

(1996) 03 MAD CK 0014
In the Madras High Court

M. Murugesu Naicker (died) and Others	APPELLANT
Vs	
M. Sadayappa Naicker and Others	RESPONDENT

Date of Decision : 18-03-1996

Acts Referred:

Benami Transactions (Prohibition) Act, 1988 — Section 4

Citation : (1996) 2 MLJ 149

Hon'ble Judges : Govardhan, J

Bench : Division Bench

Judgement

Govardhan, J.—First defendant is the appellant.

2. The plaintiff's case is as follows:

The plaintiff's father Munusami Naicker purchased the suit property by means of a sale deed dated 7.8.1957 for a sum of Rs. 300 from one

Amitha Bibi and Ors. The plaintiff and defendants are the legal representatives of the said Munusami Naicker, being brothers and sister. Munusami

Naicker was the joint family manager when he was alive. The second defendant has stealthily applied for sub-division of an extent of 5 cents out of

2.11 acres and manipulated to get the same without the concurrence of the plaintiff. The family had sunk two wells from out of the joint family

properties. The second defendant is trying to get separate service connection to the joint family well to irrigate his properties which are at a

distance: The plaintiff therefore demanded for partition and separate possession by issuing notice. The second defendant has sent a reply with false

allegations. The plaintiff has therefore filed a suit for injunction against the Electricity Board giving separate service connection to the second

defendant. It was dismissed on the ground that the plaintiff has to seek his

remedy by filing a suit for partition. The plaintiff is in joint possession and enjoyment of the properties in which he is entitled to separate 1/6th share and possession. Hence, the suit.

3. The first defendant filed a written statement stating as follows: There was never a joint family nor any joint family property to be managed since

the suit property was purchased by the first defendant out of his own earnings as a plumber in the Corporation of Madras. Out of sentiment, the

sale deed was taken in the name of the father. There is no co-parcenary property in which the plaintiff could claim his share. First defendant alone

was cultivating the entire property in his own right and taking the income. The claim of the plaintiff that he is in joint possession is not correct. The

other members of the family have executed a release deed in favour of the first defendant conceding that they have no right over the suit properties.

But, out of love and affection, the first defendant has given some properties to his brothers. When the first defendant offered some lands to the

plaintiff, he declined to accept it. A family settlement was arrived at in the year 1964. It is not known why the plaintiff has not pressed his claim for

all these two years even though he has issued a notice for partition in 1971. The suit is barred by limitation. The injunction suit filed by the plaintiff is

pending in the High Court in second appeal. The suit is liable to be dismissed.

4. On the above pleadings, after trial, the learned District Munsif has held that the first defendant has purchased the property in the name of his

father and the plaintiff is therefore not entitled to any share in the same and dismissed the suit.

5. Aggrieved over the same, the plaintiff has preferred an appeal to the Sub Court, Chengalpattu. The learned Sub Judge has held that the plaintiff

has got a right over the suit property as a co-sharer and since the suit property is a joint family property, and not the self-acquired property of the

first defendant, the-plaintiff is entitled to a decree for partition and allowed the appeal granting a decree in favour of the plaintiff.

6. Aggrieved over the same, the first defendant has preferred this second appeal.

7. The plaintiff has filed the suit for partition of the suit property into six equal shares and for allotment of one such share to him in respect of the

property in S.No. 1/1, at Sathancheri village measuring an extent of 2.77 acres contending that it was a property purchased by his father

Munusami Naicker as the Manager of the Hindu joint family and since he died intestate and since there was no division among the joint family

members, he is entitled to 1/6th share. The first defendant has resisted the same by contending that even though the sale deed in respect of the

property stands in the name of his father, it was actually purchased by him from out of his own earnings in the name of his father so that, his father

can command respect from the villagers as an elderly person presiding over panchayats in the suit village. The defendants 2, 4 and 5 have also

supported the case of the first defendant by adopting the written statement filed by the first defendant. The third defendant remained ex parte. The

trial court has accepted the case of the defendants and held that the suit property is separate property of the first defendant and therefore, the

plaintiff is not entitled to the relief prayed for and dismissed the suit on that ground.

8. The lower appellate court has reversed the judgment of the trial court on two grounds viz., the recitals in the release deed under Ex.A-8

executed by the fourth defendant in favour of the first defendant shows that there was division of the suit property and also on the ground that in the

suit filed by the plaintiff in O.S. No. 628 of 1974 against the second defendant for injunction, the appellate court has held that the plaintiff as a co-

sharer is entitled to a share in the property and the said finding is binding on the plaintiff. The learned Counsel appearing for the appellant would

argue that the evidence both oral and documentary would show that the property was purchased by the first defendant benami in the name of his

father Munusami Naicker and therefore, the judgment of the appellate court that the plaintiff is entitled to a share on the ground that it was the

property purchased by Munusami Naicker has to be set aside. The learned Counsel would argue that the endorsement in Ex.B-1 itself would show

that the money was paid by the first defendant at the time of the purchase of the property. Ex.B-1 is the registration copy of the sale deed executed

by Amitha Bi in favour of Munusami Naicker, in which the endorsement regarding the payment of consideration is to the effect that the money was

paid by the first defendant on behalf of his father Munusami Naicker. The consideration was paid only by the first defendant is seen from the above

endorsement. The first defendant was employed as a plumber in the Corporation, while his father was doing cooly work in the village. It is not the

case of the plaintiff that there was any ancestral property from which there was surplus income enabling Munusami Naicker to purchase this property from Amitha Bi.

