

(1998) 11 MAD CK 0002
In the Madras High Court

D.R. Venkatasamy Naidu (died) and Another	APPELLANT
Vs	
Anushaya Devi and Others	RESPONDENT

Date of Decision : 24-11-1998

Acts Referred:

Citation : (1999) 2 MLJ 98

Hon'ble Judges : A. Ramamurthi, J

Bench : Division Bench

Judgement

A. Ramamurthi, J.—The unsuccessful first defendant is the appellant. The first defendant died after filing the second appeal and the second appellant was added as legal heir.

2. The case in brief is as follows: The plaintiffs filed a suit for partition and separate possession of 1/5th share in the property. The suit properties originally belonged to one Bangarammal and she died in 1967. The plaintiffs and defendants 1 to 11 are the legal heirs. They enjoyed the property in common. The plaintiffs are entitled to 1/5th share, first defendant is entitled to 1/5th share. Defendants 2 to 9 are entitled to 1/5th share, defendants 10 and 11 are entitled to 1/5th share. The plaintiffs also sent notice calling upon the first defendant to effect partition, but it was not effected. Defendants No. 12 is the wife of the first defendant. Now it appears that the first defendant had executed a settlement deed in favour of defendant No. 12. Defendants 13 to 17 are tenants in the property.

3. Defendants 1, 12, 13, 15 to 17 resisted the suit stating that the suit property belonged to the first defendant. He had executed a settlement deed in favour of defendant No. 12. The first defendant alone had purchased the property benami in the name of his mother Bangarammal. For the last

34 years, the first defendant alone was enjoying the property and he had spent more than Rs. 40,000 towards improvement. Bangarammal had no means to purchase the property and she had also executed a Will in 1966 in favour of the first defendant. The notice sent by the plaintiffs have been suitably replied.

4. Defendants 2, 3, 5 to 11 and 14 remained ex parte.

5. The trial court framed 6 issues and on behalf of the plaintiffs Exs.A-1 to A-6 were marked, and P. W. 1 was examined. On the side of the

defendants, Ex.B-1 to B-40 were marked and D.Ws. 1 to 7 were examined. The trial court passed a preliminary decree in favour of the plaintiffs.

Aggrieved against this, the first defendant preferred A.S.No. 22 of 1985 on the file of the District Court, Coimbatore and the appeal was also

dismissed. Aggrieved against this, the first defendant has preferred the second appeal.

6. The first defendant raised the following substantial questions of law:

1. Whether the courts below have erred in not accepting the plea of the defendants that the suit is barred by limitation u/s 110 of the Limitation

Act?

2. Whether the courts below have in law in failing to hold that on account of ouster from 1968, the plaintiffs are not entitled to claim partition?

3. Whether the courts below have erred in casting the onus of proof of the defendants?

7. The points that arise for consideration are:

1. Whether the plaintiffs are entitled to partition and separate possession of 1/5th share in the suit property?

2; Whether the first defendant purchased the property benami in the name of his mother?

3. Whether the Will of the year 1966 said to have been executed by Bangarammal is true, valid and binding?

4. To what relief?

8. The suit property stood in the name of one Bangarammal by virtue of the registered document. The plaintiffs mainly contended that the

properties were purchased by Bangarammal and on her demise, the plaintiffs are entitled to 1/ 5th share in the property. The said Bangarammal

had three sons and two daughters. However, according to the first defendant, he had purchased the property benami in the name of Bangarammal out of his own funds. The burden is only on the first defendant to prove that the property was purchased Benami. It is stated that the first defendant was in politics and therefore the property was purchased by him benami. The original document also was not filed by the first defendant. The scribe and attestors to the document were also not examined by the first defendant. Because of this only, the trial court as well as the lower appellate court came to the conclusion that the first defendant failed to establish that the property was purchased benami in the name of Bangarammal. The assessment for the property also stood in the name of Bangarammal and the receipts also stood only in her name. At no point of time, the first defendant took any steps to get the assessment transferred in his name. In fact, D.W.1 admitted in the Cross-examination that the property belonged to his mother and on her demise, he is entitled to a share in the same. This piece of admission only strengthened the contention of the plaintiffs.

9. The next contention put forward by the first defendant is that the said Bangarammal executed a Will in his favour in 1966. At one point of time, the first defendant took a stand that Bangarammal had no means to purchase the property but later it is stated that she purchased it subsequently, the first defendant stated that she has executed a Will in his favour. The stand taken by the first defendant is inconsistent. Ex.B-3 is the Will said to have been executed by Bangarammal. The attestors to the document were examined by the first defendant but they stated that they have not seen the testator signing in the document. Ex.A-6 is the notice sent by the plaintiffs to the defendants. Ex.B-38 is the reply sent by Ex.D-1. There is no reference about the Will in the said reply notice! Moreover, even in the written statement, the year of the Will was mentioned and other particulars were not mentioned. If really there was a Will, executed by the Testator, when she was in a sound and disposing state of mind, it is not difficult for Ex.D-1 to give all the details. Considering the fact that the attestors to the document have not supported the case of will coupled with the facts that the particulars of the Will has not been projected at the earliest point of time either in the reply notice or in the written statement these are strong

circumstances to infer that the Will could not be true.

10. The learned Counsel for the first defendant contended that he is in possession and enjoyment of the property for a long period and has also

prescribed the title. In short, it is stated that whatever right available to the plaintiffs is extinguished. The first defendant has executed a settlement

deed under Ex.B-37 in favour of his wife D-12. Only when the first defendant has got absolute right in the property, he can convey the same to the

third party. The reasons stated supra clearly established that the property belonged to Bangarammal and she died intestate and under the said

circumstances, all her heirs alone are entitled to inherit the property. The first defendant was not the absolute owner of the property and he has not

power whatsoever to execute any settlement deed in favour of defendant No. 12 and as such it is not valid and binding on the parties.

11. The learned Counsel for the plaintiffs also relied upon a decision of the Apex Court in Dr. J.N. Banavalikar Vs. Municipal Corporation of

Delhi and another, , wherein it is observed as follows:

It is a settled rule of law that as between coheirs there must be evidence of open assertion of hostile title, coupled with exclusive possession and

enjoyment by one of them to the knowledge of the other so as to constitute ouster. The burden of making out ouster is on the person claiming to

displace the lawful title of a co-heir by his adverse possession.

This decision is applicable to the case on hand.

12. There is absolutely no material to come to the conclusion that the first defendant has prescribed that title by adverse possession. Both the

courts below have given a concurrent finding in favour of the plaintiffs and the learned Counsel for the first defendant is not in a position to point out

any infirmity in the orders passed by the courts below and as such no interference is called for.

13. For the reasons stated above, the second appeal fails and it is dismissed with costs. Consequently, connected C.M.Ps. are also dismissed.