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S.A.No.224 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 17.11.2023

CORAM

THE HONOURABLE MR. JUSTICE S.SOUNTHAR

S.A.No.224 of 2017
and
CMP.No.5363 of 2017

Suresh Kumar

... Appellant

Vs.

Susmitha Devarajan

... Respondent

Prayer: Second Appeal filed under Section 100 of the Code of Civil Procedure, against the judgment and decree in A.S.No.3 of 2016 (Principal District Court, A.S.No.33/14), on the file of the II Additional District Court, Tindivanam and dated 01.12.2016 in confirming the judgment and decree in OS.No.35 of 2009 on the file of the Principal Subordinate Court, Tindivanam and dated 29.02.2012.

For Appellant : Mr.E.Prabu
for Mr.S.Thiruvengadam

For Respondent : Mr.M.Venkadesan



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JUDGMENT

The unsuccessful plaintiff is the appellant. He filed a suit for declaration of title and injunction against the respondent. The suit as well as the first Appeal preferred by him were dismissed. Hence, challenging the concurrent findings of the trial Court, he is before this Court.

2. The appellant and the respondent are husband and wife. According to the appellant/plaintiff, he is employed in United States and the suit property was purchased in the name of the appellant and the respondent by his father-in-law out of the funds sent by him to his father-in-law's account. It was specifically averred by the appellant that though sale deed in respect of the suit property jointly stands in the name of the appellant and the respondent, it was purchased only for the benefit of the appellant. Therefore, the appellant sought for declaration that he was the absolute owner of the suit property and for consequential injunction restraining the respondent from interfering with his alleged peaceful possession and enjoyment of the suit property.



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3. The respondent herein filed a written statement and denied the averment of the appellant as if the suit property was purchased out of the funds sent by the appellant from abroad. It was further claimed by the respondent that the suit property was purchased by her father out of his funds for the benefit of the respondent. Therefore, she sought for dismissal of the suit.

4. Before the trial Court, the father of the appellant was examined as PW1, three documents were marked on behalf of the respondent as Ex.A1 to Ex.A3. The respondent's father was examined as DW1 and the vendor of the appellant and respondent was examined as D.W.2. 11 documents were marked on behalf of the respondent as Ex.B1 to Ex.B11.

5. The trial Court on appreciation of oral and documentary evidence available on record came to the conclusion that the appellant failed to prove his case and consequently, dismissed the suit. Aggrieved by the same, the appellant preferred an Appeal in A.S.No.3 of 2016 on the file of the II Additional District Court, Tindivanam. The First Appellate Court also



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concurrent with the findings of the trial Court and dismissed the appeal.

Aggrieved by the concurrent findings against him, the appellant has come up with this Second Appeal.

6. At the time of admission, this Court formulated the following substantial questions of law:

“1. Whether the Courts below are right in not drawing adverse inference for non-examination of defendant in the absence of any power document or permission petition?

2. Whether documents produced to show that money was transferred to defendant's father for the sake of purchase of the suit property, are the Courts below right in overlooking the same and that when the amount transferred was admitted by DW1 himself?

3. When there was no specific denial by the defendant as regards the purchase of the suit property in his name only in the capacity as a benami, are the Courts below are right in dismissing the suit?”

7. The learned counsel for the appellant submitted that Ex.A2 &



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Ex.A3 the bank account and the statement regarding wire transfer service would establish that the appellant transferred a sum of Rs.10,47,500/- to the account of respondent's father and hence, the entire sale consideration for the purchase of the suit property has been provided by the appellant.

8. The learned counsel for the appellant further submitted that the appellant proved that he paid the entire sale consideration for purchase of the suit property, however, the Courts below committed an error and it's findings are vitiated by non-consideration of material evidence available on record and therefore, the judgments of the Courts below are liable to be set aside.

9. The learned counsel for the respondent submitted that on behalf of the respondent the vendor was examined as DW2 and she clearly deposed that the entire sale consideration was received by her only from Devarajan namely father of the respondent. The independent evidence of DW2 clearly proved that the entire sale consideration was paid by the respondent's father and therefore, the appellant's claim for title over the suit property is liable to be rejected and the same has been rightly rejected by the Courts below.



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10. Ex.A1 is the sale deed under which, the suit property was purchased in the names of the appellant and the respondent. The recitals in Ex.A1 would make it clear that sale consideration was received from the purchasers namely, the appellant and the respondent. When the title document in the suit property stands in the name of appellant and the respondent jointly, the burden is very heavy on the appellant to prove that the suit property was purchased by him for his own benefit in the name of respondent/wife as a Benami.

11. Under Section 3(2) of Benami Transaction Prohibition Act, 1988, as it stood on the date of presentation of the present suit, there was a presumption that, whenever, a property is purchased in the name of wife, the same is purchased for her benefit and the burden is on the person who alleges that the property was not purchased for the benefit of wife. Even assuming the appellant succeeds in proving that the entire sale consideration for the purchase of the suit property was paid by him, still by virtue of presumption



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available under Benami Prohibition Act, the property is deemed to be purchased for the benefit of respondent/wife. The appellant who claimed that the property was purchased for his benefit and not for the benefit of his wife, has to prove the same. In order to prove the same, appellant's father was examined as PW1 and he deposed in favour of the said averment in his plaint. There is no further acceptable evidence available on record to show that the property was not purchased for the benefit of the respondent/wife but it was purchased for the benefit of appellant in all aspects. In these circumstances, the Courts below are correct in coming to the conclusion that the appellant is not entitled to declaration of absolute title over the suit property. Accordingly, the questions of law framed at the time of admission are answered.

