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CMA No.1046 of 2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 23.01.2023

PRONOUNCED ON : 01.02.2023

CORAM

THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN

CMA No.1046 of 2020
and CMP No.6638 of 2020

Tmt.Rathinam @ Rathinammal (Died)

1. Tmt.Mallika
2. Tmt.G.S.Padmajothi
3. Tmt.Parameswari

... Appellants/Defendants

Vs.

Thiru.G.K.Chenniappan (Died)

1. Thiru.G.S.Balasubramaniam
2. Thiru.G.Garunaharan

... Respondent/Plaintiff
... Respondent/Defendant

PRAYER: This Civil Miscellaneous Appeal is filed under Order 43 Rule 2 of Civil Procedure Code, against the fair and decretal order dated 01.11.2019 passed in I.A.No.545 of 2011 in O.S.No.268 of 2007 on the file of the learned 3rd Additional District and Sessions Judge, Gobichettipalayam at Erode District.

For Appellants : Mr.P.V.Ramachandran
For Respondents : Mr.N.Manokaran (For R1)
Mr.I.C.Vasudevan (For R2)



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JUDGMENT

Legal representatives of the sole defendant, are the appellants herein.

2. One GK Chenniappan appears to have filed a suit in O.S.No.268 of 2007 before the learned 3rd Additional District Judge, Gobichettipalayam at Erode, seeking declaration of his title to the suit property and for permanent injunction of the scheduled property on the ground that the 1st defendant is his wife, the defendants 2 to 4 are his daughters and 5th defendant is the son of his pre-deceased daughter.

3. The plaint proceeds on the basis that the plaintiff had purchased the property on 04.09.1995, for a valid consideration of a sum of Rs.3,68,000/- and the eastern half with the tiled house was purchased in his name and the western half was purchased in the name of his wife. The specific plea of the original plaintiff is that the defendant was only a benamidar of the plaintiff and hence, he sought the relief.



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4. It appears that the suit was decreed exparte for non filing of the written statement by the defendant/wife. At the time of filing of the suit, the original plaintiff (husband) was aged about 78 years and original first defendant (wife) was aged about 74 years. The suit was decreed exparte on 15.04.2008 for non filing of the written statement. The defendants filed an application to set aside the exparte decree in I.A.No.545 of 2011 and the same was dismissed on 01.11.2019 and hence, the appeal.

5. Heard the learned counsel for the appellants and the respondents and perused the materials available on record.

6. From the records, I find that the suit was filed for declaration of title to suit properties and permanent injunction on 13.08.2007 with two petitions under Order 39 Rule 1 and 2 and Section 151 of CPC for ad-interim injunction which has been taken on file in I.A.No.486/2007 and I.A.No.487/2007. The above petitions were allowed on 09.04.2008 in which counter not filed. That on 09.04.2008, when the suit was posted for



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written statement of D1 to D5., written statement not filed and they were called absent, set exparte and posted for 11.04.2008 for exparte evidence. Then adjourned to 15.04.2008. On 15.04.2008, the 1st respondent was examined as PW1. Proof affidavit filed. Ex.A1 to Ex.A33 were marked. Suit was decreed as prayed with costs.

7. The lower Court record further reveals that since the plaintiff who is 1st respondent in this petition Thiru.G.K.Chenniappan expired on 10.03.2011, a petition under Order 22 Rule 4 of CPC was filed by 5th defendant on 21.10.2011 with a prayer to implead 2nd respondent who is son of 1st respondent. The same was taken on file in I.A.No.794/2011. In consequence a petition under Order 6 Rule 17 of CPC was filed by 5th defendant on 21.01.2017 with a prayer to amend this petition. The same was taken on file in I.A.No.166/2018 on 25.01.2018. The petition was allowed on 25.01.2018 since the other side endorsed as no counter.

8. Thereafter a petition under Section 5 of Limitation Act was filed with a prayer to condone the delay of 32 days for filing restoration



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application by 5th defendant on 06.09.2013. It was taken on file in I.A.No.1160/2013. The petition was allowed on 17.12.2015 based on the endorsement made by the other side as petition may be allowed. Two petitions were filed under Order 9 Rule 9 of CPC on 17.08.2012. Taken on file in I.A.Nos.563/2015 and 564/2015 and the same were allowed on 18.01.2016 since other side has no counter.

9. Learned counsel for the appellants could contend that original plaintiff/husband has taken a plea of benami against original defendant/wife and wife has not filed the counter since she was living with him. An opportunity has to be given to the 1st defendant, since being the mother she has settled some portion of the property in favour of her daughters/appellants herein.

10. The learned counsel for the respondent could contend that since written statement was not filed in time, the trial Court has rightly decreed the suit.



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11. After hearing the rival submissions and after perusing the records, I find that the husband aged 78 years has filed a suit against his wife aged 74 years and their daughters and son to declare that the property purchased in the name of his wife, is benami. After the Benami Prohibition Act, such a plea cannot be taken. Furthermore, I find that an opportunity to defend the case has to be given to the parties. From the records, both the original plaintiff/husband and original defendant/wife have passed away and daughters have filed the Civil Miscellaneous Appeal against the son. Since the appellants/defendants got settlement from their mother on whose name the property was purchased, I find that an opportunity has to be given to the daughters. Further, since written statement has been already been filed along with the petition to set aside the exparte decree and also the narration of facts as stated supra, compels this Court to allow this appeal.

12. Accordingly, the Civil Miscellaneous Appeal is allowed. The order passed in IA No.545 of 2011 in O.S.No.268 of 2007 dated 01.11.2019, is hereby set aside and I.A.No.545 of 2011 stands allowed. The exparte decree granted in O.S.No.268 of 2007 dated 15.04.2008, is set aside



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and the suit is restored to file. The trial Court is hereby directed to take on file the written statement and dispose of the suit on merits and in accordance with law, within a period of four months, after giving an opportunity to both parties. No Costs. Consequently, the connected Civil Miscellaneous Petition is closed.

01.02.2023

Index : Yes/No
Neutral Citation : Yes/No.
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To

The 3rd Additional District and Session Judge,
Gobichettipalayam at Erode.



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RMT.TEEKAA RAMAN,J.,

ars

Pre-delivery judgment in
CMA No.1046 of 2020

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