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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 05.07.2021

CORAM

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A.(MD)No.108 of 2008

1. N.S.Parthasarathy ... 1st Appellant/1st Appellant/
1st Plaintiff
2. N.S.Jothiram ... 2nd Appellant/2nd Appellant/
2nd Plaintiff
3. N.S.Chandrasekaran (Died) ... 3rd Appellant/3rd Appellant/3rd Plaintiff
4. Santha
5. Sridevi
6. Balaji ... Appellants 4 to 6
(Appellants 4 to 6 are brought on record as LR.
of the deceased 3rd appellant vide Order dated
09.03.2012 made in M.P.(MD)No.2 of 2012)

Vs.

1. Amirtham Ammal
2. N.S.Prem Kumar
3. N.S.Kubendran
4. N.S.Amarnath
5. Chandra Bai
6. Asha
7. Sheela ... Respondent 1 to 7/
Respondents 1 to 7/
Defendants 1 to 7

Prayer: Second appeal filed under Section 100 of C.P.C., to set aside the Decree and Judgment dated 30.11.2006 passed in A.S.No.46 of 2006 on the file of the Principal District Judge, Madurai, confirming the Judgment and Decree dated 12.04.2006 passed in O.S.No.562 of 1997 on the file of the I Additional Subordinate Court, Madurai and thereby decreeing the suit in O.S.No.562 of 1997 with costs throughout.

For Appellants : Mr.J.Barathan,
for Mr.T.R.Jeyapalam.

For Respondents: Mr.G.Aravindhan

<https://hcservices.ecourts.gov.in/hcservices/>



J U D G M E N T

The plaintiffs in O.S.No.562 of 1997 on the file of the I Additional Sub Court, Madurai, are the appellants in this second appeal.

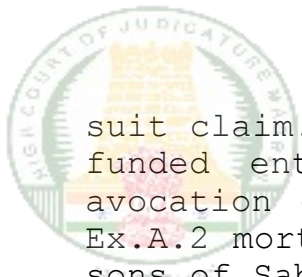
2. The said suit was filed seeking the relief of partition in respect of 33/70th share in the suit property. The suit was dismissed by the trial Court by judgment and decree dated 12.04.2006. Questioning the same, the plaintiffs filed A.S.No./46 of 2006 before the Principal District Court, Madurai. The first appellate Court dismissed the appeal vide judgment and decree dated 30.11.2006. Challenging the same, this second appeal came to be filed.

3. This second appeal was admitted on the following substantial question of law:-

“ Whether the lower court has committed an error of law in not applying the settled principles of law - while considering the plea of benami purchase - that the title is presumed to vest with the person, in whose name the sale deed stands, and the burden of proof lies heavily on the person who sets up benami plea? ”

4. The appellants who are the plaintiffs in the suit pleaded that the suit property was purchased by their mother Swarnalakshmi Ammal vide Ex.A.1 dated 30.09.1943. She passed away shortly thereafter. The plaintiffs and the fifth defendant Chandra Bai were born to Sabapathy Iyer through Swarnalakshmi Ammal. After the demise of Swarnalakshmi Ammal, Sabapathy Iyer contracted second marriage with Krishnamani. The second wife also passed away. Through Krishnamani, there was no issue. Thereafter, Sabapathy Iyer married the first defendant Amirdham Ammal and through her, defendants 2 to 4, 6 and 7 were born. The stand of the plaintiffs was that the property though purchased by Swarnalakshmi Ammal out of her earnings and Stridhana was treated only as a joint family property. The suit properties formed part of a larger extent. Portions of the property purchased vide Ex.A.1 were subsequently sold in favour of a third party vide Ex.A.3 dated 22.04.1971. It was also mortgaged in favour of a registered association vide Ex.A.2 dated 14.05.1962. Sabapathy Iyer passed away on 05.02.1997. In the coparcenary comprising Sabapathy Iyer, the three plaintiffs, defendants 2 to 4, each of them had 1/7th share. Following the demise of Sabapathy Iyer, his 1/7th share would devolve equally on the plaintiffs as well as the defendants. According to the plaintiffs, they are entitled to 33/70th share in the suit property.

