



S.A.No.494 of 2006

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 14.02.2023

PRONOUNCED ON : 25.05.2023

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No.494 of 2006

and

C.M.P.No.6229 of 2006

Ramasamy

...Appellant

-vs-

- 1.A.Periyasamy (died)
- 2.Pavayammal
- 3.Thangamani
- 4.Saraswathi
- 5.Thulasimani
- 6.Jayalakshmi
- 7.P.Vignesh

(R6 and R7 have been impleaded
vide order dated 07.03.2013)

(R7 has been declared as Major
and R6 has been discharged from
guardianship vide order dated
30.10.2014)

... Respondents



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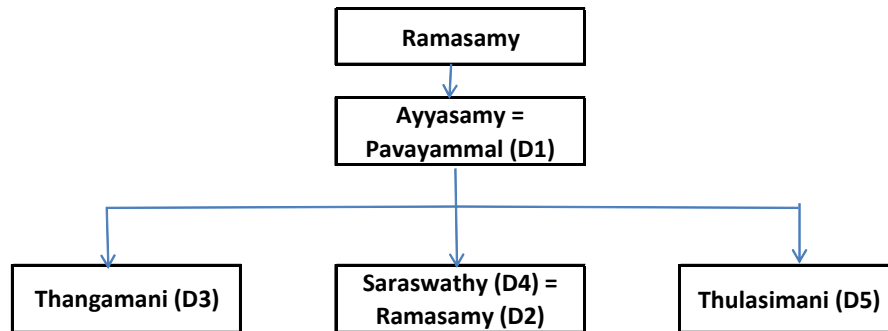
Prayer: Second Appeal is filed under Section 100 of C.P.C to set aside the judgement and decree of the learned Principal District Judge, Erode in A.S.No.55 of 2004 dated 22.08.2005 confirming the judgment and decree of the learned II Additional Sub Judge, Erode in O.S.No.394 of 2000 dated 18.09.2003.

For Appellant	: Mr.N.Manokaran
For R1	: Died
For R2	: No appearance
For R3 to R5	: Given up
For R6 & R7	: Mr.A.Sundaravadhanan

JUDGEMENT

Challenging the concurrent judgment and decree passed in a suit O.S.No.394 of 2000 filed for partition by the first respondent/the plaintiff, the second defendant is before this Court.

2.The facts in brief, which are necessary for appreciating the case on hand, are detailed below. For a proper appreciation of the relationship between the parties, a short genealogy of the parties to the proceedings is herein below given.



PLAINTIFF'S CASE:-

3.It is the case of the plaintiff that his father, Ayyasamy Gounder owned extensive ancestral agricultural lands and a residential property in Elumathur Village. Under a sale deed dated 15.05.1946, Ayyasamy Gounder had sold his entire properties in favour of one Chidambara Gounder for a total sale consideration of Rs.1,850/-. A portion of this amount was used by the said Ayyasamy Gounder for setting up a grocery shop and with the remaining, he had purchased a vacant site, measuring an extent of 150 ft * 30 ft. (5400 sq.ft.,) under a sale deed dated 29.08.1951. He had put up a terraced building. The front portion of the building was being used for running the business and the rear portion was being used as



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the residence. The said Ayyasamy Gounder had borrowed amounts extensively from the third parties for putting up the construction and for running his business. Unfortunately, the business did not yield income as expected and Ayyasamy Gounder sustained huge losses and between 1955 and 1960, several suits were initiated against Ayyasamy Gounder.

4.Ayyasamy Gounder was declared as insolvent in I.P.No.10 of 1956. His property was sold through Court auction pursuant to the decree in the suit O.S.No.379 of 1960 in favour of Muthusamy Gounder. By sale deed dated 29.06.1961, the western half of the property was sold to discharge the debts. On 10.06.1965, Ayyasamy Gounder for himself and on behalf of his minor sons, Palanisamy and Periyasamy (the plaintiff herein) had sold the remaining property. The said Ayyasamy Gounder had discharged some of his debts and fearing that his creditors would take away property standing in his name, the said Ayyasamy had purchased the vacant site of the suit property in the name of his wife, the first defendant herein. The sale consideration for the purchase of this vacant site on 11.06.1995 was paid



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from out of the sale proceeds received by him under the sale deed dated 10.06.1965. Thereafter, Ayyasamy Gounder has constructed a thatched shed and a calicut tiled house on this property.

