(1979) 08 MAD CK 0043

In the Madras High Court

Kuppayammal and Others APPELLANT

Vs

Parvathammal and Others RESPONDENT

Date of Decision : 13-08-1979

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 66(1)

Citation : (1980) 1 MLJ 263

Hon'ble Judges : V. Ratnam, J

Bench : Division Bench

Judgement

V. Ratnam, J.—Defendants 1 to 6, who had lost in the Courts below are the appellants, in this second appeal which arises out of a suit for

partition and separate possession of 1/3 share in the suit properties instituted by the first respondent herein. The relationship between the parties

has been set out in the ""A"" Schedule to the plaint and the correctness thereof is not in dispute. One Anicham Pillai Kandar, whose wife was

Kuppayee, had three sons viz., Thandavan alias Doraiswami Kandar, Veerabadra Kandar and Appavu Kandar. The plaintiff in the suit,

Parvathammal, is the wife of Veerabadra Kandar. Kuppayee wife of Thandavan alias Doraiswami Kandar and her children are defendants 1 to 6

in the suit. The wife of Appavu Kandar viz., Valli is the 7th defendant and her son is the 8th defendant in the suit. According to the case of the

plaintiff, her husband Veerabadra Kandar, his brothers Thandavan alias Doraiswami Kandar and Appavu Kandar as well as the father Anicham

Pillai Kandar constituted an undivided Hindu family and the suit properties belonged to that family. The ""B"" schedule properties which originally

belonged to the joint family of Anicham Pillai Kandar and his sons were brought to sale in Court auction in execution of a decree in O.S. No. 1367 of 1925, District Munsif''s Court, Namakkal. The decree therein was assigned in favour of one Shanmuga Kandar who was none other than the

brother-in-law of Anicham Pillai Kandar and the father-in-law of Thandavan alias Doraiswami Kandar and the properties, according to the

plaintiff, were purchased in the name of the said Shanmugha by Anicham Pillai Kandar out of his own funds since Anicham Pillai Kandar was a

spond-thrift. Anicham Pillai Kandar died on 5th June, 1945. The husband of the plaintiff viz., Veerabadra Kandar died on 27th February, 1947.

Kuppayee, wife of Anicham Pillai Kandar, died on 15th May, 1948 and Thandavan alias Doraiswami passed away on 24th October, 1973. After

the death of Anicham Pillai Kandar in 1945, according to the plaintiff, the ""B"" Schedule property was transferred by Shanmuga in favour of his

sister Kuppayee, wife of Anicham Pillai Kandar by means of a sale deed without any consideration. Those properties, according to the plaintiff,

were family properties and treated and enjoyed as joint family properties throughout and even after the death of Kuppayee in 1948. In addition to

the ""B"" schedule property, the family also possessed the ''C schedule property viz., the family house. The plaintiff claimed that ""B"" and ""C

schedule properties belonged to the plaintiff and defendants in which the plaintiff, as the wife of Veerabadra Kandar, would be entitled to 1/3 share

and defendants 1 to 6, as the heirs of Thandavan alias Doraiswami Kandar, will be entitled to 1/3 share and defendants 7 and 8 will be entitled to

the other 1 /3 share as the hairs of Appavu. A demand for partition made by the plaintiff was also not acceded to by the defendants and after the

death of Thandava Kandar, defendants 1 to 6, his heirs, were also not desirous of bringing about a partition. Under these circumstances, the

plaintiff instituted the suit with reference to her 1/3 share in the suit properties.