5. The contesting respondents/defendants 1 to 4 opposed the



suit claim. According to them, the purchase of the suit property was funded entirely by Sabapathy Iyer. Swarnalakshmi Ammal had no avocation on her own nor she possessed any Stridhana. Even though Ex.A.2 mortgage deed and Ex.A.3 sale deed stand in the names of the sons of Sabapathy Iyer, still in the recitals, it has been mentioned that the property was purchased only by Sabapathy Iyer. It was further stated that during his lifetime, Sabapathy Iyer executed a Will dated 09.04.1975 bequeathing the property in favour of defendants 1 to 4. During the course of trial, a second Will dated 13.07.1990 surfaced as per which the suit property was bequeathed by Sabapathy Iyer in favour of defendants 2 to 4. The defendants also pleaded that the plaintiffs were never in possession of the suit property jointly.

6. The fifth defendant sailed along with the plaintiffs. She also paid Court fee for 1/10th share.

7. The trial Court framed the following issues:-

"(1) Whether the plaintiffs are entitled to partition and separate possession of 33/70th share in the suit property?

(2) Whether the Will said to have been executed by Sabapathy Iyer on 09.04.1975 is true and valid?

(3) Whether the suit has been properly valued and court fee correctly paid?

(4) To what other reliefs the plaintiffs are entitled?"

8. The first plaintiff N.S.Parthasarathy examined himself as P.W.1 and marked Ex.A.1 to Ex.A.6. The second defendant N.S.Premkumar examined himself as D.W.1 and one Raghavan, attestor of Ex.B.21 Will dated 13.07.1990 was examined as D.W.2. Ex.B.1 to Ex.B.23 were marked. The learned trial Judge after a consideration of the evidence on record, dismissed the suit by judgment and decree dated 12.04.2006. The same was confirmed by the first appellate Court also.

9. The learned counsel appearing for the contesting respondents submitted that the entire case of the contesting defendants is that the suit property was the self-acquired and absolute property of Sabapathy Iyer. The property was purchased benami in the name of his first wife Swarnalakshmi Ammal / the mother of the appellants herein. He placed reliance on the decision reported in (2004) 4 MLJ 153 (Valliammal (D) by LRs. V. Subramaniam and others) in which the Hon'ble Apex Court had culled out the circumstances which can be taken as a guide to determine the nature of the transaction. They are follows:-

" 13. ..

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

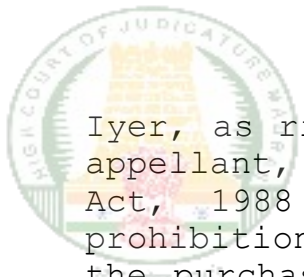
6. the conduct of the parties concerned in dealing with the property after the sale."

According to the learned counsel, the plaintiffs have not adduced any evidence to show that the purchase money for Ex.A.1 came from Swarnalakshmi Ammal. He called upon this court to take judicial notice of the fact that the transaction took place way back in the year 1943 and that therefore, it was only probable that Sabapathy Iyer would have funded for the entire purchase. The property was always in the possession of Sabapathy Iyer; he had dealt with the property as his own self-acquired and absolute property as evident from the recitals set out in Ex.A.2 and Ex.A.3 and the nature of his bequest (Ex.B.21). The learned counsel also took me through the cross examination of P.W.1. P.W.1 appears to have been under the care and protection of his paternal uncle. Even the name of Sabapathi Iyer does not figure in the educational certificates of P.W.1. According to him, the Courts below have correctly applied the relevant principles and that the impugned judgment does not call for any interference.

10. I am not persuaded by the aforesaid contentions advanced by the learned counsel appearing for the contesting respondents. As rightly pointed out by the learned counsel appearing for the appellants, the suit property admittedly stood in the name of Swarnalakshmi Ammal. If according to the defendants, it was purchased benami by Sabapathy Iyer, the burden to prove the same lay only on them. In the decision reported in (1976) 2 MLJ 470 (Kistappa Naicker and another V. Elumalai Naicker), following the decision of the Apex Court, it was held that once the title deed stands in the name of a person and it is asserted that the real title vests in another person and that the person in whose name the title deed stands is a benamidar, the burden of proving that the person in whose name the title deed stands is not the beneficial owner and the beneficial owner is somebody else, is throughout on the person who asserts to that effect, and the burden never shifts. Therefore, the burden lay only on the contesting defendants to show that the suit property was the absolute property of Sabapathy Iyer.

