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Sakunthala, and ors. Vs. Raghupathy, and anr.

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Court : Chennai

Decided On : Jul-07-2010

Judge : M.Venugopal, J.

Acts : Code of Civil Procedure (CPC) , 1908 - Section 100

Appeal No. : S.A.No.375 of 1997 and C.M.P.No.22267 of 1997

Appellant : Sakunthala, and ors.

Respondent : Raghupathy, and anr.

Advocate for Def. : Mr.N.T.Karunakaran; Mrs.G.Meena, Advs.

Advocate for Pet/Ap. : Mrs.Shanmugapriya, Adv.

Judgement :

1. The Appellants (Legal Representatives of 1st Defendant) have projected this Second Appeal before this Court as against the Judgment and Decree dated 08.08.1996 made in A.S.NO.7 of 1993 on the file of Learned Principal District Judge, Vellore.

2.The Learned First Appellate Court, viz., the Principal District Judge, Vellore, in its Judgment in A.S.No.7 of 1993 on 08.08.1996, has among other things observed that 'The oral and documentary evidence clearly prove that the plaintiff and the defendant are entitled to the suit property and the plaintiff is entitled for partition and separate possession of his share in the suit property and has hold

that the trial Court has correctly come to the conclusion and has decreed the suit for partition and separate possession of plaintiff's 1/3rd share in the suit property and also for mesne profits and resultantly, dismissed the appeal without costs thereby confirming the Judgment and Decree passed by the trial Court in O.S.No.64 of 1991 [O.S.No.54 of 1984 on the file of Subordinate Judge, Vellore] on the file of learned Subordinate Judge, Ranipet.

3.The trial Court, in the suit filed by the Respondent/ Plaintiff in O.S.No.64 of 1991, has, inter alia, held that the suit property belonged to the Plaintiff and the Defendants and the said property is an undivided one and therefore, the Plaintiff is entitled to get 1/3rd share in the suit property and has also further held that the 1st Defendant is liable to render account in respect of the income received from the suit property and directed the 1st Respondent/Plaintiff to take steps separately as per order 20 Rule 12 of Civil Procedure Code to determine the mesne profits and accordingly passed a preliminary decree with costs to be paid by the 1st Defendant.

4.Before the trial Court viz., Subordinate Judge, Ranipet, on the side of the 1st Respondent/Plaintiff witnesses, P.W.1 and P.W.2 have been examined and Exs.A.1 to A.16 have been marked. On the side of the deceased 1st Defendant and the 2nd Respondent/2nd Defendant, the deceased 1st Defendant has been examined as D.W.1 and no exhibits were marked.

5.However, before the First Appellate Court, viz., Principal District Judge, Vellore in A.S.No.7 of 1993, the Legal Representatives of the 1st Defendant viz., the Appellants (in Second Appeal) have filed I.A.No.169 of 1994 praying permission of the Court to receive the additional documents under Order 41 Rule 27 of C.P.C. and the same has been allowed on 08.08.1996. Accordingly, Exs.B.1 to B.12 have been marked on the side of the Defendants.

6.Being dissatisfied with the Judgment and Decree of the First Appellate Court viz., Principal District Judge, Vellore in A.S.No.7 of 1993 dated 08.08.1996, the Appellants (Legal Representatives of the deceased 1st Defendant) have preferred this Second Appeal before this Court.

7.At the time of admission of the Second Appeal, this Court has framed the following substantial questions of law for consideration:

"1.Whether the Courts below were right in sustaining the title of the plaintiff to the suit properties?

2.Whether the Courts below misconstrued Exs.A.1 to A.11 in rejecting the claim of adverse possession and ouster pleaded by the appellants?

3.Whether the Courts below were right in not providing for the payment of the mortgage debts discharged by the 1st defendant alone?"

8.Contentions, Discussions and Findings on Point Nos.1 to 3:

According to the Learned Counsel for the Appellants, both the courts below have failed to take into account of the fact that the property has been sold in an auction sale and one Nagammal has purchased the suit property, who in turn had sold it to the 1st Defendant, who has purchased the same in the name of his mother.