2. The heirs of the third son of Anicham Pillai Kandar viz., Appavu Kandar, who were defendants 7 and 8 in the suit, remained ex Parte. The suit

was resisted only by the heirs of the first son of Anicham Pillai Kandar viz., Thandavan alias Doraiswami Kandar. According to them, the Court

auction sale in execution of the decree in O.S. No. 1365 of 1925 in favour of Shanmugha Kandar is not a benami one and it is also further

incorrect to state that Shanmugha Kandar transferred the ""B"" schedule property in the name of his own sister Karuppayee without consideration, The ""B"" schedule property, according to defendants 1 to 6, was purchased by Kuppayee with her own money and she was in possession and

enjoyment of the same in her own right and it was never treated as joint family property. From 1948 when Kuppayee died, Thandava, the father of

defendants 2 to 6 and the husband of the first defendant, was in possession and enjoyment of the suit properties openly in his own right and

thereafter, defendants 2 to 6 were in possession of the same. It was therefore contended that Thandava Kandar had prescribed his right, interest

and title over the suit properties by adverse possession and that he was never the manager of the joint family. As regards the ""C"" schedule, it was

claimed that it exclusively belonged to Thandava Kandar and that it was not the joint family property. The husband of the plaintiff, viz., Veerabadra

Kandar, according to the defendants 1 to 6, did not have any right in the suit properties and consequently, the plaintiff suing as a heir of the

husband, did not have any rights in the properties. Defendants 1 to 6 prayed for the dismissal of the suit.

3. The learned District Munsif, Namakkal, who tried the suit held that the Court auction sale in O.S. No. 1367 of 1925 was a benami one as

contended by the plaintiff and that it was brought into existence by the utilisation of the moneys of Anicham Pillai Kandar for the benefit of the joint

family. The sale by Shanmugha in favour of Kuppayee was also held to be for the benefit of the joint family. The plea of prescriptive title put forth

by defendants 1 to 6 was characterised as an after-thought and baseless one and negatived. In view of the aforesaid findings, it was held that the

suit properties were the joint family properties belonging to Thandava Kandar and his two brothers and therefore, the plaintiff is entitled to 1 /3

share in the properties as the only heir of the deceased husband Veerabadra Kandar Aggrieved by this, defendants 1 to 6 preferred an appeal in

A.S. No. 379 of 1975. District Court, Salem. The learned District Judge held, on an analysis of the entire evidence both oral and documentary,

that the property sold to Shanmugha Kandar in the Court-auction sale was only enjoyed by Anicham Pillai Kandar and his sons and that the

objection raised by defendants 1 to 6 that the Court-auction sale cannot be questioned as benami is not sustainable. It was also further held that

the ""B"" schedule property constituted the joint family properties of Anicham Pillai Kandar and his sons. The plea of acquisition of title by adverse possession set up by defendants 1 to 6 was held to be without substance. On these conclusions, the learned District Judge held that the plaintiff is

entitled to the relief for partition and separate possession of her 1/3 share and in this view, he confirmed the judgment and decree of the trial Court

and dismissed the appeal.

4. In this second appeal, the learned Counsel for the appellants Miss S. Padmini. in a very able argument, raised three contentions. The first is that

by reason of Section 66(1) of the Civil Procedure Code, the plaintiff cannot base her title on a benami purchase in Court-auction and seek to

enforce her rights in the ""B"" schedule properties on that footing. The second contention of the learned Counsel for the appellants is that it is not

established that the consideration for Exhibit B-l sale proceeded from the joint family. The third and last contention of the learned Counsel is that in

any event the appellants have prescribed title to the suit properties by adverse possession. Per contra, the learned Counsel for the respondents

contends that Section 66(1) of the CPC can have no application to the facts of the instant case, where the suit has been filed on the basis that the B

Schedule properties belonged to the joint family. It is further contended by him that it is admitted that the B Schedule properties were purchased in

the name of Shanmugha from out of the funds provided by Anicham Pillai Kandar, who was the manager of the family. The learned Counsel also

contends that the possession of the properties by Thandavan, husband of the first defendant, was only on behalf of the family and therefore, there

can be no acquisition of prescriptive title to the suit properties. There is no dispute that the B Schedule properties originally belonged to Anicham

