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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date: 30.01.2020

CORAM

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

S.A.No. 1199 of 2006

Ayesha Bivi

..Appellant/Appellant/
1st Defendant

Vs.

1.Kurshith Begam

... 1st Respondent/
1st Respondent/Plaintiff

2.Mahadeva Padayachi

3.Shanmugasundaram

...2 & 3 Respondents/ 2 & 3
Respondents/Defendants 2 & 3

Prayer: Second Appeal filed under Section. 100 of C.P.C. against the judgment and decree dated 25.10.2005, made in A.S.No. 5 of 2005, on the file of the Additional District Court (Fast Track Court - I) at Chidambaram, as confirmed by judgment and decree dated 28.09.2004, made in O.S.No. 131 of 2000, on the file of the Sub-Court at Chidambaram.

For Appellant : Mr. Srinath Sridevan

For Respondents : Mr.S.Sounthar for R1
R2 & R3 - died

J U D G M E N T

This second appeal has been preferred as against the judgment and decree dated 25.10.2005 passed in A.S.No. 5 of 2005 on the file of the Additional District Court (Fast Track Court No-I) at Chidambaram confirming the judgment and decre-e dated 28.09.2004 passed in O.S.No. 131 of 2001 on the file of the Sub-Court at Chidambaram.

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 follows:-

3.1. The suit is filed for partition and separate possession



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and also for permanent injunction. The plaintiff and her father, Madharasa Sahib earned lot of money by working in Singapore. After the death of her mother in the year 1982, her father got married to the first defendant to look after his children who were born through his first wife. He purchased the property separately in their names since the plaintiff was minor at the time of purchase of the suit property. Further, the first defendant had no issue. Therefore, till the life of 1st defendant's residence and for the sole benefit of the plaintiff, the suit property was purchased in the name of the plaintiff and the 1st defendant. After death of her father, house tax was assessed in the name of the first defendant without the knowledge of the plaintiff. Thereafter, she also created mortgage deed in favour of the defendants 2 and 3 and since the said mortgage is not valid and it was brought only to defeat the rights of the plaintiff. Therefore, the said mortgage is not binding upon her. Now, the defendants 2 & 3 are attempting to take forcible possession with the help of the 1st defendant.

4. Resisting the same, the first defendant filed written statement and contended that the suit property was purchased by the registered sale deed dated 05.09.1988 for valid sale consideration from and out of her own funds. In fact, after purchase of the suit property she demolished the house and constructed RCC terrace building thereafter, the said house was assessed to the house tax in her name. In fact, the plaintiff was about 9 years old at the time of purchase and she was considered as a lucky child so her name was in the sale deed. Therefore, the plaintiff is not at all entitled for her ½ share as claimed by her and sought for dismissal of the suit.

5. On the side of the plaintiff, she examined P.W.1 to P.W.3 and were marked as Exs.A1 to A10. On the side of the defendant, she examined D.W.1 and D.W.2 and marked Exs.B1 to B7. On perusal of the evidence on record and on going through the oral and documentary evidence, the Trial Court decreed the suit as prayed for in favour of the plaintiff and in so far as the partition of the suit property and in so far as the permanent injunction is concerned, dismissed the suit. Aggrieved by the same, the first defendant preferred A.S.No. 5 of 2005 and the first Appellate Court also dismissed the appeal and confirmed the judgment and decree passed by the Trial Court. Aggrieved by the same, the first defendant filed the second appeal.

6. At the time of admission, the following substantial questions of law were framed for consideration:-



"i) Whether the Courts below can presume that Ex.B1 was a purchase by the husband in the name of wife and daughter under the theory of advancement, when the parties are all Muslims?

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ii) Whether the provisions of Benami Transaction Prohibition Act will apply to sham and nominal sale?

iii) Whether the Courts below have not erred in their failure to properly consider the oral evidence with regard to the means of the 1st defendant?

iv) Whether the Courts below did not err in law in failing to consider the question of title to superstructure and cost thereof?"

7. Heard, Mr.Srinath Sridevan for the appellant and Mr.S.Sounthar for the 1st respondent. Respondents 2 and 3 died and no steps were taken.

8. Admittedly, the suit property was purchased by the father of the plaintiff as well as the husband of the first defendant in the name of the plaintiff as well as the 1st defendant. Therefore, both are entitled for their $\frac{1}{2}$ share in the suit property. Though the defendant contended that the suit property was purchased by her own income, she miserably failed to prove the source of income for the purchase of the suit property. In fact, she did not even produce any document to show that she has source of income to purchase the suit property. The friend of the deceased, father of the plaintiff, P.W.2 categorically deposed that in the year 1988, the suit property was purchased by the deceased father of the plaintiff after discussion with him, since the plaintiff was minor, he decided to purchase the house, considering her future and marriage and also the 1st defendant has no issue and to provide shelter to her, in favour of the plaintiff and the 1st defendant. In fact, the deceased Madharasa Sahib had also purchased various properties in the name of his son, which was marked as Exs.A3 to A5. It is also established by the evidence of P.W.3 which is none other than one of the son of deceased mother. In fact, the first defendant in her deposition categorically admitted that there was no record to prove that she was employed in Singapore and lending money by selling her jewels for the purpose of the purchase of the suit property. Therefore, both the Courts rightly held that the suit property is treated as joint property of the plaintiff and the 1st defendant and as such both are entitled to get $\frac{1}{2}$ share each in the suit property.



9. In view of the discussion, this Court does not find any valid reason to interfere with the reasoning and findings rendered by the Courts below. Therefore, this Court is of the considered opinion that no substantial questions of law are involved in this second appeal. Be that as it may, all the substantial questions of law are accordingly answered against the first defendant and in favour of the plaintiff. In fine, the second appeal is dismissed. No costs.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

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To:

1. The Additional District Court
(Fast Track Court - I) at Chidambaram.
2. The Sub-Court, Chidambaram.
3. The Section Officer, V.R.Section, High Court, Chennai

S.A.No. 1199 of 2006

PP (CO)
K.RK. (08.09.2021)