



A.S.(MD)No.179 of 2020

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 29.07.2024

PRONOUNCED ON :22.11.2024

CORAM:

THE HONOURABLE MRS.JUSTICE S.SRIMATHY

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- 1.M.Kamala
- 2.Gnanasekar
- 3.Kavitha
- 4.Tamilselvan
- 5.Valli
- 6.Murugan
- 7.Kumar
- 8.Thangam
- 9.Rajeswari
- 10.Kamalhasan
- 11.M.Gopinath

...Appellants

Vs.

- 1.Balasubramaniyan
- 2.M/s. City Union Bank,
Represented by its Manager,
SIGC Campus,
Kalamman Koil Street,
Tiruchirappalli-620 002.
- 3.M/s. State Bank of India Limited,
Administrative Office,
Cantonment, Trichy Zone,
Tiruchirappalli.

...Respondents



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PRAYER: This Appeal Suit filed under 96 of C.P.C., against the decree and judgment dated 04.08.2018, passed in the suit in O.S.No.160 of 2013 on the file of the III Additional District Judge, Tiruchirappalli.

For Appellant : Mr.Shankar Murali
For R1 : Mr.M.Vivek Bharathi
For R2 : Mr.M.Prakash
For R3 : Mr.C.Karthik

JUDGMENT

The present Appeal Suit is filed by the defendants in the suit against the decree and judgment dated 04.08.2018, passed in the suit in O.S.No.160 of 2013 on the file of the III Additional District Court, Tiruchirappalli.

2. The plaintiff in the suit is the 1st respondent herein, the defendants 1 to 11 are the appellants herein and the defendants 12 and 13 are the respondents 2 and 3 herein. For the sake of convenience, the parties are referred as plaintiffs and defendants as per the ranking in the suit.

3. The suit is filed for preliminary decree for partition and for allotting 13/24 share in the suit property by metes and bounds. The brief facts are that the plaintiff's father and mother namely, Thennavan and Kunjammal got married in May 1965 as per Hindu rites and customs and out of the wedlock the plaintiff was



born on 13.08.1981. Immediately after the delivery, the plaintiff's mother Kunjammal died on 19.08.1981, leaving behind the plaintiff and her husband as legal heirs and she died intestate. The plaintiff's mother while she was alive, had purchased the suit property on 27.02.1980 bearing Door No.59/1 and thereafter, she was in possession and enjoyment of the property. After her demise, the plaintiff was in joint possession along with his father and both are entitled to one share each. The plaintiff's father died on 17.03.2009. While he was alive, he was living with one Kamala and through her the defendants 2 to 11 were born. The contention of the plaintiff is that there was no lawful wedlock between Thennavan and Kamala. The said Kamala arrayed as 1st defendant was already married and she was not legally separated, as per law. After the demise of the plaintiff's father Thennavan, the plaintiff issued lawyer notice calling upon to divide the suit property and hand over the possession. The plaintiff further submitted that he had also discharged the debt incurred by his father to Vijaya Bank, though the plaintiff was not a signatory to the debt incurred by his father, the plaintiff had paid a sum of Rs.2,63,718/- and discharged the debt during March 2011, which is after the demise of his father.

4. The further contention of the plaintiff is that the defendants have caused damage to the suit property and submitted the plaintiff reliably learnt that the



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defendants had suppressed the true facts and mortgaged a portion of the property to City Union Bank and State Bank India by creating fictitious documents and they are arrayed as 12th and 13th defendants. The defendants have no authority to create encumbrance in their name in respect of the entire suit property. Further neither the Thennavan had right to execute any settlement in favour of any of the defendants nor he is entitled to claim the entire suit property, since the father had only half share. Hence, he is not entitled to execute settlement deeds in respect of shares over which he had no right. If any settlement deed is created or executed by the father, the same will not bind on the shares of the plaintiff and the same is non-est in the eye of law. The plaintiff issued lawyer notice, dated 12.07.2013 but the defendants failed to reply to the same. Further, the plaintiff came to understand that the defendants had borrowed loan from 13th defendant in loan account No.10322423777 and the defendants 12 and 13 are not entitled to bring the entire property for sale. The debt incurred by the defendants with regard to the suit property will not bind on the plaintiff. If any mortgage is created based on the illegal documents, the same will not deprive the statutory rights of the plaintiff. The plaintiff had filed O.S.1671 of 2011 for declaration that he is the sole heir of Thennavan and the same was decreed on 24.01.2012. Since the defendants refused partition, the plaintiff has filed the present suit for partition claiming 13/24th share.