Pillai Kandar and his sons and that they were sold in Court-auction in execution of the decree in O.S. No. 1367 of 1925, District Munsif''s Court,

Namakkal. The sale certificate Exhibit B-l dated 9th June, 1934, has been issued in the name of Anicham Pillai Kandar''s brother-in-law

Shanmugha Kandar and he had taken possession through Court on 20th September, 1934, as shown by Exhibit B-3. After the death of Aincham

Pillai Kandar, Shanmugha Kandare purported to sell the B Schedule properties in favour of his sister Kuppayee Ammal under Exhibit B-2. It is in

the background of these facts that the first contention of the learned Counsel for the appellants has to be considered.

5. Section 66(1) of the Code of Civil Procedure, as amended by Act CIV of 1976, runs thus:

(1). No suit shall be maintained against any person claiming title under purchase certified by the Court in such manner as may be prescribed on the

ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims and in any suit by a person

claiming title under a purchaser so certified, the defendant shall not be allowed to plead that the purchase was made on his behalf or on behalf of

some one through whom the defendant claims.

The section prior to its amendment by Act CIV of 1976 provided that a suit is not maintainable against a purchaser certified by the Court on the

ground that the purchase was made benami on behalf of the plaintiff. By the amending Act CIV of 1976, an additional bar in relation to the defence

based on any right in respect of any property held benami. whether against the person in whose name the property was sold or against any other

person, is provided and this does not apply to the instant case. The bar u/s 66(1), Civil Procedure Code, as it stood would apply only if the suit is

against the certified purchaser or his representative on the ground that the purchase was made on behalf of the plaintiff or his predecessor-in-

interest. In the instant case, it must be noted that the suit for partition is neither against the certified purchaser nor his representative and therefore,

the bar u/s 66(1), Civil Procedure Code, could not be invoked. However, the learned Counsel for the appellant strongly relied on Vadrevu

Suryanarayana Vs. Kocherlakota Venkata Subbarao and Another, . In that case, the plaintiff''s property was sold in execution of a decree against

him and it was brought by the defendant in his name, but the entire amount of the sale price and expenses of the sale was admittedly furnished by

the plaintiff, part of it on the day of sale and the balance four days after the sale. On the latter date, the defendant addressed a letter to the plaintiff

wherein he referred to the fact of the sale and of the plaintiff having got the defendant to bid at the sale at the plaintiff s costs and concluded by

stating that the said land shall be reconveyed to the plaintiff whenever required by him without demanding any consideration therefor. In a suit for

specific performance of the agreement contained in the letter, the defendant pleaded Section 66(1), Civil Procedure Code, in bar of the suit. The trial Court granted a decree for specific performance but on appeal by the first defendant, it was held that Section 66(1), Civil Procedure Code,

would clearly bar the suit. At page 8l Rajamannar C,J., laid down the real test thus:

If the plaintiff''s title depends ultimately on the benami nature of the transaction, then, Section 66 would certainly be a bar, but, if the plaintiff''s title

is dependent upon other facts and circumstances like, for example, the application of the general law or the carrying out of a separate contract,

then Section 66 would not be a bar.

The title of the plaintiff in the present case is dependent upon other facts and circumstances viz., the properties being the joint family properties and

therefore, their being available for partition. The learned Counsel for the appellants laid considerable emphasis on the opening portion of the

passage extracted above and contends that in the process of establishing title, if it is necessary even remotely to refer or rely upon a benami Court-

sale, then the bar u/s 66(1), Civil Procedure Code, would be attracted. The further observations of the Bench extracted above to the effect that if

the plaintiff''s title is dependent upon other facts and circumstances, then Section 66(1), Civil Procedure Code, would not be a bar, clearly do not

support this Contention. The use, therefore, of the word ""ultimately"" in the context of the facts and circumstances of that case, must be taken to

mean without more or exclusively. In this view, the decision in Vadrevu Suryanarayana Vs. Kocherlakota Venkata Subbarao and Another, relied

on by the learned Counsel for the appellants does not assist her in any manner.

