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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.01.2022

CORAM

THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

S.A.No.337 of 2018
and
C.M.P.No.9376 of 2018

A.S.Samivelu ... Appellant/Plaintiff
Vs.

1. Pappal
2. P.Muthusamy
3. Tamilzharasi ... Respondents/Defendants

PRAYER: The Second Appeal filed under Section 100 of the Code of Civil Procedure, 1908 against the portion of the findings made in judgment and Decree dated 20.04.2016 made in A.S.No.40 of 2015 on the file of II Additional District Cum Sessions Court, Salem in reversing the Judgment and Decree dated 21.02.2014 made in O.S.No.216 of 2011 on the file of the Subordinate Judge, Mettur.

For Appellant : Mrs.R.Gouri

For Respondents : No Appearance

J U D G M E N T

Aggrieved by the reversal of the decree by the first Appellate Court, setting aside the judgment and decree of the Trial Court in O.S.No.216 of 2011 dated 21.02.2014, the plaintiff has preferred the above Second Appeal.

2. The plaintiff has filed the above Suit for recovery of money from the legal heirs of the borrower. According to him, one Paramasivam, during his life time, borrowed a sum of Rs.3,00,000/- from the plaintiff on 03.12.2008 for his urgent family and other needs and executed a demand promissory note in favour of the plaintiff, agreeing to repay the same with interest at Rs.1.00 per hundred per month, either to the plaintiff or to his order on demand. After borrowing the amount, the said Paramasivam died unexpectedly during 3rd week of March 2008, leaving behind the defendants as legal heirs to succeed



his estate. The plaintiff has made several demands on the defendants, being his legal heirs, to repay the debt due to the plaintiff, but ended in vain. Hence, he filed the Suit for recovery of money.

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3. In the written statement, the defendants denied the averments made in the plaint. It was stated that the said Paramasivam did not borrow any money from the plaintiff, nor executed any promissory note, agreeing to repay the same with interest at Rs.1.00 per hundred per month. Paramasivam died on 28.12.2008 and the plaintiff never demanded any repayment to be recovered from the estate of the deceased Paramasivam. No joint family property was available and doctrine of pious obligation does not arise in this case. The said Paramasivam was seriously ill and he was unable to move out of the bed during the year 2008. During the month of November and December 2008, he was frequently admitted in Gobi Hospital, Salem and he died on 28.12.2008 and therefore, the date of death mentioned by the plaintiff is wrong. The said Paramasivam was an Income-Tax assessee and his son, i.e., the second defendant is working as an Executive Engineer, T.N.E.B and drawing a salary of Rs.57,000/-. The third defendant, who is the daughter of the deceased Paramasivam, is also well settled and therefore, there is no family or legal necessity for the deceased Paramasivam to borrow any such big amount from the plaintiff.

4. The Trial Court framed appropriate issues and held that the promissory note executed by Paramasivam is true and that the plaintiff is entitled for recover of the money. Further, it was held that the property, which stands in the name of his wife, was purchased out of the income earned by Paramasivam and the said fact has been proved by the plaintiff. The defendants have not adduced any evidence of repaying the same and therefore, the property, which was attached before the Judgment is a joint family property and the plaintiff is entitled to recover the same through the said property.

5. Aggrieved by the same, the defendants preferred an Appeal. The first Appellate Court, while discussing the points for consideration, held that the promissory note was executed by the said Paramasivam and the finding of the Trial Court was confirmed, based on the evidence of the plaint. But, however, a finding had been given to the effect that the property, which was attached, during the pendency of the Trial, stands in the name of the first appellant/ first defendant and the Benami Transactions Act, will not be attracted to the case. The issue need not be considered and decided in this case. Having found so, a direction was given to the plaintiff to recover the money from the independent property of the said Paramasivam and it cannot be recovered from the properties which stands in the name



of the first appellant / first defendant and the doctrine of pious obligation does not apply. Challenging the non consideration, the material issue as to realization of money from the subject property to attach pending suit, the Second Appeal is being filed by the plaintiff.

6. This Court admitted the Second Appeal on the following substantial questions of law on 20.07.2018:

a. Whether the Lower Appellate Court is right in not confirming the findings of the Trial Court that the subject property of attachment pending suit was purchased by the late Paramasivam out of his self earned income in the name of the wife being the 1st respondent. The said estate having devolved upon the respondents after the life time of the deceased Paramasivam which is being enjoyed by the respondents, the respondents are liable to pay the suit decreed amount to the Appellant?

b. Whether the lower Appellate Court is right in not rendering a finding that the property only stood as benami in the name of the 1st respondent. The respondents having enjoying the estate left out by the deceased Paramasivam is coupled with the pious obligation to repay the entire amount from the date of borrowal to till the date of realization.

7. In spite of service of notice, the respondents have not chosen to appear. However, the matter is taken up for final hearing today.

8. Learned counsel for the appellant/ plaintiff vehemently contended that both the Courts below have concurrently found that the execution of the promissory note had been proved and that the plaintiff is entitled to recover the money. Further, the Trial Court has given a categorical finding that the property, which stands in the name of the mother, was purchased from and out of the earnings of the said Paramasivam in the name of his wife. It is also well settled that if benami fails to sue exempting the property purchased in the name of the wife from the purview of the Act, it shall be held to be the property of the said Paramasivam. With regard to doctrine of pious obligation, first Appellate Court has given a finding that the issue need not be gone into and a finding need not be given.

9. This Court is of the considered opinion that without a finding on the said issue, the fruits of the Decree cannot be



enjoyed by the plaintiff. Therefore, if at all, the issue to be decided based on the facts of law.

10. Learned Counsel highlighted on the judgment on this Court relied on in the case of R.N.Velu mani Vs. Narayanaswami Naidu @ Alias Raju Naidu & Another, reported in 1996 (I) CTC 220. However, the principle of pious obligation seems to have to an amendment introduced in 2005. Therefore, this issue should also to be gone into and decided by the first Appellate Court on considering the materials placed before it. Therefore, for the purpose of deciding the finding by the first Appellate Court on this aspect, the judgment and decree of the first Appellate Court stand set aside on that aspect alone and the matter is remanded back for a decision on the particular issue.

11. Accordingly, the Judgment and Decree of the first Appellate Court in respect of the particular issue alone stands set aside and the Second Appeal stands allowed to that extent. A further direction is given to the first Appellate Court to hear the matter on the issue as indicated above and render a judgment within a period of three months from the date of receipt of copy of this Judgment. There shall be no order as to costs. Consequently, the connected civil miscellaneous petition is closed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1. The II Additional District Cum Sessions Judge, Salem.
2. The Subordinate Judge, Mettur.

Copy To

3. The Section Officer,
VR Section,
Madras High Court,
Chennai. (Remand Back Matter)

S.A.No.337 of 2018 and
CMP No.9376 of 2018

SSI (CO)
GN(24/05/2022)