

Dharmalinga Chetty and ors. Vs. Mathurambal and anr.

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Court : Chennai

Decided On : Feb-12-1987

Reported in : (1987)2MLJ268

Appellant : Dharmalinga Chetty and ors.

Respondent : Mathurambal and anr.

Judgement :

Sengottuvelan, J.

1. Defendants 1 and 3 to 5 in O.S. No. 230 of 1977 on the file of the District Munsif of Vellore, have filed this second appeal challenging the legality and correctness of the Judgment and decree of the Subordinate Judge, Vellore in A.S. No. 157 of 1978.

2. The facts of the case are briefly as follows :- The first respondent in the second appeal, viz., the plaintiff in O.S. No. 230 of 1977 and the 2nd respondent herein are the daughter and son of the first appellant herein, Dharmalinga Chetty through his first wife Meenakshi who died on 27.1.1944. Appellants 3 and 4 are the defendants 4 and 5 in the suit. Defendants 4 and 5, are the sons of Dharmalinga Chetty (1st appellant) through his second wife Rajammal who figures as second appellant herein. The relationship of the parties may be set out in the following genealogy.

Dharmalinga	Chetty(1st	defendant)
_____	_____	Meenakshi
Rajammal(died on 27.1.1944)	(3rd defendant)	_____
_____		Mathurambal Krlshnan Subramania DhanapalChetty
Chetty(Plaintiff)	(2nd defendant)	(4th defendant) (5th defendant)

3. The suit house is in Baratharami village. It was purchased in the name of Meenakshi, first wife of the 1st appellant as per the sale deed, Ex. A2 dated 26.8.40. for a consideration of Rs. 150/-. According to the first respondent (Plaintiff in the suit), the house was purchased by her mother Meenakshi from one Chinnathai Ammal under Ex.A2 for a consideration of Rs. 150/-, that her mother was in possession and enjoyment of the suit property till her death on 27.1.1944, that she died intestate and that as such she is the only heir under the Hindu Law. At the time of death her mother was aged 85 years and she (1st respondent) was under the care and protection of the first appellant and he was in management of the suit property on her behalf of trustee and natural guardian. She was in possession of the suit property through her father. Even after her marriage, she was enjoying the suit property through, her father and her father is in possession of the property only as trustee on behalf of the first respondent. According to the plaint allegations, appellants 2 to 4 had set up adverse possession to the suit property, Hence, the first respondent has filed the suit for declaration and possession.

4. The case of the first defendant-1st appellant is that the suit property was purchased by him out of his own funds, benami, in the name of his first wife, Meenakshi to avoid his undivided brothers from laying any claim to the suit property. His first wife, Meenakshi, had no earnings and she could not have paid the consideration for the sale deed Ex. A2. After the demise of Meenakshi, the 1st appellant married the second appellant and that was not liked by respondents 1 and 2. Hence, at the instigation of their mother's sister, Lakshmi, they left the care and protection of the 1st appellant and joined the said Lakshmi who is living separately. It was Lakshmi who performed the marriages of respondents 1 and 2. The 2nd respondent got married twice. Immediately after the second marriage, the 2nd respondent came and asked the first appellant to give a share in the suit house. The first appellant gave the southern half of the suit house to the 2nd

respondent and the northern half to appellants 3 and 4 about 20 years ago by means of a division. Since then, the first appellant's sons had been in absolute possession of the property in their own rights. While so, the first respondent issued a notice Ex.A4 on 5.7.1975 at the instigation of the enemies of the first appellant and when he asked the respondents about it, they said they would not pursue the matter further. In spite of the said undertaking, the first respondent has filed the present suit.

5. The second respondent in this appeal 2nd defendant in the suit, filed a written statement stating that his mother purchased the suit property with her own funds, that she was in enjoyment of the suit property till her death and that as such under Hindu Law the first respondent is entitled to succeed to the property. The second respondent has supported the case of the first respondent.