5.In the year 1982, Ayyasamy Gounder died intestate leaving behind him surviving the plaintiff and the first defendant as his only legal heirs. On 22.01.1990, the plaintiff and the first defendant had paid a sum of Rs.40,000/- and obtained release from the other son, Palanisamy Gounder. The plaintiff would submit that he had spent over a sum of Rs.50,000/- on the property to put up a powerloom shed. The plaintiff would further submit that the first defendant was originally living with him, but in the Tamil month of Chithirai, 1997, on account of the ill-feeling between herself and the plaintiff's wife, she had left the plaintiff's house and had gone to live with her daughter, the third defendant and her husband, the second defendant. Thereafter, under two sale deeds dated 11.11.1997 and 09.12.1998, the first defendant had conveyed the suit schedule properties to the second defendant. It is the case of the plaintiff that he has spent over a sum of



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Rs.50,000/- and put up the powerloom shed in the property. He has got 42/90 share in the suit property and the defendants have a 12/90 share each. Therefore, the plaintiff has come forward with the above suit.

WRITTEN STATEMENT FILED BY THE FIRST DEFENDANT:-

6.The first defendant had filed a written statement *inter alia* denying the various contentions set out in the plaint and the fact that the property belonged to the joint family. It is the case of the first defendant that the suit property was purchased from and out of her funds and the amounts given by her family. She would submit that she has all along asserted her right as the true owner of the property by mortgaging the same, redeeming it, etc. It is her further case that she has sold the property to the second defendant for valid consideration and that it is the second defendant, who is now in possession and enjoyment of the suit schedule property.

7.She would further submit that the revenue records all along



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remained only in her name and after the sale in favour of the second defendant, the records were mutated in his favour. She denied the allegation contained in the plaint that her other son, Palanisamy Gounder had executed the release deed in her favour and in favour of the plaintiff in respect of the suit schedule property. It is her case that the suit schedule property does not form part of the properties that had been released under the said deed dated 22.01.1990.

8.She would further submit that the second defendant was living at Salem with his family and since the plaintiff was already in possession of the property, he had leased out the same to the plaintiff on a monthly rental of Rs.1,500/-. The monthly rent was fixed at Rs.1,000/- for the godown and Rs.1,500/- for the other tenants.

9.The plaintiff had collected the rents from the other tenants and paid it to the second defendant. This has been done irregularly and finally, since the plaintiff was not paying the rent, the second defendant had demanded



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that the plaintiff should vacate the premises and hand over the possession to him. It is angered by this demand that the present suit has been filed. In fact, the first defendant had submitted that the suit filed without declaring the sale deeds in favour of the second defendant as null and void is not maintainable.

WRITTEN STATEMENT FILED BY THE 2ND DEFENDANT:-

10.The second defendant had filed a written statement, which is more or less on the same lines as that of the 1st defendant. He would reiterate that the 1st defendant was compelled to sell the property only to settle the earlier debts payable by her to third parties.

TRIAL COURT:-

11.The learned II Additional Subordinate Judge, Erode before whom the suit registered as O.S.No.394 of 2000 was instituted had framed the following issues:-

“1) வாதி தாவாவில் சூகாரியபடு பாகப் பிரிவனை பரிகாரம்



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பேற அருகதைருடையவரா?

2) வாதி தாவாவில் சூகாரியபடு நிரந்தர உறுத்துக் கட்டளைப் பரிகாரம் பேற அருகதைருடையவரா?

3) வேறு என்ன பரிகாரம்? ”

12.On the side of the plaintiff, the plaintiff had examined himself as P.W1 and one Chinnusamy was examined as P.W2 and 16 documents were marked as Ex.A1 to Ex.A16. On the side of the defendants, the second defendant had examined himself as D.W1 and one Palanivel was examined as D.W2 and 6 documents were marked as Ex.B1 to Ex.B6. The learned II Additional Subordinate Judge, Erode on considering the evidence on record proceeded to decreed the suit.

APPELLATE COURT:-

13.Aggrieved by the same, the second defendant had filed an appeal in A.S.No.55 of 2004 on the file of the Principal District Court, Erode. The learned Principal District Judge, Erode had also confirmed the judgment and

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decree of the trial Court and dismissed the appeal filed by the second defendant, aggrieved by which, the appellant, the second defendant, is before this Court.

SECOND APPEAL:-

14.The second appeal has been admitted on the following substantial question of law:-

“Whether the Courts below are justified in decreeing the suit overlooking that the plea of benami is not open to plaintiff in view of Section 4 of Benami (Prohibition) Transaction Act, 1988 (Act 45/1988).”

