



A.S.(MD)No.51 of 2018

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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RESERVED ON : 13.10.2022

PRONOUNCED ON : 23.11.2022

CORAM

THE HONOURABLE MR.JUSTICE K.MURALI SHANKAR

A.S.(MD)No.51 of 2018
and
C.M.P.(MD) No.2806 of 2018

A.Raju : Appellant / 1st Defendant

Vs.

1.Parasakthi : 1st Respondent / Plaintiff

2.R.Chandrasekar

3.Sumathi

4.Chitra

: Respondents 2 to 4/
Defendants 2 to 4

PRAYER:- Appeal Suit filed under Section 96 of the Code of Civil Procedure against the Judgment and Decree, passed in O.S.No.29 of 2013, dated 20.12.2017, on the file of IV Additional District Court, Madurai.



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For Appellant : Mr.J.Gunaseelan Muthiah

For Respondents :Mr.J.Paresh Kumar
for Mr.A.S.Amirtha Raj
for R.1
: R.2 given up

: No Appearance for R.3 and R.4

JUDGMENT

The Appeal Suit is directed against the judgment and decree passed in O.S.No.29 of 2013, dated 20.12.2017, on the file of VI Additional District Court, Madurai.

2. The gist of the plaint is as follows:

The suit property was purchased by the plaintiff and the first defendant on 12.09.1972 jointly and since then, they have been in joint possession and enjoyment of the same. The plaintiff, wife of the first defendant is a retired Headmistress of Government School, Melur. The first defendant after working in Statistical Department, had retired. Both of them by using their earnings, have constructed buildings and a compound of 14 houses and leased out to various tenants. Due to their wedlock, the defendants 2 to 4 were born to them and all of them got



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married and settled. Subsequently, there arose some disputes and issues between the plaintiff and the first defendant and due to the ill-treatment of the plaintiff and their son by the first defendant, they have shifted their residence to Madurai and are living separately. The plaintiff has been suffering from various old age health ailments and with the help of the pension amount, she could not meet out the medical expenses. The plaintiff's complaint to the police against the first defendant for returning of gold jewels was of no avail. The plaintiff came to know recently that the first defendant has been taking steps to alienate the suit property including the plaintiff's share to the third parties. Hence, the plaintiff is constrained to file the above suit for partition.

3. The defence of the first defendant is as follows:

The relationship between the parties is admitted. The suit property has been purchased by the first defendant with his separate income and the amount received by the sale of ancestral properties. The first defendant had no bad habits and worked hard and earned sufficient money for the family. The first defendant with his own money had constructed 14 houses and leased out the same and is receiving the rents. At the instigation of the plaintiff, their daughter-in-law Alagusudha has



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filed a petition in H.M.O.P.No.175 of 2013 against their son Chandrasekar and the same is pending. As of now, there is no need or necessity to effect the partition of the suit property and he is not having objection for his legal heirs to inherit the property after his life time. The plaintiff had been spending all her earnings including the retirement benefits towards the welfare of her sisters and their children. The plaintiff has not contributed any amount either for the purchase of the suit property or for the constructions made therein. Hence, the suit is liable to be dismissed.

4. The defence of the second defendant is as follows:

The suit property has been purchased by the first defendant with the help of the income derived from the joint family properties and subsequently, by utilizing the amount obtained by sale of the ancestral properties, had made constructions therein. Though the sale deed was taken in the joint name of the plaintiff and the first defendant, the plaintiff has not contributed any amount. The first defendant was having ancestral lands at Muthalaikulam and in Keelapatti Villages. The first defendant has been doing money lending business. The second defendant and his sisters are also entitled to get 1/4th share in the suit properties.



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The non-impleadment of the sisters of the first defendant is fatal to the suit. The plaintiff is not entitled to claim any share in the suit properties.

Hence, the suit is liable to be dismissed.

5. On the basis of the pleadings, the following issues have been framed by the trial Court:

- (1) Whether the suit property was purchased out of the funds derived by selling ancestral properties and from the self acquired properties of the defendant?
- (2) Whether the plaintiff is entitled for $\frac{1}{2}$ share in the suit property?
- (3) To what relief ?