5. The defendants had filed a written statement denying all the allegations and specifically denied the marriage between the father of the plaintiff and Kunjammal in the year 1965 and submitted that the plaintiff's mother Kunjammal was not blessed with any child for more than 10 years from the date of marriage, hence, the father had married the second wife Kamala with the consent of the 1st wife Kunjammal during 1975 at Samayapuram Mariyamman Temple as per Hindu rites and customs. Out of the said lawful wedlock, the 4th defendant Kavitha was born on 08.05.1977, the 2nd defendant was born on 03.11.1978. The 3rd defendant was born on 10.12.1980 and the plaintiff was born after the birth of defendants 2 to 4 on 13.08.1981. The defendants 5 to 11 are all sons and daughters born thereafter. The allegation that the suit property was purchased by Kunjammal on 27.02.1980 is denied. The said Kunjammal was an ardent wife and had no wherewithal to purchase any property much less the suit property. Further she was not in possession and enjoyment of the property and she was residing at Arunachalam Colony, Palakkarai until her death. The further allegation that after the demise of Kunjammal, the plaintiff and his father are entitled to one share each and the plaintiff is in joint possession with his father are all false. The defendants further submitted that the father Thennavan was carrying on brass copper and stainless-steel polishing and repairing business for the past 23 years and he was carrying the business in the name of 'Valli Industries'. Thennavan



purchased the suit property out of his own 'hard earned' money in the name of his 1st wife Kunjammal and it was not for the welfare of the said wife. Kunjammal's parents had not given any sridhana property and she had no independent source of income. Further, there is no pleading that the suit property was purchased by the said Kunjammal out of her earning and sridhana properties and no proof was submitted for the same. Hence the said Kunjammal is only name lender. The Thennavan is the real owner of the suit property and the tax assessment was made in the name of Thennavan and he alone is entitled to deal with the suit property. Therefore, the plaintiff cannot claim any right under the pretext that the suit property was purchased by his mother Kunjammal. Hence, the plaintiff's claim for partition is meritless and legally not sustainable. Further, the defendants denied the allegations of the plaintiff that there is no wedlock between Thennavan and Kamala and stated the said allegation is only for the purpose of suit. Further, the allegation that the said Kamala was already married and she was legally separated are false and no proof was submitted by the plaintiff.

6. The plaintiff who was all along with the defendants 1 to 11 kept silent and never claimed partition of the suit property during the lifetime of his father. The defendants contacted the relatives and they assured compromise and hence, they did not reply for the plaintiff's lawyer notice. Further, the allegation that the



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father availed loan from Vijaya Bank is false. One Muthusamy of M.S.Marketer availed loan from Vijaya Bank and Thennavan stood as guarantor. Thennavan had produced the original sale deed No.1167/1980 dated 27.02.1980 standing in the name of Kunjammal for security due for the said repayment. The said principal borrower was making payments periodically to the said bank. After the demise of Thennavan, the plaintiff with the assistance of principal borrower, hatched conspiracy and paid certain amount for the purpose of receiving the original sale deed. Accordingly, the said original sale deed was returned to the plaintiff without the consent and knowledge of the defendants. The mere custody of original document cannot confer rights of the plaintiff. The plaintiff had suppressed all material facts. It is pertinent to state that the defendants 2 and 3 have joined the vessel polishing and repairing works with the father Thennavan from their respective childhood. Hence, Thennavan was very affectionate with defendants 2 and 3. The plaintiff is a B.Sc., Mathematics degree holder and the father Thennavan used to pay money then and there to the plaintiff. The father alone took care, educated, nurtured and brought up the plaintiff. Therefore, he executed Settlement Deed No.2711/2003 dated 26.06.2003 in favour of 2nd defendant in respect of 400 square feet of the suit property. Likewise, Settlement Deed No. 4538/2003 dated 05.10.2003 was executed in favour of 3rd defendant. The said settlement deeds were duly executed, registered, accepted and acted upon. The