SUBMISSIONS:-

15.Mr.N.Manoharan, learned counsel appearing on behalf of the second defendant/appellant would submit that although a plea of benami has been pleaded by the plaintiff, it has not been proved in the manner known to law and particularly in the light of the judgment of the Hon'ble Supreme Court in *Mangathai Ammal (died) through legal representatives and*

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others Vs. Rajeswari and others reported in *(2020) 17 Supreme Court Cases 496*. In support of this plea, he would also rely upon the judgment of the Hon'ble Supreme Court in *P.Leelavathi (dead) by legal representatives Vs. V.Shankarnarayana Rao (dead) by legal representatives* reported in *(2020) 19 Supreme Court Cases 816*.

16.He would argue that right from the date of purchase, the second defendant has been exercising his right as a purchaser and has been dealing with the property. Under Ex.B5, mortgage deed, the first defendant has mortgaged the property and her husband, Ayyasamy Gounder signed as a witness to the said mortgage. In the said mortgage deed, she has described that the property is her self acquired property and the same has been tacitly accepted by her husband, late.Ayyasamy Gounder. Thereafter, under Ex.B6, there has been a redemption of the said mortgage deed. He would further submit that in the light of the above and considering the fact that all the revenue records stand in her name, the Courts below have clearly erred in coming to the conclusion that the property in question is the joint family



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property and also liable for partition.

17.*Per contra*, Mr.A.Sundaravadhanan, learned counsel for the respondents 6 and 7 would submit that the judgment and decree of both the Courts below have to be upheld for the following reasons:-

- a) The entire property was being enjoyed by the joint family and
- b) The money, which was used for purchasing the property, has come from the sale deed executed by Ayyasamy Gounder under Ex.A1.

18.The learned counsel would further submit that on the very next day, after Ex.A1, the property has been purchased in the name of the second defendant. In the plaint, it is stated that the reason for purchasing the property in the name of his wife is on account of the various litigations and insolvency proceedings that were pending against the plaintiff and in order to secure the property from the creditors, the same was purchased in the name of the second defendant's wife.

19.The plaintiff has been in continuous possession without any

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disturbance till the sale by the first defendant in favour of the second defendant and the suit has been instituted immediately thereafter. The respondents had taken out a plea that the suit property has been leased by the second defendant in favour of the plaintiff which has not been proved. That apart, the plaintiff has not been able to prove the description of the property, over which he claims a right. In support of his contention, he would rely upon the judgment of the Hon'ble Supreme Court in ***Vinod Kumar Dhall Vs. Dharampal Dhall (deceased) through his legal representatives and others*** reported in ***(2018) 16 Supreme Court Cases 645***, particularly in paragraph Nos.10 and 11, which reads as under:-

“10. The learned counsel for the appellant had relied upon the decision in Surendra Kumar V. Phoolchand (Dead) Through Lrs & Anr. (1996) 2 SCC 491 in which this Court had laid down that there is no presumption that a family, because it is joint, possessed the joint property and therefore the person asserting the property to be joint had to establish that the family was possessed of some property with the income of which the property could have been acquired. But where it is established or admitted that the family which



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possessed joint property which from its nature and relative value may have formed sufficient nucleus from which the property in question may have been acquired, the presumption arises that it was the joint property and the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family. When the property was purchased by Manager of the joint family in the name of the appellant who was then minor in the absence of material to establish that consideration money was paid out of separate funds, it was opined that the property was rightly held to be the joint property by the courts below.

11.In Union of India V. Moksh Builders & Finannnciers Ltd. & Ors. (1977) 1 SCC 60, this Court has observed that where it is asserted that an assignment in the name of one person is in reality for the benefit of another, the real test is the source whence the consideration came as also to find out who has been in the enjoyment of the benefits of the transaction. The case of the appellant must be dealt upon the reasonable probabilities and legal inferences arising from proved or admitted facts. The burden of proof is not static



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and may shift during the course of the evidence. Thus, while the burden initially rests on the party who would fail if no evidence is led at all after the evidence is recorded, it rests upon the party against whom judgment would be given if no further evidence were adduced by either side on the evidence on record. Once the evidence has been adduced the case must always be adjudged on the evidence led by the parties.