6. Appellants 2, 3 and 4 contended that the suit property is the absolute property of the 1st appellant and that the first appellant was never in possession of the suit property as trustee of the first respondent or anybody. The first appellant effected division of the suit property between appellants 3 and 4 and the second respondent more than 50 years ago and gave the northern half of the suit house to appellants 3 and 4. The southern half was given to the second respondent. Appellants 3 and 4 are living in the southern half of the house as absolute owners for the past 20 years. In any event, they have perfected their title by adverse possession.

7. The trial Court, on a consideration of the evidence, both oral and documentary, came to the conclusion that the plaintiff is not entitled to the suit house for the following reasons:

(1) at the time of purchase under Ex. A2 there had been misunderstandings between the first appellant and his brothers and there is sufficient motive on the part of the first appellant to purchase the suit property in the name of his senior wife to prevent his brothers from laying any claim to the suit property.

(2) The first appellant had sufficient earnings as a clerk in a grocery shop and he was also running a country oil crusher. Therefore, he had the means to advance

the sum of Rs. 150/- the sale consideration under Ex. A2.

(3) The first respondent who got married about 20 years ago is living with her husband and she did not lay claim to the suit house for more than 20 years. The property tax assessment as well as the receipts stand in the name of the 1st appellant. In any event, the possession of appellants 2 to 4 of the suit house is adverse to that of the 1st respondent. In view of the above conclusions arrived at, the Trial Court dismissed the suit with costs. As against the said judgment, the 1st respondent filed A.S. No. 79 of 1978 on the file of the District Court of North Arcot which was subsequently transferred to the Sub Court, Vellore and numbered as A.S. No. 157 of 1978. The Subordinate Judge, on a reappraisal of the evidence, reversed the judgment and decree of the trial Court and decreed the suit in favour of the first respondent for the following reasons :

(1) There is no documentary evidence to prove that the 1st appellant was earning as a clerk in a grocery shop and in the country oil crusher.

(2) One of the attestors to Ex. A2, namely, Marappa Chettiar, who is alive has not been examined to prove the case of the first appellant.

(3) The mother of Meenakshi had properties and as such there is possibility of Meenakshi having resources given by her mother.

(4) Except the interested testimony of the first appellant, there is no evidence for the motive for the benami transaction.

(5) The 1st appellant produced the title deeds as well as the property tax receipts marked as Exs. A1 to A15 in support of her case.

(6) The possession of the first appellant is only on behalf of the first respondent and the same cannot create any right in the first appellant. In view of the above conclusions, the lower appellate Court found that the first appellant failed to prove that Ex. A2 is benami and hence set aside the judgment and decree of the trial Court and decreed the suit and directed the parties to bear their own costs. This second appeal is filed challenging the legality and correctness of the judgment and decree of the lower appellate Court.

8. The questions that arise for consideration in this second appeal are:

1. Whether the suit house was purchased by the first appellant under Ex. A2 in the name of his wife benami for him?

2. Whether the appellants 2 to 4 have perfected their title to the suit property by adverse possession?

9. Before entering into a discussion on the first question relating to the benami nature of the transaction under Ex. A2, the criteria for deciding whether a particular transaction is benami or not have to be borne in mind. It is laid down in *Duraiswami Pillai v. S.K. Munuswami Mudaliar* : (1975)2MLJ8 , that the question whether a transaction is benami or not depends upon (1) the source from which the purchase money came; (2) the nature of possession of the property after 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. A conclusion cannot be arrived at only on the basis of one or more circumstances set out above and the matter will have to be considered taking all the circumstances cumulatively along with the facts and circumstances in each case. Whether a particular circumstance is an important one is to depend upon the facts and circumstances of a given case.

10. When a husband purchases property in the name of his wife, the question whether by such sale the husband intended to benefit the wife also will have to be borne in mind in coming to a conclusion. Bearing in mind the above principles, we have to see whether the conclusion arrived at by the lower appellate Court is based upon the proper analysis of the evidence and the circumstances in the case.