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plaintiff is well aware of the settlement deeds and never raised his little finger challenging the settlement deeds. The plaintiff knew that he is not having any right over the suit property. He was silent and there was no whisper or murmur during the father's lifetime. The 2nd defendant in pursuance of the said settlement deed, had availed loan from the 12th defendant bank and had discharged the said loan. Hence, the 12th defendant is an unnecessary party to the present lis. The 3rd defendant in pursuance of settlement deed, availed loan from the 13th defendant and was making payments to the said bank periodically. Therefore, the allegation that the father had no right to execute settlement deed is false. Further, the contention of the plaintiff that the father is having only half share is also false. The allegation that the defendants have no authority to make encumbrance and the defendant had caused damages to the suit properties is invented and the same is false. The suit property was a thatched shed when it was purchased by Thennavan on 27.02.1980. Thereafter, he constructed ground floor during 1982 at the cost of Rs.80,000/- and initially, the same was leased out by him. The defendants 2 and 3 after the settlement in their favour put up the existing first floor at the cost of Rs. 2,50,000/- and now, the defendants 1, 2, 3, 6, 7, 10 and 11 are residing in the first floor of the suit property. In the ground floor, the defendants 2 and 3 are carrying on the business under the name and style of 'Valli Industries' from 2006. Therefore, the said settlement deeds are valid, lawful and binding on the plaintiff.



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The defendants 2 and 3 who have accepted the settlement deeds executed by the father had put up the first floor at their own cost. Therefore, the defendants 2 and 3 alone are the absolute owners of the suit property. Further, the suit in O.S.No. 1671 of 2011 is not binding on the defendants, since it is *exparte* decree. Further, the decree has been interpreted wrongly. The Court has only declared that the plaintiff is the surviving legal heir of the deceased Thennavan and Kunjammal. The said decree does not say that the plaintiff is the sole legal heir of the deceased Thennavan. Therefore, the plaintiff is not entitled to any share much less 13/24 share in the suit property. Further, the allegation that the bank has brought the suit property for sale is false and there is no such action taken by defendants 12 and 13 as alleged by the plaintiff. For these reasons, the defendants prayed to dismiss the suit.

7. The plaintiffs have examined himself as PW1 and marked exhibits A1 to A25. The 2nd defendant was examined as DW1. One Nagamani has been examined as DW2. The defendants have marked exhibits B1 to B4. The defendants 12 and 13 remained *exparte*. After hearing the case, the suit was allowed in favour of the plaintiff wherein the preliminary decree was passed in favour of the plaintiff declaring that the plaintiff is entitled to half share and separate possession. Aggrieved over the same, the present appeal suit is filed



raising various grounds.

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8. The points for consideration in the present appeal suit is the following:

- i. Whether the property is hit by benami transaction and the property is purchased for the benefit of the first wife?
- ii. Whether the burden of proof is on the plaintiff or on the defendants to prove the benami transaction?
- iii. Whether the suit is barred by limitation?
- iv. Whether the settlement in favour of 2nd defendant and 3rd defendant is valid?
- v. If settlement is not valid, whether the suit property is available for partition among the legal heirs?

9. The primary contention of the defendants is that the said property is purchased by Thennavan in the name of his wife Kunjammal and the same is not for the benefit of his wife Kunjammal. But the contention of the plaintiff is that his mother Kunjammal had purchased the property through Ex.A1 and hence she is the owner of the property. The Trial Court had held that the defendants had raised the plea of benami and hence the same ought to be proved by the defendants, but the defendants failed to prove the same, hence the property



belongs to Kunjammal, consequently the plaintiff is entitled to half share in the suit property.