6. The learned Counsel for the respondents invites my attention to the judgment reported in P. Krishna Bhatta and Ors. v. Mundlla Ganapathia

Bhatta and Ors. AIR 1956 Mad. 643 In dealing with the scope of the bar u/s 66, CPC two limitations in regard to the prohibition u/s 66, Civil

Proceodure Code, have been pointed out. One is that if the purchase is made by persons with the express or implied authority or agency or by

persons who stand in a fiduciary position, the bar u/s 66, Civil Procedure Code, is not attracted. The second limitation noticed is about the

purchase made with joint family funds by the managing member of a Hindu family in the name of the third person. Referring to the decision

reported in A. Nataraja Mudaliar Vs. D.P. Ramaswamy Mudaliar and Others, , Justice Ramaswami stated thus:

Where the managing member of a Hindu family makes a purchase with joint family funds but takes the safe in the name of a third person, any

member of the family can sue the third person on the ground that the purchase was benami for the managing member and so ensured for the benefit

of the family. The reason is that a purchase by a managing member in the name of a third person cannot be considered to have been on behalf of all

the members of the family and so cannot be considered to have been made ''on behalf of the plaintiff'' within the meaning of Section 66.

The object of Section 66, according to the Bench, is to put a stop to benami purchases at Court-sale and when a managing member makes such a

purchase in the name of a third person, he is doing something which is fully wrong and cannot be presumed to be acting on behalf of the family. The

scope of the bar u/s 66(1), Civil Procedure Code, came up for consideration in Girja Nandini Devi and Others Vs. Bijendra Narain Choudhury, .

There, the question arose whether the properties which stood in the name of the 24th defendant belonged to the joint family of the parties. With

reference to those items of property acquired in the name of that defendant in Court-auction-sale, the trial Court held that properties were acquired

with the aid of family funds and the High Court also concurred with that view. On that basis, it was contended before the Supreme Court that a

share as claimed by the plaintiff in those properties cannot be given in view of the bar contained u/s 66(1), Civil Procedure Code. In dealing with

this contention, Shah, J., has explained the object of Section 66 thus at page 102:

The object of the clause is to prevent claims before the civil Court that the certified purchaser purchased the property benami for another person.

Thereby, the jurisdiction of the civil Court to give effect to the real as against the nominal title is restricted and the section must be strictly

construed. Where a person alleges that a property purchased at a Court-auction was purchased on his behalf or on behalf of some one through

whom he claims, the suit is clearly barred.

Dealing with the facts of that case, the Supreme Court proceeded to point out that in so far as the claim of partition with reference to the properties

that stood in the name of the 24th defendant is concerned, the plaintiff did not set up a case that the 24th defendant acquired the properties for him,

nor did he plead that the properties were acquired for some person through whom he was claiming. The claim made was that the properties

belonged to the joint family because they were purchased with the aid of the joint family funds in the name of the 24th defendant. To such a claim

Section 66(1), Civil Procedure Code, will not be attracted is the ultimate conclusion of the Supreme Court. In the instant case also, the claim that is

made is that the suit properties formed part of the joint family properties or treated as family properties and therefore, on the death of Thandavan,

his wife, the plaintiff in the suit, was entitled to succeed to his share therein. The principles laid down by the Supreme Court referred to above

would apply to the present case and therefore, the contention of the learned Counsel for the appellants that Section 66(1), Civil Procedure Code,

would be a bar cannot be accepted.