9.It is the further contention on the side of the Appellants that they are in possession of the suit property for well over the statutory period to the exclusion of the 1st Respondent/Plaintiff and the 2nd Respondent/2nd Defendant and as such, they have prescribed titled to the property by means of adverse possession and ousted the Respondents from enjoyment, as evident from Exs.A.1 to A.11.

10.Advancing her arguments, the Learned Counsel for the Appellants contends that even assuming the suit property is a subject matter of partition and the same is available only after the Respondents are made to pay the amount towards the discharge of the mortgage debts incurred by the deceased 1st Defendant, the Courts below ought to have made provisions in this regard and in the absence of the same, the Judgment and Decree of both the Courts are illegal and without jurisdiction and liable to be set aside by this Court in Second Appeal.

11.Contending contra, the Learned Counsel for the 1st Respondent/Plaintiff submits that both the Courts below have taken into account the oral and documentary evidence available on record and has come to the right conclusion

that the Plaintiff and the Defendants are entitled to the suit property and further, it has held that the documents prove that the Plaintiff and Defendants have discharged the mortgage and they are entitled to the suit property and finally decreed the suit for partition and separate possession of the 1st Respondent/Plaintiff's 1/3rd share in the suit property and for mesne profits and the same need not be interfered by this Court at this distance of time.

12.It is the case of the 1st Respondent/Plaintiff that the suit property originally belonged to the mother of the deceased 1st Defendant and 2nd Defendant and after the death of their mother Ethiraji Ammal, they along with five sisters have become the joint owners of the suit property because of the fact that they are her heirs and as a matter of fact, the five sisters have executed a release deed Ex.A.1 dated 27.5.1967 to and in favour of the 1st Respondent/Plaintiff and the deceased 1st Defendant and the 2nd Respondent/2nd Defendant and therefore, the 1st Respondent/Plaintiff and the deceased 1st Defendant and the 2nd Respondent/2nd Defendant have become the co-owners of the suit property, each of them is entitled to get 1/3rd share in the suit property.

13.That apart, it is the stand of the 1st Respondent/ Plaintiff that the deceased 1st Defendant has postponed the division of the suit property into 3 equal shares and on 5.5.1980, in the presence of Panchayatdars Krishnasamy and three others, a family arrangement, Ex.A.16 viz., an Agreement letter, has been entered into between the 1st Respondent/Plaintiff, the deceased 1st Defendant and the 2nd Respondent/2nd Defendant in and by which a sum of Rs.8,000/- has already been paid to the deceased 1st Defendant by the 1st Respondent/Plaintiff on behalf of the 2nd Respondent/2nd Defendant and also a partition deed will have to be written and registered before 30.06.1980.

14.Proceeding further, the case of the 1st Respondent/ Plaintiff is that he and 2nd Respondent/2nd Defendant have been ready and willing to fulfil the tenor of the Ex.A.16 but the deceased 1st Defendant has not paid the amount agreed to by him to the 1st Respondent/Plaintiff etc. According to the 1st Respondent/Plaintiff, he along with the 2nd Respondent/2nd Defendant has paid their share of the debt incurred by their mother and also the mortgage debt to the deceased 1st

Defendant and discharged the same and as on 5.5.1980 there is no family debt and that the deceased 1st Defendant has borrowed a sum of Rs.500/- from the 1st Respondent/Plaintiff for his daughter's marriage which is liable to pay etc.

15.In the written statement, the deceased 1st Defendant (during his life time) has, among other things, mentioned that the suit property viz., the house originally belonged to the ancestors of the 1st Respondent/Plaintiff, the deceased 1st Defendant and the 2nd Respondent/2nd Defendant and the house has been mortgaged to Ammanur Co-operative Society by Puniyakoti (father of the parties) and his brother Raghavalu more than 50 years back and since the loan has not been discharged, the Society got a Decree for sale of the suit property in CL.No.2200/31-32 and the property has been sold to one Nagammal in or about 1942 in E.P.No.1538/39-40.