10. In order to consider the said plea, it is necessary to consider whether the six circumstances exist in the transaction as held by the Hon'ble Supreme Court in the case of ***Valliammal (d) by LRs Vs. Subramaniam and others*** reported in **2004 (5) CTC 60**. The relevant portion is extracted hereunder:

“The essence of a benami transaction is the intention of the party or parties concerned and often, such intention is shrouded in a thick veil which cannot be easily pierced through. But such difficulties do not relieve the person asserting the transaction to be benami of any part of the serious onus that rests on him, nor justify the acceptance of mere conjectures or surmises, as a substitute for proof. Referred to Jaydayal Hoddar Vs. Bibi Hazra, 1974 (1) SCC 3; Krishnanand Vs. State of Madhya Pradesh, 1977 (1) SCC 816; Thakur Bhim Singh Vs. Thakur Kan Singh, 1980 (3) SCC 72; His Highness Maharaja Pratap Singh Vs. Her Highness Maharani Sarojini Devi & others, 1994 (Supp. (1) SCC 734; and Heirs of Vrajlal J. Ganatra Vs. Heirs of Parshottam S. Shah, 1996 (4) SCC 490. It has been held that in the judgments referred to above that the question whether a particular sale is a benami or not, is largely one of fact, and for determining the question no absolute formulas or acid test, uniformly applicable in all situations can be laid. After saying so, this Court spelt out following six circumstances which can be taken as a guide to determine the nature of the transaction.

a. Source of purchase money



- b. Nature and possession of property after purchase
- c. Motive for benami
- d. The relationship of parties
- e. Custody of title deeds after purchase
- f. Conduct of parties in dealing with property after purchase

The above indicia are not exhaustive and their efficacy varies according to the facts of each case. Nevertheless, the source from where the purchase money came and the motive why the property was purchased benami are by far the most important tests for determining whether the sale standing in the name of one person, is in reality for the benefit of another. We would examine the present transaction on the touchstone of the above two indicia.”

11. As held in the judgment cited supra the person who is ascertaining ought to prove the benami. In the present case the defendant had raised the plea and hence the defendant ought to prove that the purchase is hit by benami transaction and the same is purchased for the benefits of Kunjammal.

12.(i) As far as other ingredients are considered the same may be analyzed.

Source of money: The defendants had stated that Kunjammal had no independent income and the same is purchased by the husband Thennavan from his own money by carrying on brass copper and stainless-steel polishing and repairing business and he was carrying the business in the name of 'Valli Industries'. Infact



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the plaintiff had admitted the fact that the father was carrying on the said business.

However, the plaintiff had claimed the mother had sridhana money, but the same is only bare statement without any evidence. The Trial Court had held that the defendant ought to prove the same. This Court is of the considered opinion, when the defendant had filed a written statement denying the purchase by Kunjammal, then the plaintiff ought to have filed additional pleadings to prove the source of money. Even though the burden is on the defendant to prove the benami transaction and not purchased for the benefit of Kunjammal the wife, but when the defendant had taken a plea that the father was doing polishing business and the mother Kunjammal had no source of money, the burden shifts to the plaintiff to prove the sridhana and other source of money of Kunjammal. Further the defendant cannot be expected to prove the negative that the Kunjammal was not having sridhana and no source of money. Therefore, this Court is of the considered opinion that the Trial Court had failed to take this shifting of burden and has also failed to take into consideration that negative cannot be proved.