12. The learned counsel for the appellant alternatively submitted that, even assuming the appellant failed to prove that he is the absolute owner of the suit property, when the title document of the suit property stands in the name of the appellant and the respondent, the appellant is entitled to $\frac{1}{2}$ share in the suit property. Therefore, the Courts below can take into consideration the said fact and grant lesser relief of partition for $\frac{1}{2}$ share in the suit property in favour of the plaintiff.



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13. In support of the contention, the learned counsel for the appellant relied on the judgment of this Court in ***Uthammappan Vs. S.Rajannan and Ors.***, reported in ***MANU/TN/1842/2015***.

14. The said prayer made by the learned counsel for the appellant was objected by the counsel for the respondent on the ground that both the Courts below came to the conclusion that funds for purchase of the suit property was provided by the father of the respondent. Therefore, the appellant is not entitled to $\frac{1}{2}$ share in the suit property.

15. Though the respondent filed a written statement claiming that the suit property was purchased out of the funds provided by the father of the respondent, she has not substantiated the same by leading any cogent evidence. In order to prove that entire funds was provided by the respondent's father, the vendor who executed Ex.A1 was examined as DW2, who had deposed that she received the sale consideration from the respondent's father Devarajan. The said Devarajan was examined as DW1. During course of his



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evidence he clearly admitted that the appellant sent money to his account on 12.05.2005 to the tune of Rs.4,300/- Dollars. The said admission of DW1 is very well corroborated by Ex.A2 statement of accounts. During course of cross examination of DW1, it is also admitted that he is an Income Tax Assesse and the amount paid by him for the purchase of the suit property has not been shown in his tax returns. When alleged payment of sale consideration for Ex.A1 has not been shown in the tax returns of DW1, it cannot be accepted that DW1 the father of the respondent paid the entire sale consideration for the suit property out of his own funds. Therefore, the findings reached by the Courts below that the father of the respondent namely Devarajan paid the sale consideration for the suit property is only based on the oral testimony of DW1 & DW2, the same is not acceptable to this Court, in the light of documentary evidence available on record namely Ex.A2 and Ex.A3.

16. When the suit property stands in the name of appellant and the respondent under Ex.A1 in the absence of any acceptable cogent evidence to show that the entire sale consideration was paid by the father of the respondent to purchase the suit property, the appellant is entitled to $\frac{1}{2}$ share in the suit property.



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17. It is settled law, the Court while declining relief of declaration of title, is always entitled to grant lesser relief based on the evidence available on record. In the case on hand, under Ex.A1 registered sale deed suit property is owned by the appellant and the respondent. Therefore, the appellant is entitled to declaration that he has got $\frac{1}{2}$ share in the suit property.

18. When this Court comes to the conclusion the appellant is entitled to $\frac{1}{2}$ share in the suit property. The appropriate relief for the appellant would be preliminary decree for partition. In the facts and circumstances, this Court feels it would be equitable to prevent the parties from going for another litigation by directing the appellant to file a separate suit for partition and possession. In this regard, the observation of this Court in ***Uthamamappan Vs. S. Rajannan and Ors., reported in MANU/1842/2015***, would be relevant the same reads as follows;

“14. Learned counsel for the plaintiffs/respondents 1 to 3 submits that even though the plaintiffs have filed the suit for declaration of title, injunction and for recovery of possession, the first appellate Court has rightly granted lesser relief of partition.



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For the reason, he relied upon the following decisions:

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(i) In MANU/TN/0477/1957 1958 2 MLJ 189 (Kesavalu Naidu v. Doraiswami Naidu (died) and others), wherein it was held that a prayer for larger relief, claim not made out, claim to lesser relief made out and hence, lesser relief can be granted. In para-8, it is held as follows:

"16. To sum up in all cases in which a Court is called upon to give a relief different from that claimed 12 by the plaintiff, the test is to see whether the defendant is not taken by surprise and there can be no surprise if the relief granted is consistent with that claimed and with the case raised by the pleadings or is less than that claimed by the plaintiff. The plaintiff need do no more than suggest the relief to which he is entitled and it is for the Court to determine what relief could be given on the facts found. Where all the facts are stated in the plaint and the plaintiff claims only one relief although he could have claimed another alternative relief the Court can grant the latter relief. When necessary facts are stated in the plaint which if established entitle the plaintiff in law to obtain certain reliefs, it is open to the Court to grant him such reliefs if established although the reliefs asked for and the issues raised may be inartistically framed. *Judicis est judicare secundum allegare et probata*, it is the duty of a Judge to decide according to facts alleged and proved."