11. The lower appellate Court seems to have placed utmost importance to the production of the title deed, Ex. A2 and the house tax demand notices and receipts, Exs. A7 to A15. The case of the first appellant is that the title deeds and property tax receipts which were in the house were taken away by the 2nd

respondent and handed over to the first respondent. The evidence in this case shows that the second respondent demanded partition of the suit house about 20 years ago and in pursuance of the said demand, the first appellant divided the house into two shares and has given the southern half to the second respondent and the northern half to the appellants 3 and 4 and ever since then the respective sharers are in enjoyment of portions of the suit house. The fact that the 2nd respondent as well, as appellants 3 and 4 are residing in the same house is admitted by the 1st respondent who was examined as P.W. 1. Though the sale deed, Ex. A2 stands in the name of Meenakshi, yet in the property tax register maintained by the Fanchayat, the suit house had been, registered, in the name of the 1st appellant and the property tax demand notices and receipts are also in the name of the 1st appellant herein. If the house had been registered in the name of Meenakshi in the Panchayat Board registers, then the production of the receipts may advance the case of the first respondent. But on the other hand, the fact that the property had been registered from the inception in the name of the first appellant, is a circumstance in favour of the benami transaction. The production of property tax receipts and house tax demand notices Exs. A3 and A7 to A15 will advance the case of the first respondent only if they stood in the name of her mother Meenakshi. Fortunately, in the present case, the first appellant is alive and he has spoken to the circumstances under which the benami transaction in question had taken place and the differences that arose between the 2nd respondent and appellants 3 and 4, the sons by the junior wife. The fact that such differences are in existence is also evident from the conduct of the second respondent. He had chosen to file a written statement recognizing the title of the first respondent and disclaiming any rights in the suit house. This circumstance clearly shows that there has been difference of opinion amongst the 2nd respondent and appellants 3 and 4. The fact that the property tax receipts stand in the name of the first appellant clearly probabalises the version of the first appellant that the documents of title had been taken away by the 2nd respondent and handed over to the 1st respondent. Taking the above circumstances into consideration and also the fact that the property tax receipts are in the name of the first appellant, it is clear that mere production of document of title and the property tax receipts by the first appellant will not advance her case.

12. In so far as the motive for such a benami transaction is concerned, the version given by the 1st appellant is that there had been differences between himself and his brothers as a result of which he had to leave his original place and proceed to Bharatharami. It is admitted by both P.Ws. 1 and 2 that there is every reason for the first appellant when he purchased the house in the name of his senior wife as otherwise, he will have to face the claim to the suit property by his brothers. This circumstance which is admitted by the first respondent and her witness (P.W. 2) makes the case of the first appellant probable. In respect of the source of purchase price of Rs. 150, the case of the, 1st appellant is that he was earning as a clerk in a grocery shop and was also running a country oil crusher and there by earned the amounts. The version of P.W. 1 that her grandmother contributed some amounts for the purchase of the suit house and her mother contributed some portion of the consideration cannot be believed on account of the fact that P.W. 1 would have been of tender age, without the power of undertaking, at the time of execution of Ex. A2. The evidence of P.W. 2 also cannot be relied upon since he is not an attester to Ex. A2 and there is no special reason for him to know about the affairs of the family. Under the circumstances, the version of the first appellant that he paid the sale consideration under Ex. A2 will have to be accepted.

13. The next question to be considered is the relationship that facilitated the benami transaction. In the present case, the sale deed, Ex. A2, was taken in the name of the first respondent's mother, the senior wife of the 1st appellant. On behalf of the respondents, it is contended that by such transaction, the first appellant would have included the wife to be the owner of the property. Reliance is placed on the decision in *Amma Ponnammal v. Shanmugam Pillai* : AIR1971 Mad370 , wherein Ismail, J., (as he then was) observed that if the husband had the intention to benefit the wife and he wanted the wife to be the owner of the property at the time when the property was purchased, then such an intention cannot be changed subsequently. In *Kistappa Naicker v. Elumalai Naicker* : AIR1977 Mad38 , the very same learned Judge held that when a husband purchased property in the name of his wife by paying his own money, from that alone no inference could be drawn that the wife was only a benamidar. Having regard to the nature of the relationship between the parties and the normal

tendency of the husband to benefit the wife either by payment of money or by purchase of property in her name, the allegation of benami could be established only by proving the motive for such benami purchase.