12(ii) The Trial Court had held as under:

“DW2 claimed that the sale consideration is Rs.21,000/-, a sum of Rs. 5,000/- was paid on the date of sale deed. But the sale deed recites that the sale consideration as Rs.20,000/-, Rs.7000/- was paid as advance, various amounts to be adjusted out of the rental advance payable to the tenants of



*the property, Rs.12,000/- was paid in the presence of Sub-Registrar. Similar endorsement is made by the Sub Registrar, in such circumstances the fact that the Kunjammal paid the balance sale consideration as recorded by the Sub Registrar has to be **presumed** in view of the section 60(2) of Registration Act”.*

The said finding is merely presumption and the Trial Court had presumed that the Kunjammal had paid under section 60(2) of Registration Act. As rightly pointed out by the defendants that section 60(2) would prove only execution and registration only. But when Kunjammal had no wherewithal, when there is no evidence to prove sridhana amount and source of money, then it cannot be presumed. In other words, even for presumption there should be some material, when the wherewithal is not there for Kunjammal, then the same cannot be presumed. On the other hand, when the father had polishing business then it can be presumed that the father Thennavan had paid the said sum. If the claim that the Kunjammal had paid the said amount, then some positive evidence is necessary, more so when the said Kunjammal had no source of income, including sridhana. As held supra even though the defendants ought to prove when he alleges benami transaction, the defendants cannot be expected to prove the negative aspect that the Kunjammal had no sridhana money. In such circumstances, the plaintiff had to prove that Kunjammal had sridhana money. Infact there is no whisper in the plaint about the source of money at all. Therefore, this Court is of the considered



opinion that the source of money is from Thennavan and not Kunjammal and the finding of the Trial Court is erroneous.

13. Nature and possession: The sale deed is dated 27.02.1980 and Kunjammal died on 19.08.1981, that is within 1 ½ years the said Kunjammal died. Further it is seen that the marriage with Kunjammal was in the year 1965 and with Kamala was in the year 1975. And three children were born to Kamala and thereafter the Kunjammal had given birth to the plaintiff, which would indicate that the family was living together. Therefore, the entire family was in possession of the property and the father Thennavan was residing with the son born through first wife i.e. the plaintiff, along with second wife and her children. Further the contention of the defendant at the time of purchase there was thatched shed, then during the life time of the father the 2nd and 3rd defendants had put up first floor where the entire family i.e. sons along with the 1st defendant Kamala are residing and the ground floor is being used to continue the polishing business in the name and style of 'Valli Industries' from 2006. Infact the plaintiff had admitted in his cross examination that the defendants are residing in the said property from 1989 onwards and also admitted that the 2nd and 3rd defendants are running the polishing industries in the ground floor. The plaintiff had specifically admitted that the first floor was constructed in the year 2005 but had denied the 2nd and 3rd



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defendants had constructed and stated that the father had put up construction.

Further it is seen that at the time of purchase of the suit property tax assessment number was assigned and the plaintiff had admitted that the mother had never paid property tax, water tax in her name. Also admitted that the father had paid the same all these years. Therefore, this Court is of the considered opinion 'possession of property after purchase' is with the father along with the entire family. And the nature of the possession is both residential and commercial. When the Thennavan was in possession of the property then the Kunjammal cannot claim she is the owner of the property, consequently the plaintiff case is not acceptable.

14. Motive for benami: The contention of the defendant is that since the said Thennavan and 1st wife Kunjammal are husband and wife, the husband had purchased the properties in the name of the 1st wife Kunjammal name and the same cannot be stated that the property was purchased for the benefit of the 1st wife Kunjammal. Since the Thennavan had married the 1st wife in the year 1965, thereafter the Thennavan had married the 2nd wife in the year 1975. Through the 2nd wife the said Thennavan had first child on 08.05.1977, the 2nd child on 03.11.1978, then the 3rd child defendant on 10.12.1980 and the plaintiff was born through the first wife on 13.08.1981, which is after the birth of three children to



the second wife. Hence the suit property was purchased as benami and the first wife is only name lender. Then the said purchase is protected under section 3 of the Benami Transaction (Prohibition) Act. When the entire family along with first wife child and second wife and her children were living together, then the said purchase cannot be taken for the benefit of the first wife alone.

