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CRP.No.2374/2014 & S.A.816 of 2013

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 14.07.2022

DELIVERED ON : 07.12.2022

CORAM:

THE HONOURABLE MRS.JUSTICE J.NISHA BANU

C.R.P.No.2374 of 2014
and M.P.No.1 of 2014
and Second Appeal No.816 of 2013
and M.P.No.1 of 2013

CRP.No.2374 of 2014:-

Sakkammal

..Revision Petitioner/Defendant

VS

V.Gopal

..Respondent/Plaintiff.

Civil Revision Petition filed under Section 115 CPC against the fair and decretal order of the learned District Munsif of Krishnagiri, dated 04.12.2013 in I.A.No.605 of 2013 in O.S.No.37 of 2007.

Second Appeal No.816 of 2013

1.V.Jothi (died)

2.N.Dhanalakshmi



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3.Venugopal

4.Srinivasan

5.Meena

..Appellants

Appellats 3 to 5 brought on record as LR's of the
deceased 1st appellant

Viz., Jothi vide order of court dated 18.1.2021. made
in CMP.No.9516/2019

In S.A.No.816 of 2013.

Vs.

1.Chandra

2.Gopal

3. Sakammal

..Respondents 1 and 2/Defendants 2 and 3

..3rd respondent/1st defendant.

Second Appeal filed against the judgment and decree dated
07.03.2013 made in Appeal Suit No.14 of 2011 on the file of the Court of
the Principal District Judge, Krishnagiri, reversing the judgment and
Decree dated 06.01.2011, made in O.S.No.155 of 2010 on the file of the
Court of Principal Subordinate Judge, Krishnagiri.

For Petitioner in CRP. : Mr.R.Sunil Kumar

For appellant in SA. : Mr.T.S.Baskaran

For respondents : Mr.P.Krishnan Seshadri for R1 and R2.
in CRP.

For respondent
in SA. : Mr.R.Sunil Kumar for R3



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COMMON JUDGMENT

Civil Revision Petition is filed against the dismissal of the petition in I.A.No.605 of 2013 in O.S.No.37 of 2007. The said petition was filed under Section 5 of the Limitation Act to condone the delay of 1903 days in filing petition to set aside the Exparte decree passed against the petitioner.

2. The facts necessary for the disposal of the revision petition is that the revision petitioner is the grand mother, and the respondent is the grand son. The averments raised in the revision petition is that the respondent/plaintiff, taking advantage of the fact that the petitioner/defendant is the aged illiterate women staying with his grandson/respondent, managed to project before the trial court as if the summon in the suit was served on the petitioner/defendant. On that basis, the petitioner was set exparte on 12.03.2007 in the suit.

3. It is also mentioned in the affidavit filed in support of the



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revision petition that the suit was presented in the court by the plaintiff/respondent on 12.02.2007. The petitioner/defendant was set exparte on 12.03.2007. Order 5 Rule 1 CPC mandates that 30 days time shall be given to the defendant to file his written statement.

4. The learned counsel for the revision petitioner also submitted that Order 9 Rule 6(C) of CPC provides for procedure to be followed by the court when the defendant is absent. Order 9 Rule 6(C) CPC reads as under:-

c)When summons served but not in due time-if it is proved that the summons was served on the defendant, but not in sufficient time to enable him to appear and answer on the day fixed in the summons, the Court shall postpone the hearing of the suit to future day to be fixed by the Court, and shall direct notice of such day to be given to the defendant.

5. The learned counsel brought to the attention of this court to the decision of this court in ***CRP.No.4324 of 2018 [Shanthimalai Trust Vs. Arunachala Education and Environment Development Trust]*** which decision has been rendered following a Division Bench judgment of this



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court in *Meenakshi Sundaram Textiles Vs. Valliammal Textiles*

[2011(3) CTC 168] wherein, it is held that proceeding ex parte within 30 days from the filing of the suit and granting ex parte decree is clearly illegal.

6. The learned counsel further submitted that yet another suit between these parties was filed on 08.05.2006 and was pending in O.S.No.155 of 2010 on the file of Sub Court, Krishnagiri. The said suit was filed for partition and common counsel represented defendant Nos.1 and 3 and there are possibilities for getting the signature of the petitioner/defendant in summons.

