial questions of law were framed for consideration:-

"(i) Is the lower appellate Court justified in holding that the purchase made by the first defendant under Ex.B.3 sale is not benami for the benefit of the family, overlooking the various admissions made by the first defendant as D.W.1 to the effect that he was aged 22 years, unmarried at that time having only meagre income and all the members were living jointly as joint family members?

(ii) Whether the lower appellate Court is right in modifying the decree of the trial Court holding that Ex.P.3 is not benami purchase for the benefit of the family overlooking that all the ingredients of benami are establish by the appellant?"

8. The learned counsel appearing for the appellant and the respondents are present and they are reiterated the avernments set out in the plaint as well as the written statement.

9. Heard Mr.J.Prithivi, learned counsel appearing for the appellant, Mr.V.Manohar, learned counsel appearing for the respondents 6&8 and Mr.S.Saravanan, learned counsel appearing for the respondents 7&9.

10. The suit is filed for partition. The plaintiff and the defendants are brothers and sisters. Their father Mariappa Thevar had two brothers viz., Rama Thevar and Subbanna Thevar. They were born to one Raya Thevar. The entire suit property belonged to him and he purchased the same from his own income. According to the plaintiff, his father's elder brother Rama Thevar sold out his ancestral property share to Mariappa Thevar i.e., the father of the plaintiff by a registered sale deed dated 15.03.1946 registered as document No. 458 of 1946, which was marked as Ex.A.1. His another brother Subbanna Thevar died as bachelor in the year 1948. Therefore, his share also inherited by the said Mariappa Thevar as sole legal heir. The plaintiff and the defendants are being the sons and daughters of the said Mariappa Thevar, all have enjoyed the suit property as common. Thereafter their father died in the year 1974. Therefore, the plaintiff claims 1/7 share in the suit property.

11. Whereas according to the first defendant, the suit property is not at all the joint family property. Originally, it belonged to one Raya Thevar i.e., grandfather of the first defendant and the entire property was mortgaged to one Krishna Iyer on 23.08.1922. Thereafter one of his son Rama Thevar relinquished his right insofar as his 1/3 share over the suit property. The other two sons viz., Mariappa Thevar and Subbanna Thevar sold out the entire property along with another 8½ cents, for valid sale consideration of Rs.500/- to discharge the antecedent debts to one Muthu Gounder and also delivered the entire possession of the suit property. Thereafter, the first defendant was purchased the suit property from the said Muthu Gounder and he was put in possession and enjoyment of the suit property from the year 1935. He purchased the suit property out of his own separate funds and he also purchased another property ad measuring 8½ cents from Muthu Gounder on 23.11.1959. Therefore, the plaintiff and the defendants 2 to 6 are not at all entitled for any claim over the suit property.

12. Now the only question is that whether the purchase of the suit property by the first defendant under Ex.B.3 is benami for the benefit of the family or not, when he was aged about 22 years and not married and had only meager income?

13. Insofar as the 1/3 share of Rama Thevar, he executed sale deed dated 15.03.1946, in favour of Mariappa Thevar i.e., the father of the plaintiff and defendants, which was marked as

Ex.A.1. Since the said document was 30 years old and registered one, it is construed to be a true and valid document as per Section 90 of the Indian Evidence Act. The father of the first defendant and his brother viz., Subbanna Thevar sold out the suit property to one Muthu Gounder by the registered sale deed, which was marked as Ex.B.2. Thereafter the first defendant purchased the suit property from the said Muthu Gounder out of his own income and constructed house in item No.2 of the suit property. It was assessed to the house tax and the door number is 39.

14. In fact, he also mortgaged the suit property on his own to one Lakshmiammal and borrowed loan, which was marked as Ex.B.6. In fact the second item of the suit property also mortgaged to Gobichettipalayam Co-operative House Mortgage Bank and borrowed loan, in which except the first defendant, no other family members are parties to the said mortgage deed. In the suit property 8½ cents was sold out to D.W.2 viz., Iyyammal by the registered sale deed dated 23.11.1959, which was marked as Ex.B.1. In fact, no other family members have objected the said sale executed in favour of D.W.2, Iyyammal.

15. The trial Court concluded that the first defendant was not married at the time of purchase of the suit property and he did not mark his marriage invitation, as such the trial Court considered that all the family members were lived as joint family and the property purchased only from the income from the joint family. However, before the first appellate Court, the first defendant filed an application in I.A.No.1349 of 1996 to receive additional documents and mark the documents to prove his age and marriage. The first appellate Court rejected the document in respect of the date of birth and allowed the document to prove his marriage on 10.06.1959 and marked as Ex.B.16. Accordingly, the suit property purchased by the first respondent after his marriage i.e., on 23.09.1959.

16. Therefore, the first appellate Court rightly held that the first defendant purchased the suit property by his own individual income and he is entitled to have 15/21 share in the suit schedule property and remaining 6/21 shares are entitled by the plaintiff and the defendants 2 to 6. Therefore, this Court does not find any illegality or infirmity in the order passed by the first appellate Courts modifying the judgment and decree passed by the trial Court. Accordingly, this Court is of the considered opinion that no substantial question of law involved in this appeal. Be that as it may. All the substantial questions of law, formulated by this Court in this Second Appeal, are answered in favour of the first defendant and as against the plaintiff.

17. In fine, this Second Appeal stands dismissed by confirming the judgment and decree passed by the first appellate Court. No order as to cost.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

rts
To

1. The Principal District Judge,
Erode
2. The Subordinate Judge,
Gobichettipalayam.
3. The Section Officer,
V.R. Section,
Madras High Court,
Chennai.

+1 CC to Mr.V.Manohar, Advocate sr 17407.
+1 CC to Mr.S.Saravanan, Advocate sr 17098
+1 Cc to Mr.S.Kaithamlai Kumaran, Advocate sr 17624.

S.A.No. 1332 of 1998

RSV(CO)
SP(16/09/2020)

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