

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 06.03.2020

CORAM:

The Hon'ble Mr.Justice N.Seshasayee

S.A.No.1504 of 2002

1.Bhuvaneshwari
2.Anandan
3.Raghupathy
4.Karthick
5.Amudha
6.Ilavarasi

...Appellants/Appellants/Defendants2 to 7

Vs.

1.Gnanabhusanam
2.Kasturi

...Respondents/Respondents/Plaintiffs

Prayer:- Second Appeals filed under Section 100 of Civil Procedure Code against the decree and judgment dated 4.7.2002 rendered in A.S.No.176 of 2001 on the file of the Additional District Judge cum Fast Track Court No.II, Salem, confirming the preliminary decree and judgment dated 21.12.2000 rendered in O.S.No.92 of 1985 on the file of the Additional Subordinate Judge, Salem.

For Appellants : Mr.S.Subbiah, senior counsel
for Mr.D.Sathya Sri

For Respondents : No appearance

JUDGMENT

The legal representatives of the sole defendant in O.S.No.92 of 1985 are the appellants herein. The parties would be referred to by their rank before the trial court.

2.The suit is laid for partition of two items of properties. They are two adjacent plots of land and in item no.1, there is a house. The foundational facts are admitted on either side, and they may be briefly stated;

- Item No.1 was purchased by certain Palaniammal under Ext.B.2, sale deed dated 05.09.1938. Subsequently, under Ext.B.1, sale deed dated 30.05.1940, Palaniammal sold this property to Govindachetty.
- Palaniammal had two daughters and a son. The two daughters are the plaintiffs and her only son is the sole defendant.
- Be that as it may, on 12.03.1963, under Ext.B.3, the legal representatives of Govindachetty, the purchaser under Ext.B.1, sale deed had purchased item No.2 property. Item No.2 property lies to the immediate east of item no.1.
- On 19.12.1963, under Ext.A.1, sale deed the heirs of Govindachetty sold both the properties that they had purchased under Ext.B.1 and Ext.B.3. It may be mentioned that the property covered under Ext.B.1 is item no.1. In other words, under Ext.A.1, both item nos.1 and 2 have been purchased by Palaniammal and her only son, the defendant in the suit. While so, Palaniammal died on 22.06.1970. This is known from Ext.A.2, death certificate. It is in this setting, the suit for partition is laid.

3.As already indicated, the plaintiffs are the daughters of Palaniammal. They would contend that the suit property was purchased benami by Palaniammal by including her son Palanisamy (the defendant) under Ext.A.1, sale deed. In other words, Palanisamy is only a nominal name lender and the entire property belongs only to Palaniammal. Even though initially, they sought partition of their 1/6th share each in the suit property, midway through the trial, they brought out an amendment to seek 1/3rd share in the property. The suit was resisted by the sole defendant on the ground that Palaniammal is the nominal name lender under Ext.A.1 and that the entire sale consideration has moved from him.

4.Before the trial Court, the first plaintiff has examined herself as P.W.1. For the defendant, the defendant had died by then and his widow was examined as D.W.1.

5.The critical question before the trial Court was who was the benami holder; whether it is Palaniammal holding $\frac{1}{2}$ share in the entire property as benami for the defendant, or the defendant lending his name for the benefit of Palaniammal.

6.The suit was laid in 1985, and some three years prior to the advent of Benami Transactions(Prohibition) Act, 1988. On appreciating the evidence, the trial Court held that so far as item No.1 is concerned, it was repurchase of the property which Palaniammal has sold under Ext.B.1 to Govindachetty, and that she found to possess sale consideration only for purchasing item no.1. So far as item no.2 is concerned, it held that it belongs to the second defendant entirely and accordingly, it passed a

preliminary decree for 1/3rd share in item no.1. The matter was taken in appeal by the defendants. The plaintiffs did not prefer any cross-objection regarding the finding on item No.2. The first Appellate Court had taken the view that plea of benami is not available to the defendant on the basis of Benami Transactions(Prohibition) Act and dismissed the appeal and hence, the present second appeal.