7. As regards the second contention of the learned Counsel for the appellants on the question of furnishing of consideration for the acquisition of

the B Schedule properties, the plaintiff, in order to substantiate this had examined. P.Ws. 2 and 3. They speak to the Court-sale in favour of

Shanmugha as well as the sale by Shanmugha in favour of his sister Kuppayee. Their evidence clearly shows that the property was purchased in

the name of Shanmuga for the benefit of the family by Anicham Pillai Kandar and after the death of Anicham Pillai Kandar, his brother-in-law

Shanmuga Kandar, transferred it to his sister Kuppayee. The plaintiff has also given evidence as P.W. 1 on this aspect. P.W. 4 also further

corroborates the above said versions. All of them speak about the enjoyment of the property as family property. D.W. 2, a neighbour had

admitted that since Anicham Pillai Kandar was a spend-thrift, he purchased the suit properties in the Court-auction in the name of his brother-in-

law Shanmugha Kandar with his own funds. The evidence of P. Ws. 1 to 4 and D.W. 2 makes it clear that the family properties of Anicham Pillai

Kandar really never left the family in spite of the Courts sale, but was only enjoyed by Anicham Pillai Kandar and his sons as before. The

production of Exhibits B-l and B-2 by the defendant can also be explained since the first defendant''s husband was managing the entire properties

as joint family manager. Naturally therefore, he had the custody of Exhibits B-l and B-2 and other documents as well. The evidence of P.Ws. 1 to

3 is to the effect that the B schedule properties were in the possession and enjoyment of the joint family consisting of Anicham Pillai Kandar and his

three sons. P. Ws. 1 and 2 are definite that Shanmugha Kandar never enjoyed the B schedule properties D.Ws. 1 to 3, no doubt, deposed that

Shanmuga Kandar enjoyed the B schedule properties. The best evidence with reference to such enjoyment of Shanmugha Kandar has not been

produced either in the shape of kist receipts or by the examination of the Village Officers. In the absence of such evidence, it is not possible to

accept the evidence of D.Ws. 1 to 3 that Shanmuga Kandar was in possession and enjoyment of the B schedule properties. On the basis,

therefore, of the evidence of P.Ws 1 to 3, it has to be held that the properties were purchased by Anicham Pillai Kandar out of the family funds

and that he and his sons were in possession and enjoyment of the properties as properties of the joint family. It is therefore not possible to accept

the contention of the learned Counsel for the appellants that there is no proof for the acquisition of the properties from out of the family funds and

the enjoyment thereof by the members of the family.

8. The last contention that the defendants and their predecessor-in-title Thandavan had prescribed title to the suit properties by adverse possession

since they had been in enjoyment of the suit properties for more than the statutory period may now be considered. The properties were the joint

family properties of Anicham Pillai Kandar and his sons and on the death of Anicham Pillai Kandar, his eldest son, Thandavan Kandar, husband of

the first defendant, became the manager of the family and its properties and was looking after the same till his death on 24th October, 1973. The

mere circumstance that kist and hous. tax were paid in the name of Thandavn Kandar and the receipts are in the name of his son, is not sufficient to

show that the properties were enjoyed adversely by Thandavan Kandar There is nothing unusual or unnatural in the payment of kist or house tax

by the senior male member of the family and that too by a person in the position of a manager. Inasmuch as the properties have been hell to be the

joint family properties, even if the case of the defendants that the plaintiff did not receive any share in the income is to be accepted, it does not

mean that she had been ousted from her possession. There is therefore, no subsistence in the contention of the learned Counsel for the appellants

that the appellants have prescribed title to the suit properties by adverse possession. On the death of Anicham Pillai Kandar, his three sons

succeeded to the B and C schedule properties. On the death of the husband of the plaintiff in 1947 and on the death of Kuppayee in 1948. the

plaintiff had undoubtedly become entitled to 1/3 share in the B and C schedule properties. Obviously, therefore, she will be entitled to the relief of

partition and separate possession of her 1/3rd share in the B and C schedule properties.

9. For the aforesaid reasons, the conclusions of the Counts below are unassailable and the second appeal has to fail and is accordingly dismissed.

But having regard to the close relationship between the parties, each party will bear his or her costs throughout.