15. The relationship of parties and custody of title deeds after purchase:

The relationship of the parties is husband and wife and the document is with the father Thennavan until his demise on 17.03.2009. As held supra the husband Thennavan was living with the first wife and second wife along with the children in the same place. Therefore, the relationship of the parties are husband and wives, the document was kept as common. And it is not exclusively in the possession of the Kunjammal.

16. Conduct of parties in dealing with property after purchase: As far as the conduct of the parties are concerned the father Thennavan was an Income Tax assessee and he has stated that the properties are purchased through his income from said business. The father had dealt with the property and had shown the property as guarantor, thereafter had executed two settlement deeds in favour of 2nd and 3rd defendants. From the above conduct it is evident the father had



purchased the property as his own property and had dealt with the property as his own. It is pertinent to state herein if the claim of the plaintiff is true, he would have sought for partition when the father Thennavan was alive, but the plaintiff failed to do so. The father died in the year 2009, the suit was filed in the year 2013. Further the plaintiff is aware of the fact that the father had executed settlement deed in the year 2003. But the plaintiff had kept silent when the father was alive, then continued the silence until 2013. In such circumstances, this Court is of the considered opinion that the father had dealt with the property after purchase.

17. The Hon'ble Supreme Court had further held that the list of relevant factors to be considered is not exhaustive and the most important test are source of purchase money and motive. In the present case, the source of money to purchase is with the father Thennavan and not with Kunjammal. The motive to purchase as benami in the name of 1st wife Kunjammal is for the benefit of entire family. Therefore, all the circumstances stated in Vallimmai's case are proved in favour of the defendants, hence the 1st point for consideration is held in favour of defendant and against the plaintiff.

18. The next point for consideration is that whether the suit is barred by



limitation? The contention of the defendants is that when the plaintiff had admitted that he was well aware of execution of two registered settlement deeds marked as exhibits B1 and B2 which were executed by the father in favour of 2nd and 3rd defendants in the year 2005 itself but the suit was filed in the year 2013, the same is barred by limitation. If the suit is filed for cancellation of the alleged settlement, then the question of limitation would arise. It is seen that the suit is filed for partition. There is no limitation for filing the suit for partition. Therefore, this Court is of the considered opinion that the suit is not barred by limitation.

19. The next contention is that whether the settlement in favour of 2nd defendant and 3rd defendant is valid? If settlement is not valid, whether the suit property is available for partition among the legal heirs? On perusal of the said settlement deeds marked as Ex.B1 and Ex.B2, it is seen that the father Thennavan had executed the settlement deeds wherein it is stated that out of love and affection the same is settled in favour of the 2nd defendant and 3rd defendant. When there are ten children born for the second wife it is unknown why the father had executed settlement in favour of two children alone that too to the 2nd and 3rd defendants alone. The document is not stating any reason for gifting only to the said two sons alone. But there is a possibility the said settlement is only to avail loan from the banks which is evident by arraying the banks as 12th and 13th



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defendant in the suit. The alleged loan is also admitted by the defendants. Further it is also admitted that the defendants 1, 2, 3, 6, 7, 10 and 11 are residing in the first floor of the suit property, i.e. mother and sons alone. Hence the defendants had not proved the genuineness of the said settlement deed. Consequently, all the sons and daughters of Thennavan are entitled to share in the property and each are entitled to 1/11th share. But 1st defendant who is the second wife of Thennavan had alleged to have married Thennavan in the year 1975, when the first marriage was subsisting. However the said marriage is not proved and hence share is declined to the 1st defendant.

20. Therefore, the judgment and decree dated 04.08.2018 rendered by the Trial Court in O.S.No.160 of 2013 is set aside and the appeal suit is allowed. The plaintiff and the defendants 2 to 11 are entitled to 1/11th share in the suit property
No costs.

22.11.2024

NCC : Yes / No
Index : Yes / No
Internet : Yes
Tmg



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To:

- 1.III Additional District Judge,
Tiruchirappalli.
2. The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.



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S.SRIMATHY, J.,

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