7.The appeal is admitted on the following substantial questions of law:

"1.When two items of the property were purchased under the very same sale deed and when a suit for partition filed by the plaintiffs when their claim for item 2 of it was negatived rejecting their case and when the plaintiffs did not prefer any appeal or cross objections in the appeal preferred by the defendants, is not the findings of the trial court dismissing the suit for item No.2 would operate as 'resjudicata' to the other item No.1, especially when the pleadings of both parties are the same for both the items?

2.Whether the Benami Transaction Prohibition Act 1988 would apply to a suit filed on 21.9.1984?

3.Whether the judgment of the trial court is vitiated by illegality in not considering the principles relating to the benami transaction, and the application of them to the suit transaction?

4.When the property was purchased jointly in the name of mother and son, with the claim of two daughter each 1/3 in the suit property is sustainable?"

8.Heard, the learned senior counsel for the appellants/defendants. None appeared for the respondents/plaintiffs.

9.The learned counsel for the appellants/defendants would argue;

- The issue before the Court was whether Palanisamy was mere name lender in terms of the allegation in the plaint or whether Palaniammal is the nominal name lender for the same transaction in terms of the allegation in the written statement.
- However, the burden is on the plaintiffs to prove their case and if so, the plaintiffs must establish that the sale consideration of Rs.500, for which the property was purchased under Ext.A.1 was entirely advanced by Palaniammal. Here, the only evidence available on record is P.W.1.
- In her cross-examination, P.W.1 would admit that item no.1

which Palaniammal had purchased under Ext.B.2 was sold by her under Ext.B.1 to raise a mere sum of Rs.300 for meeting the marriage expenses of P.W.1. According to her, at the relevant time Palaniammal was around 60 years. Accordingly, Palaniammal was around 80-85 years when the suit properties were purchased under Ext.A.1 in 1963. This is also admitted by P.W.1 in her cross-examination.

- She would say that when Palaniammal died she had no jewellery or cash left and that she had been in her care for few years before she opted to move to the suit property and she died shortly thereafter. The only source of income according to P.W.1, which her mother had was that she was running a small mess and she admits that at that time when Ext.A.1 was executed, the defendant was already employed.
- Admittedly, Palaniammal had died in 1970. In the next 14 years, the plaintiffs have never demanded for any partition. P.W.1 would say in this regard that the property had been leased to a third party and that the rent had always been received by the defendant and after his demise, by his widow and that at no time prior to the suit they have demanded any share in the rental income.
- D.W.1 would state that the defendant, her husband, was employed as a booking clerk in a certain transport company. When both P.W.1 and D.W.1 concurred on the fact that the defendant was earning when the suit properties were bought under Ext.A.1 and the sale consideration was itself Rs.500, it is only probable that the sale consideration would have moved from the defendant for the purchase of the suit properties under Ext.A.1 and not from Palaniammal.

10.This Court carefully perused the material papers and finds merit in the statements of the learned counsel for the appellants.

11.In the case of R.Rajagopal Reddy(dead) by LRS. and Others Vs. Padmini Chandrasekharan(dead) by LRS., [(1995) 2 SCC 630], the Hon'ble Supreme Court had held that Benami Transactions (Prohibition) Act, 1988 would only operate prospectively and inasmuch as the suit was laid in 1985, the Act would not apply to the present case. This was over looked by the first Appellate Judge when he made Benami Transactions(Prohibition) Act applicable to the present case.

12.Turning to the merit of the case, this Court does not consider that the first Appellate Court had adverted to the facts correctly or appreciated them logically. If rule of preponderance of probability is a thumb rule in deciding civil disputes, then certain logic in appreciating evidence cannot be ignored. According to the plaintiffs, their mother Palaniammal was running a small time mess in a village, and beyond this self

serving statement, there is nothing on record to show that she actually raised any income. On the contrary, the same P.W.1 would admit that the defendant was employed at the relevant time, when Ext.A.1, sale deed was obtained. Here is a women who had to sell the only property that she purchased under Ext.B.2 to raise Rs.300 for meeting the marriage expenses of P.W.1 and she died without leaving any properties, and this cannot be lost sight of.

