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A.S.No.327 of 2016

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 29.11.2022

PRONOUNCED ON : 20.12.2022

CORAM

THE HON'BLE MR.JUSTICE D. BHARATHA CHAKRAVARTHY

A.S.No.327 of 2016

and

C.M.P.No.19219 of 2022

R.G. Nhaveenraj

.. Appellant

Vs.

N.Rajagopal (deceased)

1.Sivagami Rajagopalan

2.Gugapriya

3.Sripriya

4.Bhuvaneswari

5.K.Karthikeyan

6.J.Babulal.Jain

.. Respondents

Prayer: Appeal Suit is filed under Section 96 of C.P.C., to set aside the judgment and decree in O.S.No.607 of 2010 dated 24.11.2015 on the file of First Additional District Court, Thirupur.

For Appellant : Mr. A.Sivaji

For Respondents : Mr. D. Selvaraju, for R5 & R6
No Appearance for R1 to R4



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J U D G M E N T

A. The Appeal Suit :

This Appeal Suit is filed aggrieved by the judgment and decree of the Learned I Additional District and Sessions Judge, Thirupur dated 24.11.2015 in O.S.No. 607 of 2010, in and by which the suit filed by the plaintiff is for a declaration that item 1 of the suit schedule property is dedicated to the plaintiff's family deity *Sri.Karupparayan*, for a decree of partition in respect of schedule II properties and for a declaration that the alienation of the suit property under sale deed dated 11.12.2007 in favour of the seventh defendant as sham and nominal.

B. The Case of the Plaintiff :

2. The case of the plaintiff is that the first defendant is the father of the plaintiff. The schedule properties were purchased by him along with one *Chinnaiyan* on 07.07.1976 with the joint family nucleus, that is, money from the grandfather one *Nataraja Mudaliar*. While so, the first defendant unnecessarily mortgaged the suit properties to *Tamilnadu Mercantile Bank Ltd.*, by standing as a surety to one *M/s. Surya Prabha of Vignesh Plastics*. While so, without any right, the first defendant entered into a sale agreement with the seventh defendant



by obtaining a meager amount and the sixth and seventh defendants fraudulently obtained a Power of Attorney in favour of the sixth defendant and consequently sold the schedule properties to the seventh defendant.

2.1. The schedule properties are ancestral properties and the sale is invalid. Item 1 of the schedule property is actually dedicated to the family deity. Item 2 of the schedule properties is liable to be partitioned and hence the suit.

C. The Case of the Defendants :

3. The suit is resisted by the first defendant by filing a written statement to the effect that the suit properties are his self-acquired properties and not ancestral properties. The seventh defendant was approached only for a loan but however through his henchman, the sixth defendant obtained a sale deed and the same is a fraudulent transaction because of the misuse of the documents supplied by the 1st defendant for the purposes of availing the loan.

3.1. The seventh defendant contested the suit by claiming that the first defendant approached him to sell the suit properties stating that he required money for discharging the mortgage loan and the balance could be used for his



business purposes. Accordingly, the total sale consideration was fixed at Rs.58,73,740. After due verification of the title, discharge of the mortgage loan and delivery of original parent deeds, the schedule properties were purchased by the seventh defendant. As a matter of fact, even during the course of the transactions, to blackmail the seventh defendant, he setup his son, the plaintiff herein, to file a suit in O.S.No. 872 of 2007 for the same reliefs. However after negotiation, the said suit was withdrawn on 11.12.2007 and thereafter the sale deed was executed on 24.01.2008. Now, once again the present suit with the same prayer is filed by the same plaintiff only to harass the seventh defendant.

D. The Issues & The Trial :

4. On the said pleadings, the trial court framed the following issues and the first issue was framed at the time of pronouncement of judgment:

- 1. Whether the suit is barred under Order 2 Rule 2 CPC?*
- 2. Whether the plaintiff is entitled for declaring I Schedule property dedicated and allotted to the family deity Sri.Karupparayan and family temple of the plaintiff without any alienation and encumbarance?*
- 3. Whether the plaintiff is entitled for share in respect of II Schedule properties as prayed for?*
- 4. Whether the plaintiff is entitled for declaration against*



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D7 that alienation of such property under registered document No.14015/2007 is invalid, inoperative and unenforceable and not binding on all co sharers?