14. In the present case fortunately we have the testimony of the first defendant D.W. 2 that he had no such intention. No other circumstance is pointed out to support such an intention on the part of the 1st appellant that he had taken the sale deed in the name of his wife to benefit her. Any one in the circumstances in which the 1st appellant was placed would ordinarily think of acquiring a house for his residence in the name of his wife in view of the strained relation ship that existed between himself and his brothers which is also admitted by P.Ws. 1 and 2. From the evidence and the circumstances, the only inference that could be drawn is the relationship that existed between the benamidar and the real owner in the present case facilitated such a benami transaction.

15. The next criteria to be considered is the nature of possession that followed the acquisition of the property. In the instant case, it has been asserted by the first appellant and his witnesses that he had been in possession for over 20 years and subsequently he divided the properties between the second respondent as well as appellants 3 and 4 and they were in enjoyment of the property after such a partition. The fact that the 2nd respondent and appellants 3 and 4 are in enjoyment of the property is admitted by P.W. 1. It is seen that after the demise of Meenakshi on 27.1.1944, as borne out by Ex. A1 when the first appellant decided to marry the 2nd appellant misunderstandings arose in the family as a result of which respondents 1 and 2 had been brought up by the sister of Meenakshi and even their marriages were celebrated by the sister of Meenakshi, namely Lakshmi. This has been admitted by P.Ws. 1 and 2. If that is so, then as soon as misunderstandings arose between the parties, the sister, of Meenakshi acting for the respondents would have claimed possession of the property. But such a thing had not been done. On the other hand, the first appellant had been in possession of the property and his name stands registered in the property tax demand register and he had paid the house tax as per the house tax receipts produced. The version of the first respondent in the registered notice, Ex. A4, is as if she has been in possession of the suit property and that the appellants are trying to

interfere with her possession. In the said registered notice it has not been stated that the appellants are in possession on her behalf. The possession of the first appellant as well as appellants 3 and 4 cannot be on behalf of the 1st respondent in view of the strained relationship which is even admitted by the witnesses for the first respondent. Hence, on a consideration of the several circumstances, it cannot be stated that possession of the first appellant as well as appellants 3 and 4 is on behalf of the first respondent. The conduct of the parties also probablises the case of the 1st appellant. In *N.A. Hye Sahib v. N. Majid Sahib* : (1976)1MLJ301 , the learned Judge of this Court observed that in deciding whether a purchase is benami, the question of motive is not very much relevant as such purchases are frequent and common in this country. The subsequent treatment of the property is, however, a significant factor. In the present case, the subsequent treatment of the property goes a long way to establish the case of the first appellant. On an analysis of the circumstances of the case, the inference drawn by the lower appellate Court is not correct. The learned Counsel for the respondents contended that under Section 100, C.P.C the finding of fact arrived at by the lower Court cannot be disturbed by this Court. The question of benami transaction is - not merely a question of fact, but a legal conclusion has to be arrived at based upon certain proved facts. When the conclusion arrived at on such proved facts is not proper, then the same can be set right in second appeal. The principle that the propriety of legal conclusion based upon certain proved facts can be gone into in second appeal has been recognised by the Supreme Court in *Orient Distributors v. Bank of India Ltd.* : AIR 1979 SC867 . In view of my conclusion that on the proved facts in the present case, the inference drawn by the lower appellate Court is incorrect, this is a fit case where the finding of the lower appellate Court will have to be set aside.

16. In view of my finding on the first question the second question regarding adverse possession claimed by the appellants 3 and 4 need not be gone into.

17. In view of my conclusion that the sale deed Ex. A2, had been taken by the first appellant in the name of his senior wife, Meenakshi, benami for himself, the judgment and decree of the lower appellate Court will have to be set aside. Consequently, the second appeal is allowed the judgment and decree of the lower

appellate Court are set aside and those of the trial Court restored. In view of the relationship between the parties, there will be no order as to costs.

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