16.The categorical stand taken by the deceased 1st Defendant, in his written statement, is that he has been the only earning member of the family, employed in the Railway workshop, arranged for funds and repurchased the house in his mother's name for safety against the activities of the father in reckless borrowing and also apart from his earnings, he has with other resources like milk trade etc. with which he helped not only the family but also frequently has given large amounts to the 1st Respondent/Plaintiff, who on some pretext or other made demands for monetary help, as he himself has not been in a position to make both ends meet.

17.The deceased 1st Defendant, in his written statement, has projected a plea that the properties acquired by the 1st Respondent/Plaintiff in the name of his wife and improved upon with funds provided by the 1st DEFENDANT must also be brought into the hotchpot, if the 1st Respondent/ Plaintiff wants to go back on assurance etc. and also the suit is bad for partial partition and added further, the debts payable have been set out in the Annexure-I besides, the deed dated 20.6.1980 has been abandoned when the 1st Respondent/Plaintiff has refused to pay the share of the debt etc.

18.As far as the present case is concerned, the evidence of P.W.1 (1st Respondent/Plaintiff), P.W.2 and evidence of the deceased 1st Defendant (D.W.1)

assume significance.

19.It is the evidence of P.W.1 (1st Respondent/ Plaintiff) that the suit property initially belonged to his mother Ethiraji Ammal, who expired on 10.4.1967 and that he has five sisters and after the death of his mother, himself and the defendants and the sisters have got right over the suit property and his five sisters after receiving money have executed an Ex.A.1-release deed dated 27.5.1967 to and in favour of the 1st Respondent/Plaintiff, the deceased 1st Defendant and the 2nd Respondent/2nd Defendant and after the execution of release deed, the Plaintiff and the Defendants have got right over the suit property.

20.Further, the evidence of P.W.1 (1st Respondent/ Plaintiff) is to the effect that on 5.5.1980 in respect of the suit property a panchayat has taken place in regard to partition in the presence of Krishnasamy and 4 others and in the said panchayat, the suit property has been resolved to be divided into 3 equal portions and it has also further been resolved as to the rental payment to be made by the deceased 1st Defendant and the said resolution has been written by one Veerasamy and later on after reading the Ex.A.16 agreement letter dated 5.5.1980, the 1st Respondent/ plaintiff and the two defendants have affixed their signatures and in the panchayat, it has been decided that the deceased 1st Defendant has to pay Rs.990/- to him.

21.P.W.1 has further deposed that though himself along with the 2nd Respondent/2nd Defendant they have been ready to get the documents registered as per agreement made in the panchayat. But after the said panchayat also the deceased 1st Defendant has not paid the amount in regard to the collection of the rental amount and till the date of filing of the suit the deceased 1st Defendant has to pay a monthly amount of Rs.130/- towards rental due.

22.The evidence of P.W.1 goes to the effect that before 5.5.1980 all the loans have been discharged and it is wrong to state that only with the money of the deceased 1st Defendant the suit property has been purchased in the name of his mother.

23.The evidence of P.W.2 is to the effect that on 5.5.1980 the panchayat has taken place and in the said panchayat he along with Krishnasamy and others have been present together with P.W.1 (Plaintiff) and Defendants and it has been talked that in the family there has been a loan to an extent of Rs.12,000/-, out of which each one has to pay a sum of Rs.4,000/- and the 1st Respondent/Plaintiff and the 2nd Respondent/2nd Defendant have given a sum of Rs.8,000/- to the deceased 1st Defendant and an agreement has been written to divide the houses into 3 and within one month a document has been executed and the said resolution has been written by one Veeraraghavan and that the parties have signed the said agreement after reading the contents of the same, in and by which he has signed as a witness.

24.It is the evidence of D.W.1 (deceased 1st Defendant) that he has been receiving the rent in respect of the suit property from the year 1967 and the suit property has been purchased in auction by his aunt Nagammal and he has served in the Railways for 19 years and with a view to maintain the family, he has resigned his job and thereafter, he has been done milk business in places like Vellore, Agaram and spent the said income so received for the family and that he has educated his brothers and even after the auction he has enjoying the suit property by paying the income tax receipts.