9. In the decision reported in Ranganayaki Ammal and Others Vs. S.R. Srinivasan and Others, , it is held as follows:

In a Hindu joint family, if one member sues for partition on the foot that the properties claimed by him are joint family properties then three

circumstances ordinarily arise. The first is an admitted case when there is no dispute about the existence of the joint family properties at all. The

second is a case where certain properties are admitted to be joint family properties and the other properties in which a share is claimed are alleged

to be the accretions or acquisitions from the income available from joint family properties or in the alternative have been acquired by a sale or

conversion of such available properties. The third head is that the properties standing in the names of female members of the family are benami and

that such a state of affairs has been deliberately created by the manager or the head of the family and that really the properties or the amount

standing in the name of female members are properties of the joint family.

In the case on hand, it is the case of the defendant that there is no joint family properties at all. It is not the case of the plaintiff that there are certain

properties admitted to be the joint family properties and the suit property is an accretion or acquisition from the income of the joint family

properties. We are not concerned with the third head. The burden is therefore on the plaintiff to establish that the suit property is the joint family

property. But, in view of the fact that it is not in dispute that the father was only a cooly, that there was no ancestral property, and there was no

surplus income for the father and in view of the fact that the first defendant is employed in the Corporation, it cannot be stated that the plaintiff has

established that it is a joint family property. It has been laid down in the decision reported in Sant Ram v. Parmanand AIR 1978 P. & H. 158, as

follows:

The person who asserts and alleges any property to be Hindu joint family property has to prove the same, in order to be successful in this he

should either prove that the property was inherited from the common ancestor and as such being ancestral property, it should be presumed to be

joint family property. In the alternative, satisfactory evidence has to be led to warrant a conclusion that the property was acquired with the aid of joint family nucleus which, in its turn, has to satisfy a further test that such a nucleus was sufficient to acquire the property in question. In order to come to a conclusion from the joint family nucleus, the fact that the karta or any member of the joint family acquiring the same had other source of income also from which the property in question was in fact acquired is also relevant and has a material bearing for determination of the controversy.

The plaintiff has not let in any evidence satisfying the requirements referred above. Therefore, it cannot be stated that the plaintiff has established that the suit property is a joint family property. There is one other fact which has to be considered and it is as follows:

The plaintiff himself has purchased the property along with the fourth defendant in the year 1957 and he has sold the same in favour of one

Chandra Naicker under Ex.B-3 on 1.11.1960.

This would go to show that even though the plaintiff claims to be a joint family member, and the acquisition made by his father is a joint family

property, he had treated the property purchased by him along with his brother the 4th defendant as his individual and separate property and sold

the same in favour of one Chandra Naicker. This he could not have done if the property purchased by him along with the fourth defendant was

also treated as the joint family property. This sale deed under Ex.B-3 being later in point of time to Ex.B-1, it would show that the subsequent

treatment of the property was also as his separate property. When the fourth defendant and the plaintiff has purchased certain properties under

Ex.B-2 from Subramania Mudaliar on 1.11.1957 and when this property was sold by the plaintiff alone, in favour of Chandra Naicker the fourth

defendant it indicates that even at the time of the purchase of the property by the plaintiff and his brother Chandra Naicker, it was purchased only

on behalf of the plaintiff. Otherwise, there is no necessity for executing a sale deed in favour of Chandra Naicker- the fourth defendant by the

plaintiff when Chandra Naicker himself is a purchaser along with the plaintiff under Ex.B-2, Exs.B-1 and B-2 are two sale deeds within a gap of

three months. Therefore, the property purchased under Ex.B-1 cannot be

considered to be a purchase made by the joint family member. The treatment of the property under Ex.B-2 subsequently under Ex.B-3 shows that there was no blending of the properties purchased by one of the members of the joint family along with the property of the joint family. In this connection, it is necessary to recall the law laid down by the Supreme Court in the decision reported is Mallesappa Bandeppa Desai and Others Vs. Desai Mallappa and Others, , regarding the doctrine of blending. It has been held in the above decision as follows:

Where a member of a joint Hindu family blends his self-acquired property with property of the joint family, either by bringing his self acquired property into a joint family account, or by bringing joint family property into his separate account, the effect is that all the property so blended becomes a joint family property.