11. In this case, this burden has not at all been discharged.

Even if I assume that the purchase money came only from Sabapathy



Iyer, as rightly contended by the learned counsel appearing for the appellant, Section 3(2) of the Benami Transactions (Prohibition) Act, 1988 would come into play. While there is a statutory prohibition against benami transaction, it would not be applied to the purchase of property by any person in the name of his wife or unmarried daughter and it shall be presumed, unless the contrary is proved, that the said property had been purchased for the benefit of the wife. The learned counsel appearing for the appellants took me through the recitals of Ex.A.1. Even though it is stated that the purchase money was paid by Sabapathy Iyer, the endorsement was on behalf of Swarnalakshmi Ammal.

12. The subsequent conduct of Sabapathy Iyer also indicates that the property was always treated only as a joint family property. Otherwise there was no need to include the names of the plaintiffs as well as the other sons, when executing Ex.A.2 mortgage deed or Ex.A.3 sale deed. A portion of the property purchased vide Ex.A.1 was sold in favour of the third party vide Ex.A.3. A mere look at the recitals of Ex.A.3 would show that Sabapathy Iyer treated the property as a joint family property. Therefore, I hold that the burden cast on the contesting respondents that the property was purchased benami by Sabapathy Iyer has not at all been discharged.

13. The learned counsel appearing for the appellants drew my attention to the decision reported in (1997) 2 MLJ 46 (Parvathi Ammal Vs. Solai Ammal And Anr.). In paragraph No.11 of the said decision, it has been held as follows:-

"11. In Nand Kishore v. Sushila it was held that the prohibition to raise the plea of benami is not applicable to the property purchased by a person in the name of his wife or unmarried daughter but at the same time, the persons so pleading must prove that the said property had not been purchased, for the benefit or welfare of such persons in order to succeed. In coming to such conclusion, their Lordships of the Apex Court adverted to Section 3(2) which provided that nothing in Sub-section (1) which in turn stipulated no person shall enter into any benami transaction, shall apply to the purchase of property by any person in the name of his wife or unmarried daughter and that it shall be presumed, unless contrary is proved, that the said property had been purchased for the benefit of the wife or the unmarried daughter. So far as the case on hand is concerned, the plaintiff daughter who projected the plea of benami claimed that the properties have been purchased in the name of the 1st defendant by Kesava Padayachi, the father of the plaintiff and husband of the 1st defendant. The father is no more and it is not



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the said Kesava Padayachi who has chosen to assert such a claim that the properties have been purchased benami. The plaintiff daughter can neither claim herself to be a coparcener nor claim that the 1st defendant is in the position of trustee or other person standing in any fiduciary capacity vis-a-vis the plaintiff in respect of such properties. In any event, for the plaintiff to succeed, she should prove that the properties concerned had not been purchased by the father (the husband of the 1st defendant) for the benefit or the welfare of the wife even though it may be shown that the consideration for the purchase of the properties had been paid by her husband."

14. The learned counsel appearing for the appellants also drew my attention to Ex.A.4 award passed by the land acquisition officer on 18.11.1989. Of course, the subject matter of the said award does not pertain to the suit property. However, the relevant portion of the award is as follows:-

"2. Government Wet S.No.4.78... 0.00.5 Hec.

...

As per Revenue Registry these lands stand registered in the name of N.V.Sabapathy Iyer in holding No.18. Enquiry revealed that these lands are the stridhana Lands of his late wife and they are in his possession and enjoyment. As his children and himself are equally entitled to the lands all their names as detailed below were notified in the Draft Declaration u/s.6 of the L.A. Act.