7. The learned counsel therefore argued that setting the petitioner/defendant ex parte is illegal in the eye of law and the length of delay in filing petition is secondary.

8. The impugned order passed in the civil revision petition is in



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I.A.No.605 of 2013 in O.S.No.37 of 2007.

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9. As far as O.S.No.37 of 2007 is concerned, the same is filed by the plaintiff/respondent herein against his grandmother/defendant. According to the plaintiff/respondent, Gift deed was executed by the defendant and registered on 23.02.2006 and the plaintiff has accepted the gift and obtained the possession and is in undisturbed possession and enjoyment of the same. While so, after 10 months from the date of Gift settlement deed, on 15.12.2006, the defendant without any right had executed a cancellation deed behind the back of the plaintiff and stated that the Gift settlement deed dated 23.02.2006 was cancelled.

10. In the order dated 04/12/2013 passed in I.A.No.605 of 2013 in O.S.No.37 of 2007, the learned Judge pointed out that the defendant even after receiving summons has not contested the suit; one Jothi and Dhanalakshmi also filed O.S.No.155 of 2010 against both the plaintiff and defendant herein and in the said suit (O.S.155/2010), the petitioner/defendant appeared on 20.11.2009, 14.12.2009 and deposed as



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D.W.2 and further signed on 23.02.2006 in the proof affidavit wherein the defendant submitted that on her own volition, she executed the settlement deed. Also submitted that cancellation of the settlement deed was obtained by her daughter Jothi and Dhanalakshmi by defrauding her. It is also submitted that the since her daughters had obtained the said cancellation deed by force, she did not appear before the court even after receiving summons in O.S.No.37 of 2007. In such circumstances, the learned Judge found that the argument of the petitioner/defendant that she was not aware of the proceedings and the exparte decree has been passed behind her back, cannot be accepted. On such findings, the learned Judge, dismissed the I.A.No.605 of 2013 by order dated 4.12.2013. The said order has been challenged by the revision petitioner in CRP.No.2374 of 2014. This court by order dated 17.07.2014, granted interim stay of the operation of the decree passed by District Munsif, Krishnagiri, dated 26/03/2007 in O.S.No.37 of 2007.

11. As far as Second Appeal No.816 of 2013 is concerned, it has been filed against the judgment and decree dated 07.03.2013 made in



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Appeal Suit No.14 of 2011 on the file of the Court of the Principal District Judge, Krishnagiri, reversing the judgment and Decree dated 06.01.2011, made in O.S.No.155 of 2010 on the file of the Court of Principal Subordinate Judge, Krishnagiri.

12. The suit in O.S.No.155 of 2010 has been filed for partition and separate possession of suit “A” “B” and “D” schedule properties. The defendants admitted the plaintiffs share in suit “A” and “D” schedule properties. They claimed that “B” schedule is the separate property of 1st defendant. On 06.01.2011, the trial court decreed the suit.

13. Aggrieved against the decretal of the suit, defendants 2 and 3 preferred appeal in A.S.No.14 of 2011 with respect to claim 'B' schedule properties alone. On 07.03.2013, the lower appellate court allowed the appeal and rejected the plaintiffs' claim in 'B' schedule property. Aggrieved by the same, the plaintiffs preferred the above Second Appeal.



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14. The appellants/plaintiffs contention is that their father deceased Narasimma Naidu was allotted suit "A" schedule property under the partition deed dated 11.11.1966 with his brothers. From the said properties, he earned surplus income. Out of the said income, he purchased the suit 'B' schedule properties in the name of his wife 1st defendant. During the lifetime of the father, B schedule properties were enjoyed as joint family property. Therefore, the settlement deed dated 23.02.2006 executed with respect to B schedule properties by the 1st defendant in favour of 3rd defendant grandson of 1st defendant through her daughter/2nd defendant is void and non est in law.

15. The learned counsel for the appellants contended that deed of cancellation of settlement deed was executed on 15.12.2006. Therefore, the 3rd defendant filed a suit in O.S.No.37 of 2007 for declaration that the cancellation of settlement deed is null and void. The 3rd defendant obtained an exparte decree dated 26.03.2007.