25.D.W.1 has further deposed in his evidence that no panchayat has taken place and that he has not affixed his signature in the agreement and at the time of his mother's death in the family there has been a loan of RS.12,000/- and later himself, the Plaintiff and the 2nd Defendant have borrowed Rs.10,000/- from Ponmudi Reddiyar which has been discharged by him and towards the said loan his brothers have not paid any money.

26.The evidence of D.W.1 is to the effect that the Plaintiff has received a sum of Rs.12,000/- from him and has purchased a property in the name of his wife and a benami.

27.It is the categorical evidence of D.W.1 (deceased 1st Defendant) in his cross examination that the signature seen in Ex.A.16 letter belongs to him since he has not been aware about the conduct of panchayat, he has not mentioned the same

in the written statement and after his mother's death, one year later he has discharged the loan for which he has not filed any record and to his brother on different dates he has paid Rs.5,000/- and Rs.10,000/- respectively for which there are records but the same have not been filed into Court.

28.Though a contention has been advanced on the side of the Appellants that the deceased 1st Defendant has purchased the suit property in his mother's name on 17.10.1944 as per Ex.B.7-Sale Deed. A perusal of the contents of the sale deed clearly point out that only the name of the Plaintiff's mother has been mentioned that she has purchased the property from Nagammal and two others and nowhere in the said document any reference about the 1st Defendant is mentioned to the effect that he has purchased the property in the name of his mother.

29.It is well accepted principle in law that one is not allowed to adduce oral evidence much to the exclusion of the contents of the document or the terms of a written contract as per Section 91 of the Indian Evidence Act, 1872. It is for the party to show that the writing has been a fictitious or colourable devise. Certainly, the Court is competent to look into the surrounding circumstances. It is true that the deceased 1st Defendant is entitled to rebut the contention of the 1st Respondent/Plaintiff in regard to the ownership of the property claim to be in the name of the mother of the parties. But at the same time, it is the duty of the deceased 1st Defendant to prove the same to the satisfaction of the Court in a cogent and convincing manner. Also a perusal of Ex.A.2-Mortgage Deed dated 28.9.1963 clearly points out that the 1st Respondent/ Plaintiff's mother Ethiraji Ammal has mortgaged the property to and in favour of Parijathammal for discharging the loan amount in respect of the decree obtained by the Bank on the mortgage. It is also to be borne in mind that at the time of filing of the suit in the year 1984 the age of the deceased 1st Defendant has been made mention of in the preamble portion of the plaint as 47.

30.A perusal of Ex.A.3 certified copy of Mortgage Deed shows that the same has been executed in favour of Parijathammal by the 1st Respondent/Plaintiff, the deceased 1st Defendant and the 2nd Respondent/2nd Defendant. The said mortgage is for Rs.10,000/-. In the instant case on hand, the deceased 1st

Defendant except taking a plea that the suit property has been purchased by him out of his own money in the name of his mother Ethiraji Ammal, there is no document filed by him to substantiate his contention in this regard. A perusal of Ex.A.3-Mortgage Deed also indicate that the parties viz., the Plaintiff and the Defendants are entitled to the suit property, inasmuch as they have joined in the execution of the mortgage deed in unison. Therefore, the plea taken by the deceased 1st Defendant that he has purchased the suit property in the name of his mother Ethiraji Ammal cannot be countenanced to say that he is the real owner of the property. Moreover, in Hindu Law, if any property stands in the name of a female person then, the presumption is that she is the absolute owner of the said property, though the said presumption can be rebutted by the parties in the manner known to law.

31.Inasmuch as the suit property has been purchased by the mother of the Plaintiff, deceased 1st Defendant and the 2nd Respondent/2nd Defendant and since she is the owner of the property and even though the property tax receipts-Ex.B.4 (series) are standing in the name of Plaintiff and the Defendants, yet, in the instant case on hand, the deceased 1st Defendant has not established to the subjective satisfaction of this Court that he has purchased the suit property in the name of his mother out of his own money and the point is so answered.