1. N.V.Sabapathy Iyer, 2. Parthasarathy, 3. Jothiram, 4. Chandra Bai, 5. Chandrasekaran, 6. Premkumar, 7. Kubendran, 8. Amarnath, 9. Ahesha 10. Sheela.

All these persons are living joint Hindu family and N.V.Sabapathy Iyer is the managing head of the family and all the other members have consented to pay the compensation amount to N.V.Sabapathy Iyer. Hence, the compensation amount for these lands is payable to the following person.

N.V.Sabapathy Iyer, 9, Jadamunikoil Street, Madurai - 625 001.

Market value of land, structures, wells trees etc.,	Rs.1,698.12
30% solatium	Rs. 509.44
Additional amount of 12% on the market value per annum	Rs. 415.92

Rs.2,623.48 "

The aforesaid reasons given by the land acquisition officer are significant for two reasons. They indicate that even though the land was registered in the name of Sabapathy Iyer, still they were categorised as the Stridhana lands of his late wife and that they were in possession and enjoyment as a joint Hindu family property.



It further reads that the other members have given consent for paying the compensation amount to their father Sabapathy Iyer. That shows that the relationship between the parties till 1989 was quite cordial.

15. The appellants have not filed partition suit or issued notice till the demise of their father. Only after the demise of their father, the partition suit was instituted. The plaintiffs never claimed that the entire property was their absolute property. Their only contention was that the property was the joint family property and they are entitled to a particular share. The Courts below have completely glossed over the material evidence in this case. When Ex.A.1 stands in the name of the late wife, the burden to show that it was purchased benami was only on the person who asserted that it was a benami transaction. The Courts below failed to take note of the fact that the defendants have failed to discharge the burden cast on them. The Courts below glossed over the fact that Ex.A.2 and Ex.A.3 were executed jointly by Sabapathy Iyer and his sons. Recitals in Ex.A.3 that the suit property is a joint family property has also been overlooked. If material evidence is ignored, that vitiates the findings. The Courts below have also failed to apply statutory presumption set out in Section 3(2) of the Benami Transactions (Prohibition) Act, 1988. I have no hesitation to set aside the impugned judgment and decree and answer the substantial question of law in favour of the appellants.

16. However, certain subsequent developments will have to be taken note of. Even according to the plaintiffs, the property in question was a joint family property. They concede that Sabapathy Iyer had a share in the suit property. When the suit was instituted, only sons could have been a part of the co-parcenary. In view of the amendment to Section 6 of the Hindu Succession Act vide Central Act 39 of 2005, as interpreted by the Hon'ble Supreme Court in Vineeta Sharma Vs. Rakesh Sharma reported in (2020) 9 SCC 1, the daughters also will be entitled to equal share in the property. In that event, the share of Sabapathy Iyer was reduced to 1/7th share in the suit property. There is no dispute that Sabapathy Iyer had executed a Will in favour of defendants 2 to 4. The said Will had also been duly proved by the defendants in the manner known to law. No serious argument was advanced before me impeaching the said finding.

17. I confirm the finding of the Courts below that Ex.B.21 had been duly proved. 1/7th share of Sabapathy Iyer would devolve on defendants 2 to 4. Thus the plaintiffs as well as the fifth defendant Chandra Bai will be entitled to 6/63rd share each. Defendants 6 and 7 also will be entitled to 6/63rd share each. Defendants 2 to 4 will be entitled to 6/63rd share each and also will be entitled to Sabapathy Iyer's 1/7th share.



18. This second appeal is allowed on these terms. No costs.

Sd/-

Assistant Registrar (CS-II)

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Sub Assistant Registrar(CS)

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Note: In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To:

1. The Principal District Judge,
Madurai.
2. The I Additional Subordinate Judge,
Madurai.

COPY TO:-

The Section Officer,
V.R.Section,
Madurai Bench of Madras High Court, Madurai.

+1 CC to M/s.T.R.JEYAPALAM, Advocate (SR-21438[F] dated 07/07/2021)

+1 CC to M/s.N.SUBRAMANIAN, Advocate (SR-21581[F] dated 07/07/2021)

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05.07.2021

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