20. Heard the learned counsels appearing on either side and perused the records.

21. The entire issue revolves around whether the property purchased in the name of the second defendant under Ex.A4 dated 11.06.1965 is her own property or whether it is purchased benami in her name by her husband. In the judgment reported in ***(2020) 19 Supreme Court Cases 816 [Smt. P.Leelavathi (D) By Lrs. vs V.Shankarnarayana Rao(D) By Lrs]***, the Hon'ble Supreme Court has considered the issue as to whether the transaction made with the financial assistance given by the father to the son to purchase the properties can be treated as benami transaction. The learned Judge has relied



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upon the earlier judgments and taken into consideration the circumstances as set out in the ***Binapani Paul's case [2007 (6) SCC 100]***, which is extracted herein below:-

- “(1) the source from which the purchase money came;*
- (2) the nature and possession of the property, after the purchase;*
- (3) motive, if any, for giving the transaction a benami colour;*
- (4) the position of the parties and the relationship if any, between the claimant and the alleged benamidar;*
- (5) the custody of the title deeds after the sale and*
- (6) the conduct of the parties concerned in dealing with the property after the sale.”*

22.This dicta has been followed in all the judgments relating to benami transactions. Before proceeding to discuss the instant case in relation to the above circumstances, certain facts have to be taken note of.

23.It is the plaintiff's specific case that the entire ancestral property



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had been sold by Ayyasamy Gounder as early as in the year 1956 and from out of the sale consideration, he had purchased the vacant site and he has started his business. It is his further case that the business had not progressed as expected for which he owed money to several persons, which had led to the filing of an insolvency petition, where he was declared as insolvent. Therefore, it is crystal clear that Ayyasamy Gounder did not have the necessary wherewithal.

24.The plaintiff would try to draw support for his contention that the property has been purchased from out of the income of Ramasamy Gounder by relying upon Ex.A3, sale deed, in which he has been given a cash of Rs.3,500/- and the property in favour of the first defendant has been purchased under Ex.A4 on the very next day for a sum of Rs.2,000/-. Therefore, it is the contention of the plaintiff that the property has been purchased from and out of the income of Ayyasamy Gounder and has therefore purchased benami in her name.



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25.It is seen that the first defendant has been asserting her right as the true owner of the property by mortgaging the property under Ex.B5 on 22.03.1973. This document has been witnessed by Ayyasamy Gounder, the husband of the first defendant and the father of the plaintiff. In the recitals of this deed, the first defendant has described the property as her self acquired property. The loan has also been redeemed under Ex.B6. Thereafter, under Ex.A7 and Ex.A8, Pavayammal has sold the property to the 1st defendant. Therefore, applying the circumstances set out in the *Leelavathi case*, it appears that the property after the purchase by the first defendant was being enjoyed as her exclusive property, which is evident from the fact that she has mortgaged the property and thereafter redeemed it. Therefore, the nature and possession of the property by the first defendant were never as a benami of the deceased husband, but in her own capacity as owner of the property.

26.The plaintiff has not referred to the mortgage by his mother under



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Ex.B5 or its redemption under Ex.B6. The title deed has been produced by the plaintiff. However, it is to be noted that the plaintiff was living with his mother and continued to live there after she had left the said property to live with her daughter, the third defendant and wife of the second defendant. Therefore, the production of the original sale deed by the plaintiff may not be a clinching evidence to show that the property was purchased benami in the name of the mother, particularly in the light of the fact that the father under Ex.B5 has acknowledged the statement of his wife that the property belonged to her exclusively. He did not challenge the statement till his death in the year 1982.

27.Further, it is the case of both P.W1 as well as D.W1 that there was no ill feelings between the parties. Further, the plaintiff has not sought for declaration that the sale deed executed in favour of the second defendant is null and void. The ancestral character of the property of late Ayyasamy had lost its character upon the sale in the year 1946. Even the property that has been purchased by Ayyasamy Gounder under Ex.A2 has been sold to meet

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his debts, the plaintiff has not been able to prove the fact that it is the ancestral nucleus that was gone into the purchase of the property, since the sale is in the year 1946 and the purchase of the vacant site was only in the year 1951 and there is no details to show when the grocery business was started and what was the income that had been pumped into this business. Admittedly, the grocery business was running at a loss even according to the plaintiff. Therefore, the substantial question of law is answered against the plaintiff.

28.In fine, the Second Appeal is allowed and the judgement and decree of the learned Principal District Judge, Erode in A.S.No.55 of 2004 dated 22.08.2005 confirming the judgment and decree of the learned II Additional Sub Judge, Erode in O.S.No.394 of 2000 dated 18.09.2003 is hereby set aside. However, there shall be no order as to costs. Consequently, connected Miscellaneous Petition is closed.

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Index : Yes / No
speaking Order : Yes / No

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Neutral Citation : Yes/No
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To

- 1.The Principal District Judge,
Erode.
- 2.The II Additional Subordinate Judge,
Erode.
- 3.The Section Officer,
V.R.Section,
High Court, Madras -104.



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P.T.ASHA, J.,

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Pre-delivery Judgment in
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