6. Subsequently, the following additional issue was framed by the trial Court:

Whether the suit is bad for non-joinder of necessary parties?

7. After framing the above additional issue, the daughters of the plaintiff and the first defendant have been impleaded as defendants 3 and 4 and as rightly observed by the learned trial Judge that the said issue



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ceased to exist. The defendants 3 and 4 filed a memo stating that they are submitting to decree and that they have no objection to decree the suit as prayed for.

8. During trial, the plaintiff has examined herself as P.W.1 and his brother Shanmuga Ravi as P.W.2 and exhibited 6 documents as Exs.A.1 to A.6. The defendants have examined the first defendant Raju as D.W.1 and exhibited 4 documents as Exs.B.1 to B.4. The learned trial Judge, upon considering the evidence both oral and documentary and on hearing the arguments of both sides, has passed the impugned Judgment dated 20.12.2017 granting preliminary decree for partition declaring that the plaintiff is entitled to $\frac{1}{2}$ share in the suit properties and permanent injunction restraining the first defendant from in any way alienating the plaintiff's $\frac{1}{2}$ share without permission of the plaintiff and for initiating the proceedings under Order 20 Rule 12 C.P.C., with regard to *mesne* profits. Aggrieved by the said Judgment and Decree, the first defendant has come forward with the present Appeal Suit.

9. In the Appeal Suit, the appellant/defendant has raised the following grounds:



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(1) The Judgment and Decree of the trial Court is against law, weight of evidence and facts of the case.

(2) The trial Court has erroneously shifted the burden of proof upon the first defendant, when there is no material produced to prove that the construction was made from the plaintiff's earnings also.

(3) The trial Court has failed to consider that the property was purchased by the first defendant from and out of his own funds jointly in his name and the name of his wife and as such, it is a benami transaction which is permissible under law.

(4) The plaintiff has failed to prove her case, but the trial Court erroneously decreed the suit on the basis of the presumption and assumption.

(5) The trial Court has failed to properly appreciate the evidence of D.W.1 as well as the documents marked on the side of the first defendant.

(6) The trial Court has erroneously given a finding that the matrimonial dispute pending between the second defendant and his wife has no relevance to the issue involved in the suit, ignoring that the core dispute arose between the plaintiff and the first defendant.



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(7) The trial Court has erroneously held that the first defendant has not proved his income by producing the bank accounts and statement. Hence, the appeal.

10. The points that arose for consideration are

(1) Whether the trial Court erred in deciding that the suit property was purchased by the plaintiff and the first defendant jointly, despite showing with ample evidence that the first defendant alone had purchased the property with his separate income and the income derived from the joint family properties and the amount obtained through the sale of ancestral properties?

(2) Whether the trial Court erred in placing the burden on the first defendant to prove that the suit property has been purchased by himself with his funds and without any contribution of the plaintiff, by overlooking the legal position that the plaintiff who filed the suit and claimed the relied is duty bound to prove the case?

(3) Whether the appeal is to be allowed?

11. For the sake of convenience and brevity, the parties will be referred as per their status/ ranking in the trial Court.



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Points 1 to 3:

12. The plaintiff – wife has laid the above suit against her husband, son and daughters claiming partition and allotment of $\frac{1}{2}$ share in the suit property, wherein the husband and the son are defending the suit, while the daughters are sailing with their mother. Admittedly, the sale deed dated 12.09.1972 in respect of the suit property stands in the name of the plaintiff and the first defendant. The case of the plaintiff is that herself and her husband – first defendant being the Government servants have purchased the suit property from their earnings and that therefore, she is entitled to get $\frac{1}{2}$ share in the suit properties.

13. The first defendant in the written statement has taken a stand that the suit property was purchased by him with the help of his separate income and the amount obtained by the sale of the ancestral properties. The second defendant in his written statement has taken a defence that the suit property was purchased by the first defendant with the income derived from the joint family properties and that subsequently the first defendant made constructions therein with the help of the amount obtained by the sale of joint family properties and that the money of the



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plaintiff was not at all utilized either for the purchase or for the constructions made in the suit property.