(ii) For the same proposition, he relied upon another decision reported in MANU/SC/0725/2001: AIR 2002 SC 136 (RajendraTiwary v. Basudeo Prasad and another), in



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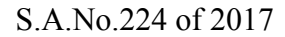
para-14, it is held as follows

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"14.Where the relief prayed for in the suit is a larger relief and if no case is made out for granting the same but the facts, as established, justify granting of a smaller relief, Order VII Rule 7 permits granting of such a relief to the parties. However, under the said provisions a relief larger than the one claimed by the plaintiff in the suit cannot be granted."

(iii) In S.B. Civil First Appeal No. 70/1982 dated 26.03.2014 in (Smt. Umrao Devi alias Amrao Devi and others v. Hulas mal and another), it was held as follows:

"In the present case, the plaintiff had filed a suit for possession; he was claiming his right and title to the suit property; the same being unpartitioned and he being the sole surviving male member pre 1956, the suit property was found to have been succeeded by both plaintiff Hulas Mal and defendant Amrao Devi jointly and once such a finding was returned, the plaintiff was entitled to a decree for possession. The relief for partition had necessarily to follow from it being a joint property, the decree of possession alone could not be effective without following it with a decree for partition, However, the trial court fell in error in merely declaring the share and directing the plaintiff to file a separate suit. The substance of the matter had necessitated the passing of the decree for partition and possession although it was not specifically prayed for in the plaint, to that extent case for exercise of power under Order XLI, Rule 31 CPC is made out and the cross-objections filed



19. It would be useful to refer to the judgment of the Hon'ble Bench of the Karnataka High Court in *Rangappa Vs. Jayamma*, **1987 ILR Karnataka P.2889**, the relevant observation reads thus:

7. Order VII Rule 7 C.P.C. reads thus :

"Relief to be specifically stated: Every plaintiff shall state specifically the relief which the plaintiff claims either simply or in the alternative and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for. And the same rule shall apply to any relief claimed by the de-fendant in his written statement."

(Emphasis supplied)



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The words "and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for" are wide enough to empower the Court to grant such relief as the plaintiff is entitled to, on the facts established on the evidence on record, even if such relief has not been specifically prayed for.

8.1. The provisions of Order VII Rule 7 of the C.P.Code are so widely worded that they do enable the Court to pass a decree for partition in a suit for declaration of title to immoveable property and possession thereof where it turns out that the plaintiff is not entitled to all the interest claimed by him in the suit property. In such a situation there is nothing unusual in giving relief to the parties by directing partition of the suit property according to the shares of the parties established in the suit. The normal rule that relief not founded on the pleadings should not be granted is not without an exception. Where substantial matters constituting the title of all the parties are touched in the issues and have been fully put in evidence, the case does not fall with- in the aforesaid rule. The Court has to look into the substance of the claim in determining the nature of the relief to be granted. Of course, the Court while moulding the relief must take care to see that relief it grants is not inconsistent with the plaintiff's claim, and is based on the same



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cause of action on which the relief claimed in the suit, that it occasions no prejudice or causes embarrassment to the other side; that it is not larger than the one claimed in the suit, even if, the plaintiff is really entitled to it, unless he amends the plaint; that it had not been barred by time on the date of presentation of the plaint.

8.2. No doubt the plaintiff has sought for exclusive title and he has not been able to prove his exclusive title; but has been able to prove that he is entitled to a half share in the suit properties. *When a party claims exclusive title to the suit property and is able to establish that he is entitled to half of the suit property, it will not be unusual for the Court to pass a decree for partition and possession of his half share. In fact such a relief flows from the relief prayed for in the plaint that he is the exclusive owner of the entire property. When a larger relief is claimed and what is established is not the entire relief claimed in the suit but a part of it, as whole includes a part, larger relief includes smaller relief, and it also arises out of the same cause of action. Therefore in the instant case, nothing prevented the Court to pass a decree for partition, in order to avoid another suit for partition and to give relief to the party in conformity with the right he had established."*(Emphasis supplied)



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20. The case laws referred are applicable to the facts of the present case. In this case also the appellant prayed for declaration of exclusive title over the entire suit property and for injunction. Though he failed to establish his exclusive title over the entire suit property, he succeeded in proving, with the evidence available on record, that he is entitled to $\frac{1}{2}$ share in the suit property by virtue of Ex.A1. Therefore, the appellant is entitled to preliminary decree for partition of his $\frac{1}{2}$ share in the suit property. Accordingly, the Second Appeal is allowed to that effect.

21. a) In nutshell, the Second Appeal is allowed by modifying the judgment and decree passed by the Courts below as indicated below;

b) declaring that the appellant is entitled to $\frac{1}{2}$ share in the suit property;

c) the preliminary decree for partition of $\frac{1}{2}$ share in the suit property is passed in favour of the appellant and,

d) as far as other relief prayed in the suit is concerned the judgment and decree passed by the Courts below are confirmed.



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e) In the facts and circumstances of the case, there shall be no order as to costs. Consequently, connected Miscellaneous Petition is closed.

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Index : Yes/No
Internet : Yes/No
Neutral Citation Case : Yes/No
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To

- 1.The II Additional District Court, Tindivanam.
- 2.The Principal Subordinate Court, Tindivanam.



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