



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 28.07.2021

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THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A. (MD)No.412 of 2008

WEB COPY

Harigopal

... Appellant/1st Respondent/
Plaintiff

Vs.

1.Murali

...1st Respondent/Appellant/
1st Defendant

2.Kusumakumari

...2nd Respondent/2nd Respondent/
2nd Defendant

Prayer : Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree in A.S.No.361 of 2005 on the file of the Principal District Judge, Tiruchirappalli dated 06.08.2007, reversing the judgment and decree in O.S.No.431 of 1996, on the file of the Sub Judge, Tiruchirappalli, dated 05.09.2005.

For Appellant : Mr.V.Chandrasekar

For Respondents : Mr.K.K.Senthil for R1

JUDGEMENT

The plaintiff in O.S.No. 431 of 1996 on the file of the learned Sub Court, Tiruchirappalli is the appellant in this second appeal. The suit was one for partition. The suit items are two in number. The appellant/Harigopal filed the said suit claiming 1/3rd share in the suit properties. The plaintiff and the first defendant are the brothers while the second defendant is the sister. There is no dispute that the suit items stood in the name of their father/Late.Rajarama Rao. Rajarama Rao passed away intestate in the year 1981. Both the items are house properties. While the plaintiff is residing in the first schedule, the first defendant is residing in the second schedule.

2.The suit claim was contested by the first defendant. According to the first defendant, the second item was purchased by him in the name of their father and therefore, the second item cannot be partitioned. Based on the rival pleadings, issues were framed.

3.The plaintiff examined himself as P.W.1. Exs.A1 to 5 were marked. The first defendant examined himself as D.W.1. Exs.B1 to B7 were marked.



4.The trial judge after a consideration of the evidence on record granted preliminary decree allotting 1/2th share in favour of the plaintiff and the first defendant. For reasons which I am not able to agree, the second defendant/sister was totally left out in the matter of allotment. But then, the second defendant who remained ex-parte did not choose to challenge the same. Therefore, I can safely conclude that the matter has attained finality as far as the second defendant is concerned. The contest is only between the two brothers.

5.The first defendant/Murali filed A.S.No.361 of 2005 before the District Court, Tiruchirappalli. By the impugned judgment and decree dated 06.08.2007, the appellate court partly allowed the appeal and granted preliminary decree for partition of the plaintiff's 1/3rd in suit 'A' schedule property. However as regards 'B' schedule property, the appeal was dismissed. Challenging the same, this second appeal has been filed.

6.The second appeal was admitted on the following substantial question of law:-

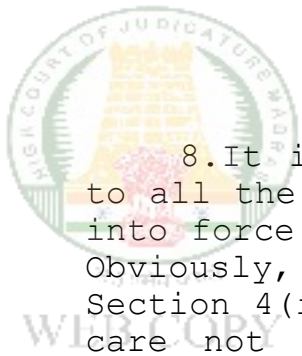
"(i) Whether the judgment and decree of the Court below with respect to plaint B schedule is perverse, in view of its finding that the property was purchased by the contesting respondent in the name of his father?"

7.Even though the second defendant/Kusumakumari did not file any appeal, the fact remains that the first appellate court had chosen to recognize her 1/3rd share in the suit property. Now the only question that arises for consideration is whether the plaintiff and the second defendant can have any claim in the second item. The stand of the first defendant is that it was he who funded the purchase of the second item. But the first defendant cannot be permitted to raise such a defence in view of the statutory mandate set out in Section 4(ii) of the Prohibition of Benami Property Transactions Act, 1988. It reads as follows:-

"(4) The Law commission has, inter alia, recommended the inclusion of the following provisions in the Bill to replace the Ordinance namely:-

(i)

(ii) entering into a benami transaction after the commencement of the new law should be declared as an offence. However, an exception should be made for transactions entered into by the husband or father for the transfer of properties in the name of the wife or unmarried daughter for their benefit. By this, the doctrine of advancement as obtaining in the English law will be incorporated into the Indian Statute Book;"



8.It is well settled that Section 4(ii) of the Act will apply to all the suits filed after the Act came into force. The Act came into force on 05.09.1988. The suit was filed only in the year 1996. Obviously, the defence taken by the first defendant will be hit by Section 4(ii) of the Act. Of course, the first defendant has taken care not to employ the expression "benami", but the cumulative effect of the defence is that even though the properties stood in the name of the father/Rajarama Rao, he is the real owner. This is nothing but a plea of benami. The Act forbids taking of such a defence. The first appellate court had failed to take note of Section 4(ii) of the Central Act 45 of 1988. Therefore, the dismissal of the suit as regards 2nd item/'B' schedule will have to be necessarily interfered with. The substantial question of law is answered in favour of the appellant court and the impugned judgment and decree passed by the first appellate Court is accordingly modified. It is declared that the plaintiff as well as the two defendants will have 1/2 (half) share in each of the items. Of course, the right of first defendant to adduce evidence in final decree proceedings to tilt equity in his favour is left open. The second appeal is allowed. No costs.

Sd/-

Assistant Registrar (CS-I)

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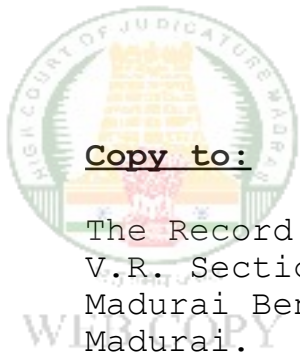
Sub Assistant Registrar(CS)

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To:

- 1.The Principal District Court,
Tiruchirappalli.
- 2.The Sub Court,
Tiruchirappalli.



Copy to:

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

+1 CC to M/s.K.K.SENTHIL, Advocate (SR-24255[F] dated 28/07/2021)

+1 CC to M/s.V.CHANDRASEKAR, Advocate (SR-24359[F] dated
29/07/2021)

**S.A. (MD) No.412 of 2008
28.07.2021**

RK (17.09.2021) 4P 7C