32.In fact, both the Courts have taken note of the oral and documentary evidence much less the documents marked at the appellate stage and have come to a right conclusion that the Plaintiff, deceased 1st Defendant and 2nd Defendant's mother has purchased the suit property on 17.10.1944 and immediately after their mother's death they along with 5 sisters have inherited the property by means of inheritance and also the five sisters have executed the release deed Ex.A1 in favour of them and consequently in law, the parties viz., the 1st Respondent/ Plaintiff, deceased 1st Defendant and the 2nd Respondent/2nd Defendant have got 1/3rd share in the suit property and accordingly, the preliminary decree so passed in regard to 1/3rd share of the 1st Respondent/ Plaintiff in respect of the suit property is a valid and correct one in the eye of law, as opined by this Court.

33.In regard to the claim of the adverse possession pleaded by the Appellants, it is to be pointed out that in the written statement filed by the deceased 1st Defendant no plea of adverse possession has been raised/taken. Only in the Second Appeal a plea has been taken by the Appellants viz., the heirs of the 1st Defendant, that they have prescribed total to the suit property by means of adverse possession and therefore, they have ousted the 1st Respondent/Plaintiff and the 2nd Defendant from enjoyment of the suit property as evidenced from Exs.A.1 to A.11.

34.At this stage, a perusal of the notice of demand for property tax Ex.B.4 (series) indicates that it is in the name of the deceased 1st Defendant, 1st Respondent/Plaintiff and the 2nd Respondent/ 2nd Defendant. Also, the mortgage deed-Ex.A.3 dated 6.8.1975 has been executed in favour of Parijathammal by the 1st Respondent/Plaintiff, the deceased 1st Defendant and the 2nd Respondent/ 2nd Defendant.

35.Apart from Ex.B.4-Property Tax Notice and the Ex.A.3-Mortgage Deed dated 6.8.1975 documents, Ex.A.16-the Agreement letter dated 5.5.1980 [which appears to be an understanding letter] points out that among the 1st Respondent/Plaintiff, the deceased 1st Defendant and the 2nd Respondent/2nd Defendant and there is less unity and because of disagreement in the presence of Panchayatdars they have decided to execute a partition deed before 30.6.1980 in regard to the suit property and also Ex.A.1 release deed dated 27.5.1967 executed by the sisters of the parties viz., the Plaintiff and the Defendants unerringly point out that the 1st Respondent/Plaintiff, the deceased 1st Defendant and the 2nd Respondent/2nd Defendant have inherited the property after the death of the mother Ethiraji Ammal and they have been enjoying the property as seen from the Tax Demand Receipts are stands in their name and these documents go to point out that there cannot be any plea of ouster or adverse possession pleaded by the Appellants.

36.Also, this Court is of the considered view that in the written statement of the deceased 1st Defendant there is an absence of plea of adverse possession and since the relationship between the parties viz., the 1st Respondent/ Plaintiff, deceased 1st Defendant and the 2nd Respondent/2nd Defendant is one of brotherhood and because of the fact that in law one co-owner's possession is for

and on behalf of the other and therefore, there is no question of adverse possession and in that view of the matter, the plea of adverse possession taken by the Appellants fail and the point is answered accordingly.

37.The evidence of P.W.2 (Attestor of Ex.A.16-Agreement letter) shows that in regard to the family debt of Rs.12,000/- the decision has been taken by the Panchayatdars that each of the parties will have to pay Rs.4,000/- each and that the 1st Respondent/Plaintiff and the 2nd Respondent/ 2nd Defendant has paid their share to the deceased 1st Defendant. As a matter of fact, the deceased 1st Defendant as D.W.1, in his evidence, has candidly admitted that he has affixed his signature in Ex.A.16. Also, in Ex.A.16-Agreement letter there is a recital that the parties have agreed to execute the partition deed before 30.6.1980.

38.Dealing with Ex.B.10-Mortgage Deed dated 28.9.1963 for Rs.5,000/- executed by the mother of the Plaintiff and Defendants to and in favour of Parijathammal, it is clear that, in the second page of the said document, there is a recital in Tamil written by one Ponnusamy Reddy to the effect that on 25.4.1975 the deceased 1st Defendant, 1st Respondent/Plaintiff and the 2nd Respondent/ 2nd Defendant have paid the entire principal and interest and further that as per this document there is no balance and as such, the said document has been cancelled. However, there is no separate or independent cancellation of the mortgage deed except Ex.B.10 second page endorsement. Also, this particular endorsement of discharge of mortgage by the parties has not been given the independent exhibit number.