13. Therefore, all that the plaintiffs might have to do to persuade the Court was to demonstrate that between the date of Ext.B.1 and Ext.A.1 Palaniammal had actually raised some income, and had the same with her to buy the property. Here, except the self serving statement of P.W.1, there is nothing on record to indicate the probable truth in plaintiffs assertion that Palaniammal had her independent source of income. In these circumstances, the other probability, namely that the defendant, who was employed at the relevant time making his own independent income, could have paid the sale consideration for Ext.A.1, was the most probable probability.

14. This Court has little option but to hold that Palaniammal is the nominal name lender to Ext.A.1 and whatever right which Ext.A.1 may indicate as belonging to Palaniammal is actually held by her benami, her son Palanisamy, the defendant.

15. In conclusion, this Court finds all the substantial questions of law held in favour of the appellants/defendants and in the result, the second appeal is allowed and the decree and judgment dated 04.07.2002 rendered in A.S.No.176 of 2001 on the file of the Additional District Judge cum Fast Track Court No.II, Salem, confirming the preliminary decree and judgment dated 21.12.2000 rendered in O.S.No.92 of 1985 on the file of the Additional Subordinate Judge, Salem is set aside. No costs.

Sd/-
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Assistant Registrar

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Sub Assistant Registrar

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To:

1. The Additional District Court
cum Fast Track Court No.II, Salem.

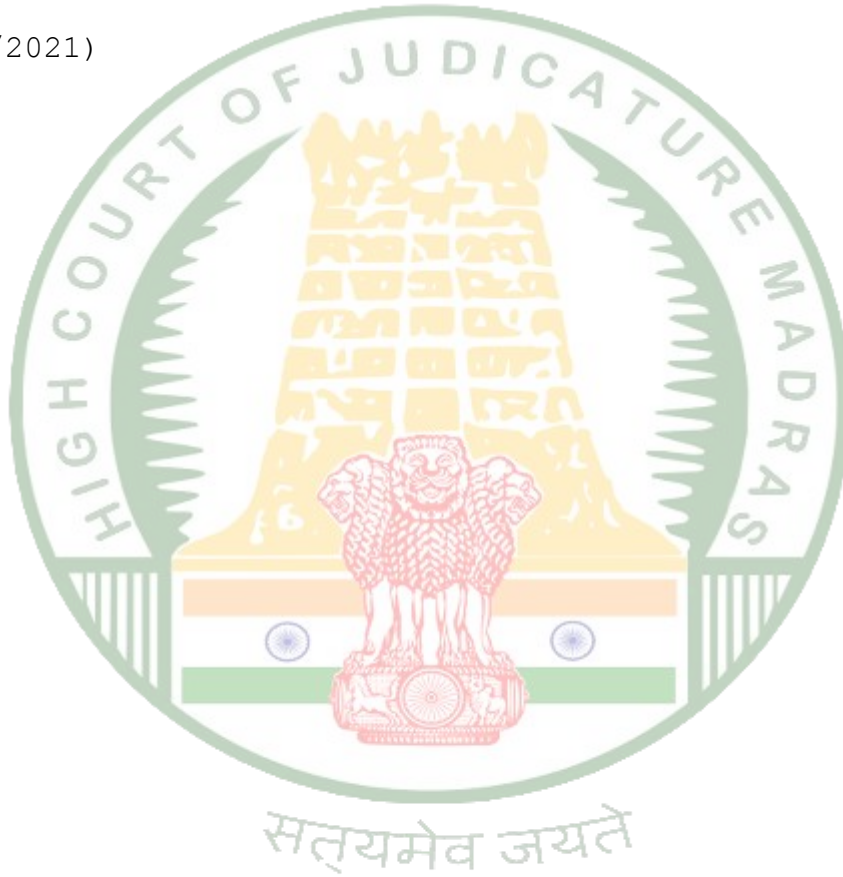
2.The Additional Subordinate Court,
Salem.

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

+1 cc to M/s.Elizabeth ravi, Advocate Sr.No. 20507

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