16. In the present suit i.e, in O.S.No.155 of 2010, the 1st defendant



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being a common counsel for 3rd defendant also got exparte decree, but on coming to know the same, the 1st defendant filed petition to set aside the same with delay and the same is subject matter in CRP.2374 of 2014.

17. According to the appellants, the plaintiffs have established that there were substantial ancestral nucleus yielding surplus income. The burden thus shifts onto the defendants to plead and prove that the 'B' schedule is the separate property of the 1st defendant, purchased out of her separate funds. Admittedly, the 1st defendant is illiterate and she has no source of income and is not aware how 'B' schedule properties were purchased.

18. The learned counsel relied upon the submissions made in written statement of the 3rd defendant, deposition of D.W.1 and submitted that 3rd defendant who was aged 3 years at the time of purchase of the suit 'B' schedule properties had no knowledge about the contribution made for the purchase and evidence contrary to pleadings cannot be relied upon.



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19. It is also submitted by the learned counsel that 1st defendant who was examined as D.W.2 in the cross examination submitted that she does not know how to write and speak Tamil. The chief examination of D.W.2 also reveal that the contents were translated and explained to the 1st defendant. D.W.2 also admitted that she has no knowledge about the contents of the proof. Therefore, the chief examination of the 1st defendant cannot be relied upon. The 1st defendant in her proof affidavit alleged that the suit 'B' schedule properties were purchased by her parents in her name. During her cross examination she deposed that she gave 15 sovereign jewels to her late husband, which was sold and properties were purchased in the name of the 1st defendant. She further deposed that she was not aware as to how much the jewels were sold for and if the said money was used by her husband to purchase the 'B' Schedule properties. Therefore, D.W.2 is unable to state as to how the suit 'B' schedule properties were purchased. Moreover there are no pleadings that from gold jewels, B schedule properties were purchased. No amount of evidence can be relied upon when there is no pleading to



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that effect. The 1st defendant admitted that all the properties were enjoyed in common and managed and administered by her husband, which proves that the B schedule properties are joint family properties.

20. It is also argued that the plaintiffs examined the vendors and document writer (P.W.2 to P.W.4) in Ex.A.7 to A.10 (Sale deeds in the name of 1st defendant) who deposed that the deceased father paid the consideration to the vendors. The said sale deeds also mentioned that the deceased father paid for the stamps. The pleadings of the plaintiffs is that 'B' schedule properties were purchased with the aid of ancestral nucleus. However, the property though purchased in the name of a female member (1st defendant), is a Joint Family property available for partition. The suit is decreed as against 'A' and 'D' schedule properties, therefore, the properties purchased from the income of the said properties, is also liable to be partitioned. The plaintiffs have discharged their initial burden to prove that the 'B' schedule properties were purchased from the joint family nucleus and that there were surplus income from the nucleus to make the purchase. The said fact that surplus joint family nucleus existed



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was admitted by the defendants.

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21. The learned counsel for the appellants relied on the following decision :-

(i) (2008) 17 Supreme Court Cases 491 [Bachhaj Nahar Vs. Nilima Mandal and another].

22. The learned counsel for the respondents would submit that it is not the case of the plaintiffs that Narasimma Naidu had purchased B schedule in the name of his wife D1 from the income derived out A schedule. In the absence of any plea, no evidence or findings are permissible. As per Section 3 of the Act, 1988, there was a presumption that the sale deeds in the name of wife is for her benefit. There is a statutory presumption that the purchase made in the name of D1 is for her benefit as per Section 3(2) of the Act, 1988. The burden of proving that the purchase under Ex.A.7 to Ex.A.10 is benami is on the plaintiffs since they asserts the said stand. The burden has not been discharged by



adducing legal evidence.

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23. The learned counsel submitted that the claim of benami transaction taken by the plaintiffs is an offence under Section 3(3) of the Act, 1988. Thus, the claim of the plaintiffs is against law and totally misconceived. The plaintiffs have claimed that the income from A schedule had been utilized to purchase B schedule in the name of D1. Indisputably, the plaintiffs have not let in any piece of evidence to prove that the suit A schedule had yielded 'surplus income' to purchase the suit B schedule. The burden of proof is very strict on the person who sets up a case that the property in the name of a female member of the family is to be treated as joint family property. In the present case, there is no pleadings or evidence to prove the claim of the plaintiffs.