14. The first defendant, after filing of the written statement by his son, has filed the additional written statement, alleging that he had purchased the suit property as a vacant land with his self acquired earnings and the money obtained by the sale of ancestral properties and that he made constructions therein with the help of the income and sale of ancestral properties.

15. The defendants 1 and 2 have taken a stand that since the suit property was purchased, by also utilizing the amount obtained by the sale of ancestral properties, has acquired the character of ancestral properties and as such, the defendants 1 to 4 are entitled to get 1/4th share each in the suit property and the plaintiff is not having any right or share in the suit property.

16. Admittedly, the plaintiff has been in Government service, working as Headmistress from 1965 onwards. The first defendant, in his evidence would say that he was owning ancestral properties at



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Muthalaikulam and Keelapatti Villages of Usilampatty Taluk, that he had two brothers and three sisters, that they were having 4.59 acres of land in Muthalaikulam and 59 cents of dry lands in Keelapatti and that they have sold Keelapatti land on 23.12.1999 and the Muthalaikulam properties in 1976. The first defendant has only produced the copy of the sale deed dated 24.04.1976 and whereunder it is evident that the property was sold for Rs.6,000/-.

17. As rightly observed by the learned trial Judge, since the first defendant is having two brothers and three sisters, he would have received only $1/6^{\text{th}}$ share (not $1/5^{\text{th}}$ share as noted by the trial Judge). The defendants have not produced the sale deed dated 23.12.1999, in which the first defendant and his brothers and sisters had sold Muthalaikulam property. As already pointed out, the suit was filed on 12.09.1972. Neither the plaintiff nor the defendants 1 and 2 have furnished any particulars as to when the constructions were made in the suit property. Though the defendants 1 and 2 have alleged that the first defendant had used the income derived from the joint family properties for the purchase of the suit property, they have not elaborated anything further. The first defendant has not chosen to examine any of his sisters and brothers or



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any other person to show that there was income from the agricultural properties and that the same was shared among the brothers and sisters.

18. It is pertinent to note that the first defendant in his evidence would admit that the income from the joint family property was not given in cash, but only in kind. The first defendant has neither pleaded nor adduced any evidence to show as to the extent of land, the amount for which lease was given and the share allegedly received by the first defendant. As already pointed out, though the defendants 1 and 2 have also alleged that the amount obtained by the sale of the joint family properties were already utilized for making constructions, they have not raised the necessary pleadings nor produced any evidence to prove the same. In the written statement, the first defendant has taken a stand that he was also doing money lending business and while giving evidence, he would say that any Government servant has to get permission for taking or for giving any loan to the tune of Rs.5,000/-, but he would deny the suggestion that it is wrong for any Government servant to involve in money lending business by himself or through some others, in the absence of any permission for doing money lending business or through some other third parties. As rightly observed by the learned trial Judge,



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the first defendant cannot be permitted to take advantage of his own wrong to win over his case by making a plea that he earned through money lending business, which is impermissible.

19. Moreover, the first defendant has only produced two promissory notes alleged to have been executed by P.W.2 dated 01.06.2000 and 10.07.2000, who is admittedly relative of the plaintiff. Except the above two promissory notes, the first defendant has not produced any other promissory notes executed by any other third party or any other document to prove the alleged money lending business.

20. No doubt, the plaintiff as well as the first defendant are making allegations and counter allegations against each other. According to the first defendant, at the instigation of the plaintiff, their daughter-in-law has filed a case in H.M.O.P. 175 of 2013 against the second defendant and that the plaintiff has been residing with her daughter-in-law separately. As already pointed out, the defendants 3 and 4 – the daughters of the plaintiff and the first defendant had entered into appearance and filed a memo submitting to decree.



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21. On considering the entire evidence adduced, this Court is of the clear view that the first defendant has miserably failed to prove that the suit property was purchased by him and the constructions were made therein with his own funds and without any contribution from plaintiff. But on the other hand, since the plaintiff and the first defendant have specifically admitted that they were living together and were in Government service and that the property was purchased in the joint names of the plaintiff and the first defendant, the finding of the trial Court that the suit property was purchased and the constructions were made therein by the contributions made by the plaintiff also and as such, the plaintiff is entitled to $\frac{1}{2}$ share in the suit property, cannot be found fault with.