39.Though on the side of the deceased 1st Defendant Ex.B.12-letter dated 28.9.1963 signed by Parijathammal has been produced and marked at the appellate stage wherein it is mentioned in the last three lines that the equitable mortgage amount of Rs.10,000/- has been paid by the deceased 1st Defendant on 20.9.1979, one cannot give much weight to this letter for the simple reason in Ex.B.10 at page 2 earlier on 25.4.1975 itself, the said Parijathammal without any ambiguity, unequivocally has stated that the Plaintiff, the deceased 1st Defendant and the 2nd Defendant have paid the entire principal and interest and even though the said cancellation endorsement is written in Ink and even in the absence of separate cancellation of document, that endorsements or recitals clearly are

worthy of acceptance and as such, this Court is not accepting the recitals in Ex.B.12 that Parijathammal has received the equitable mortgage amount of Rs.10,000/- from the deceased 1st Defendant.

40.Exs.B.5 and B.6 documents though they are in the name of the 1st Respondent/Plaintiff's wife, one cannot come to an inevitable conclusion that the deceased 1st Defendant has paid the money. In short, there is no positive, clinching and convincing proof on the side of the deceased 1st Defendant to establish that the suit property has been purchased in the name of his mother and in fact, the plea of benami has not been established to the satisfaction of this Court.

41.Though the Learned Counsel for the Appellants submits that the endorsement in Ex.B.10 mortgage deed showing the entire principal and interest amount has been discharged by the Plaintiff and two Defendants requires registration under Section 17 (b) of the Registration Act and in the absence of the same, it cannot be admitted in evidence by the First Appellate Court, it is to be pointed out that the said endorsement of discharge has not been marked separately and it only forms part of Ex.B.10 Mortgage Deed in a dovetailed fashion (though written in ink) and therefore, the plea of Discharge cannot be negatived for want of registration, as opined by this Court.

42.In this connection, it is not out of place to point out that in Ex.A.16-Agreement letter dated 5.5.1980 there is a reference that the 1st Respondent/Plaintiff has paid a sum of Rs.8,000/- for his share and also the share of the 2nd Defendant. The balance amount is said to have been paid by the deceased 1st Defendant though for which no sufficient proof is available except the factum of original Sale Deed-Ex.B.7 dated 17.10.1944 in the name of Ethiraji Ammal has been in the hands of the mortgagee Parijathammal and the deceased 1st Defendant has got back the said Ex.B.7-Sale Deed. Even though there is no positive proof that the deceased 1st Defendant has paid his part of the share of the mortgage amount in wiping out the mortgage debt apart from the sum of Rs.8,000/- paid by the Plaintiff towards his share and on behalf of the 2nd Defendant, the fact that the original document Ex.B.7-Sale Deed dated 17.10.1944 in the name of Ethiraji Ammal has come into

the hands of the deceased 1st Defendant and he has produced the same and marked the same as an additional document at the Appellate Court through I.A.No.169 of 1994, it can very well safely be presumed or inferred that the mortgage debts have been discharged not only by the deceased 1st Defendant but also from and out of the sum of Rs.8,000/- paid by the 1st Respondent/Plaintiff and the 2nd Respondent/2nd Defendant and since the agreement letter has referred to the sum of Rs.8,000/- and also P.W.2 as spoken about the arrangement made in Ex.A.16 in his evidence, this Court comes to an inevitable conclusion that both the Courts below have come to the right conclusion in not providing for the payment of the mortgage debts and the point is answered against the Appellants and the substantial questions of law 1 to 3 are answered accordingly.

43.In the result, the Second Appeal is dismissed, leaving the parties to bear their own costs. Resultantly, the Judgment and Decree dated 08.08.1996 in A.S.No.7 of 1993 passed by the Principal District Judge, Vellore, N.A.A. District and the Judgment and Decree dated 18.11.1992 in O.S.No.64 of 1991 passed by the Subordinate Judge, Ranipet are affirmed for the reasons assigned by this Court in this Appeal. Connected C.M.P. is closed.

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