5. Whether the plaintiff is entitled for permanent injunction as against D7 as prayed for?

6. What are the other relief if any for the plaintiff?

4.1. On the said issues, the parties let in evidence. The plaintiff examined himself as **P.W.1**, one *Karikalan* was examined as **P.W.2**, and one *Vanitha* was examined as **P.W.3**. **Exs.A-1** to **A-19** were marked. On behalf of the defendants, the seventh defendant examined himself as **D.W.1**, one *S.Venkidusamy* was examined as **D.W.2**, and one *Ganesan* as **D.W.3**. **Exs.B-1** to **B-14** were marked.

E. The Findings of the Trial Court :

5. Thereafter, the trial court proceeded to consider the case of the parties and by a judgment dated 24.11.2015 found that the plaintiff had filed an earlier suit for the same relief and having withdrawn the same, the present suit was barred under Order II Rule 2 of the Civil Procedure Code. The Trial Court found that the suit property was not an ancestral property. The Affidavit of the



plaintiff's grandfather therefore was not enough to dedicate item 1 of the suit property to the deity. The plaintiff is not entitled for partition in respect of item 2.

The sale being duly effected by the Power of Attorney agent, the sixth defendant, in favour of the seventh defendant, is valid and hence dismissed the suit, aggrieved by which, the plaintiff is on appeal.

F. The Submissions :

6. Heard *Mr. A. Sivaji*, the learned counsel appearing on behalf of the appellant. He would submit that the Trial Court had framed the first issue only at the time of pronouncing the judgment and as such no opportunity was given to the parties in respect thereof. Therefore, the matter has to be remanded back to the Trial Court for fresh disposal. He would rely upon the judgment of this Court in *K. Gopinathan & Others Vs. S. Savarimuthu Sebastian and Others*¹ for the said proposition. Pointing out to the market value of the property being mentioned as more than Rupees One Crore in the impugned sale deed and the sale consideration being only Rs.58,73,740/- it can *ex facie* be seen that it is a blatant attempt of exploitation and fraud by the money lender, the seventh defendant. He would submit that when the first defendant has not contested the suit by getting into the witness box, it is not for the seventh defendant to contest

¹ 2021 (3) MWN (Civil) 469



the nature of the property. Once the nature of the property is proved as ancestral and the plaintiff's family deity itself is located on the boundary of the item 1 property, the Affidavit of the plaintiff's grandfather should have been taken as sufficient proof vis-a-vis the dedication and therefore, the Trial Court ought to have granted all the reliefs prayed for in the suit.

G. The Points for Consideration :

7. Upon hearing the learned counsel for the appellant and perusing the material records of the case, the following questions arise for consideration in this appeal suit:

(i) Whether the matter has to be remanded back to the trial Court as it has framed issue No.1 at the time of pronouncing the judgment?

(ii) Whether the suit property is the ancestral property of the plaintiff and whether the plaintiff is entitled for the reliefs prayed for?

H. On Point No.(i) :

7.1. Apart from the issues already framed, the trial Court framed an additional issue at the time of pronouncing judgment as to whether the suit was barred under Order II Rule 2 CPC and answered the same against the plaintiff.



In this regard, the facts remained that the plaintiff had earlier filed the very same suit before the same Court in O.S.No.872 of 2007 and the same was withdrawn on 24.01.2008 vide **Exs.B-2** and **B-3**. Admittedly, no liberty was obtained by the plaintiff to file a fresh suit on the same cause of action. Therefore, the present suit was barred under Order XXIII Rule 4 of the Civil Procedure Code. The said plea has been taken in the written statement filed by the seventh defendant and irrespective of framing of an issue, the same can be considered since it is a question of law. Order II Rule 2 CPC is not applicable to the instant situation. Framing of the said issue itself is erroneous and for the said purpose, now, the suit need not be remitted back to the trial Court. The matter does not require letting in any evidence. Therefore, the correct question to be framed is, whether the suit is barred under Order 23 Rule 4 CPC and on a perusal of the plaint which is marked as **Ex.A6** and the judgment and decree which are produced as **Exs.B2** and **B3**, it would be clear that the present suit is barred. The appellate Court need not remand the matter back to the trial Court for every error committed by the trial Court. By virtue of the exercise of powers vested in the appellate Court under Order 41 Rules 24 and 27, the appellate Court itself, can frame the proper question especially when it is in the nature of a question of law and answer the same and hence, remand is unnecessary. Accordingly, I