22. The learned Counsel for the appellant would contend that the trial Court has erroneously shifted the burden of proof upon the first defendant by overlooking the legal position that the plaintiff is to prove their case. The learned Counsel has also relied on the decision of the Hon'ble Supreme Court in ***Union of India (UOI) and Others Vs. Vasavi Co-op. Housing Society Ltd., and Others*** reported in ***AIR 2014 SC 937***, wherein the Hon'ble Supreme Court has reiterated the legal position that



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in a suit for declaration of title, burden always lies on the plaintiff to make out and establish a clear case for granting such a declaration and the weakness, if any, of the case set up by the defendants would not be a ground to grant relief to the plaintiff and that the plaintiff in a suit for declaration of title and possession could succeed only on the strength of its own title and that could be done only by adducing sufficient evidence to discharge the onus on it, irrespective of the question whether the defendants have proved their case or not. The Hon'ble Supreme Court has specifically held that such a position is applicable for the suit which is filed for declaration of title and possession.

23. In the case on hand, the suit is for partition. It is settled law that in a partition suit, there is no much difference in the plaintiff and defendant and that plaintiff is a defendant and defendant is a plaintiff. Moreover, in the present case, since the first defendant has taken a defence that he purchased the suit property and made constructions therein with his own funds, taking note of the fact that the sale deed in respect of the suit property stands in the names of both the plaintiff and the defendant, the learned trial Judge has rightly placed the burden on the first defendant and as such, the same cannot be found fault with.



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24. The learned Counsel for the appellant would contend that the purchase made by the first defendant is a benami transaction and the same is very much permissible under law. It is necessary to refer the Section 3(1) and (2) of Benami Transactions (Prohibition) Act, 1988, which are as follows:

“(1) No person shall enter into any benami transaction.

(2) Nothing in sub-section(1) shall apply 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 or the unmarried daughter.”

25. The Hon'ble Supreme Court in ***Nand Kishore Mehra vs Sushila Mehra*** reported in ***AIR 1995 SC 2145***, has held as follows:

“Since the plaintiff is the husband who had the right to enter into a benami transaction in the matter of purchase of property in the name of his wife or unmarried daughter, as we have held earlier, he is entitled to enforce his rights in the properties concerned if he can succeed in showing that he had purchased them benami in the name



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of his wife. But in view of the statutory presumption incorporated in sub-section (2) of [section 3](#) of the Act, he can get relief sought in the suit only if he can prove that the properties concerned had not been purchased for the benefit of the wife, even if he succeeds in showing that the consideration for the purchases of the properties had been paid by him.”

26. No doubt, any person can purchase the property in the name of his wife or unmarried daughter and subsequently can claim right over the property by showing that he had purchased the property benami in the name of his wife or unmarried daughter, but at the same time, he has to prove that the property had not been purchased for the benefit of his wife or unmarried daughter.

27. In the case on hand, as already pointed out, even assuming for arguments sake, that the first defendant has proved that he had purchased the suit property and made constructions with his own funds, even then, in order to claim that property, in view of the statutory presumption incorporated under Section 3(2) of the said Act, the first defendant has to prove that the suit property had not been purchased for the benefit of the



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plaintiff. In the case on hand, the first defendant has neither raised any pleadings nor adduced any evidence in this regard. Viewing from any angle, it is very much clear that the first defendant is not entitled to claim the suit property absolutely. Hence, this Court concludes that the above Appeal Suit is devoid of merits and the same is liable to be dismissed.

28. In the result, the Appeal Suit is dismissed and the Judgment and Decree dated 20.12.2017, passed by IV Additional District Judge, Madurai, in O.S.No.29 of 2013 is confirmed. Consequently, the connected Miscellaneous Petition is dismissed. The parties are directed to bear their own costs.

23.11.2022

Index : Yes : No

Internet : Yes : No

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To

1. IV Additional District Madurai, Madurai,

2. The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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K.MURALI SHANKAR,J.

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PRE-DELIVERY JUDGMENT MADE IN

A.S.(MD)No.51 of 2018

23.11.2022