24. The burden of proof is very strict on the person who sets up a case that the property in the name of a female member of the family is to be treated as joint family property. In the present case, there is no pleadings or evidence to prove the claim of the plaintiffs. Even the entire



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reading of the cross examination of P.W.2 to P.W.4 would show that the plaintiffs have miserably failed to prove their claim that the suit B schedule is the joint family property. First defendant was examined as D.W.2 in the suit, wherein, she has categorically deposed about her source to purchase B schedule. Further she has categorically deposed about the execution of the settlement deed dated 26.02.2006 (Ex.B.1) to 3rd defendant i.e., her grand son in her chief examination itself.

25. The learned counsel for the 3rd respondent relied on the following decisions:-

(i) 2022 (3) LW 400 [Munian and others Vs. Bhavani and others]

(ii) CRP.No.4324 of 2018 [Shanthimalai Trust Rep. By its Managing Trustee, Shiva Nagar, Thiruvannamalai Vs. 1.Arunachala Education and Environment Development Trust (AEED Trust)].

The learned counsel submits that as per Section 4 of the Benami Transactions (Prohibition) Act, 1988, there is a prohibition of right to recover property held benami and the same is applicable to suit, claim or



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action pending on the date of commencement of the Act.

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26. Heard both sides and perused the records carefully.

27. The first appellate court held that the plaintiffs sought for partition and permanent injunction in respect of B schedule properties. However, B schedule properties are not joint family properties. In contrary, B Schedule properties does not belong to Narasimma Naidu, but the said properties are owned by the first defendant-Sakkammal. The first defendant Sakkammal by way of Settlement deed settled the said B Schedule property to 3rd Defendant Gopal and subsequently Patta has also been transferred in the name of 3rd defendant who is also in possession of the said property and the same has been proved by evidence.

28. The learned Judge, First Appellate Court, pointed out that while the 1st defendant Sakkammal was not well, under the guise of taking her



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to hospital for treatment, plaintiffs who are the daughters of 1st defendant obtained first defendant's signature and also cancelled the settlement deed executed in favour of 3rd defendant and in respect of the said act of the plaintiffs, 3rd defendant filed a suit in O.S.No.37 of 2007. The said suit has been decreed in favour of the 3rd defendant-Gopal. In such circumstances, it was held that the 3rd defendant is in possession of B Schedule property and therefore, the plaintiffs are not entitled for the relief of Permanent Injunction.

29. The learned Judge also held that the trial court without properly appreciating the evidence on record, came to the conclusion that B schedule properties is subject to division of properties among plaintiffs and defendant and passed the decree in O.S.No.155 of 2010 holding B schedule properties are available for partition in respect of plaintiffs also and the plaintiffs are entitled to permanent injunction, which findings are not sustainable and hence, set aside the same.

30. In such view, the lower appellate court, set aside the judgment



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and decree in respect of B Schedule properties. Since there was no appeal as against the decree passed in favour of the 3rd defendant in O.S.No.37 of 2007, the lower appellate Judge held that the properties in B Schedule are of 1st defendant – Sakkammal and the same has been settled in favour of 3rd defendant.

31. In my considered opinion, the findings of the learned First Appellate Judge is perfectly in order and I do not find any infirmity or illegality to interfere with the same. Accordingly, the Second Appeal is dismissed.

32. In the result, there is no merit in the Second Appeal and accordingly, the same is dismissed.

33. The findings of learned Judge, while dismissing I.A.No.605 of 2013 and rejecting the petition to condone the delay is that the reasons stated by the defendant/revision petitioner that she has not been served summons and that exparte decree has been passed behind her back, has



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not been accepted and the learned Judge rejected the prayer of the revision petitioner/defendant. The findings given by the learned Judge in this regard is well founded. This court has no reasons to entertain the civil revision petition. Accordingly, this civil revision petition is dismissed. No costs.

07.12.2022

Index:Yes/No

Speaking/Non-speaking

nvsri

To

- 1.The learned District Munsif, Krishnagiri,
 - 2.The learned Principal District Judge, Krishnagiri,
 - 3.The learned Principal Subordinate Judge, Krishnagiri.
 - 4.The Section Officer
- V.R.Section, High Court of Madras.



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J.NISHA BANU, J.

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