hold that the trial Court framed a wrong question, at the wrong time and even then, the matter need not be remanded back to the trial Court and the question is answered that the suit is barred under the provisions of Order XXIII Rule 4 of Civil Procedure Code.

I. On Point No.(ii):

7.2. Even otherwise, on a perusal of *Ex.B-4* sale deed and *Ex.B-5* partition deed, it would be clear that the suit properties are the self acquired properties of the first defendant. It is the case of the first defendant, the plaintiff's father, in the written statement that the suit properties are the self acquired properties. Therefore, it was incumbent on the plaintiff to prove that the said purchase was out of the joint family nucleus. Except for a bald statement that his grandfather also gave money for the purchase, the plaintiff has not let in any other evidence in respect thereof and thus, the properties cannot be held to be ancestral properties. Once the properties are held to be the self earned properties of the first defendant, the item 1 property cannot be dedicated to the deity by the grandfather of the plaintiff by swearing to an affidavit. Therefore, the suit in respect of the first relief of declaration is bound to fail. For the same reason, the plaintiff has no right by birth to seek for partition in the self acquired properties



of the first defendant, who is his father. Therefore, the second relief prayed for in the suit cannot also be granted.

7.3. As far as the third relief of declaring the sale deed as sham and nominal, once the property belongs to the first defendant, it is for the first defendant to seek any such relief even if he had been defrauded by the seventh defendant. Even though, the first defendant has pleaded so in the written statement, he had neither filed any suit for the said relief, nor made any prayer in the form of a counter claim in the present written statement. In the absence thereof, during the lifetime of the first defendant, the plaintiff has no *locus standi* to plead for the same. Accordingly, the arguments of the learned counsel for the appellant in this regard also does not deserve any consideration and according the point is answered.

7.4. On the merits of the case, as a matter of fact, apart from the documents originally filed and marked in the suit, C.M.P.No.19219 of 2022 is filed to receive additional documents as additional evidence and take the same on file. A counter affidavit is also filed by the respondents contesting the relevancy of the said documents. The two documents which are sought to be filed are the



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judgment in O.S.No.227 of 2011, filed by the first respondent against the sixth respondent and a copy of the settlement deed executed by the sixth respondent in favour of his son. Even though there are reasons mentioned in the affidavit as to why the same could not be produced during the trial, upon going through the same, this Court finds that as far as the document No.1 is concerned, it relates to the suit property and the document No.2 is only conveyance of the title by the sixth respondent in favour of his son. As such, the application is without any merits and is dismissed.

7.5. In view of my above findings, I answer that the finding of the trial Court in respect of issue No.1 that the suit is barred is correct but not under the provision of Order II Rule 2 of Civil Procedure Code but under Order XXIII Rule 4 of Civil Procedure Code. I find that the findings of the trial Court that the plaintiff has not proved the dedication to the deity in respect of issue No.2, that the plaintiff is not entitled for the share in item 2 of the schedule properties in respect of issue no.3, and that the plaintiff is not entitled to a declaration against defendant No.7 that the sale deed is invalid as correct. Similarly, I find that the plaintiff is not entitled to the relief of permanent injunction and accordingly, the finding of the trial Court in respect of issue no.5 and 6 are also in order.



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J. The Result :

8. In the result :

- (i) A.S.No.327 of 2016 is dismissed;
- (ii) There shall be no order as to costs.

20.12.2022

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Index : Yes/No



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To

- 1.The Additional District and Sessions Judge, Tirupur.
- 2.The Section Officer,
V.R.Section, High Court of Madras.



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D. BHARATHA CHAKRAVARTHY, J.

AT

Judgment in
A.S.No.327 of 2016 and
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