When we analyse the two sale deeds under Exs.B-2 and B-3 in the light of the above decision, we are able to see that the property purchased by the plaintiff and the fourth defendant under Ex-B-2 was not blended with any other property of the joint family to hold that there was blending and the property purchased under Ex.B-2 is a joint family property. The same theory applies to the case on hand regarding Ex.B-1 also.

10. The next question that arises for consideration is whether the theory of benami purchase made by the first defendant could be accepted. As per

the decision reported in Mussammat Bilas Kunwar v. Desraj Ran Singh 29 M.L.J. 335, benami dealing is common to Hindus and Mahomedans

alike and it is quite unobjectionable. The Supreme Court while considering the plea of benami and the onus of proof and the right of person to take

plea of benami in respect of property purchased by him, has held that Section 4 of the Benami Transactions (Prohibition) Act, 1988 applies only to

suits to be filed or defences to be taken in respect of the property held benami i.e., benami transactions after the coming into force of the Act and

not to those suits filed and defences taken in respect of such benami transactions and pending final decision, at the time of coming into force of the

Act, as had been held in the earlier decision in Mithilesh Kumar and Another Vs. Prem Behari Khare, . Therefore, the first defendant is entitled to

take the plea of benami when the property is shown to have been purchased by him from out of the consideration paid by him in the name of his

father. We have already seen the source of consideration, incapacity of the father purchasing the property, motive for the first defendant purchasing

the property in the name of his father etc. Therefore, when we analyse the case of the first defendant in the light of the decision reported in Nand

Kishore Mehra v. Sushila Mehra (1995) 2 C.T.C. (S.C.)356, we can safely hold that the first defendant is entitled to take this plea of benami and

the evidence has shown that Ex.B-1 is only a benami transaction.

11. It is not open for the defendants to raise a plea of benami in view of the decision in the earlier suit to the effect that the suit property belongs to

Munusami Naicker. The earlier suits in O.S. No. 628 of 1974 is a suit for injunction filed by the plaintiff against the second defendant and the

Electricity Board in which the second defendant has taken the plea that the property was purchased by brother Murugesu Naicker benami in the

name of his father Munusami Naicker and he is the owner of the property and as such, he has sold the same in his favour. In that suit, the appellate,

court has held that the benami pleaded by the second defendant is not acceptable and has held that the property was purchased only by Munusami

Naicker. As already observed by me, the earlier suit is for injunction in which the defendant has taken a plea of benami as a defence. It is not a suit

on title. Further, the first defendant was not a party in the said suit. But, it is no doubt true that the second defendant against whom the said suit was

filed was claiming title to the property through the first defendant.

12. Whether the principle of res judicata is applicable is the only question that arises for consideration. It is a recognised principle of law as laid

down in the decision reported in Ishwardas v. State of Madhya Pradesh AIR 1979 S.C. 551, that in order to sustain the plea of res judicata it is

not necessary that all the parties to two litigations must be common, and all that is necessary is that the issue should be between the same parties or

between parties under whom they or any of them claim. Once the question at issue in two suits are found to be the same, the fact that the material

which led to the decision in the earlier suit was not again placed before the court in the second suit cannot make the slightest difference. The plea of

res judicata may be sustained without anything more, if the question at issue and the parties are the same, subject of course to the other conditions

prescribed by Section 11. The question whether the property was purchased by

the first defendant benami in the name of his father was an incidental question which was considered on account of the defence raised by the defendants in the said suit. The main issue in the above suit is whether the plaintiff in the said suit is entitled to injunction. It is only incidentally the question of benami purchase was considered by the court. As per the decision reported in AIR 1936 258 (Privy Council) a party raising a plea of res judicata is not entitled to go into the question of res judicata, when it has not been properly raised by the pleadings or in the issues particularly in those issues. The issue raised in the earlier suit is whether the appellant plaintiff is a co-sharer of the plaint schedule property and as such whether he is entitled for the relief of injunction to restrain the first defendant from getting electric service connection. The first defendant referred in the above issue is the second defendant herein. It is thus seen that there was no specific issue with regard to the nature of the transaction under Ex.B-1 herein. But, at the same time, it cannot be disputed that question of benami nature of the sale under Ex.B-1 was also incidentally considered by the appellate court in the said suit.

13. The first defendant herein was also not a party. But the first defendant in the said suit who is the second defendant herein is a person claiming under the first defendant herein. But, yet, in view of the fact that in the earlier suit, there is no specific issue properly raised by the pleadings in the said suit, I am of opinion that the present suit cannot be dismissed applying the principles of the res judicata. Considering these aspects, I am of opinion that the judgment and decree of the appellate court to the effect that the transaction under Ex.B-1 is not a benami transaction and the property is a joint family property on account of the purchase made by their father and therefore, the plaintiff is entitled to a partition of his share in the suit cannot be substantiated. In that view, I am of opinion that the appeal is to be allowed.

14. In the result, the appeal is allowed setting aside the judgment and decree of the lower appellate court and dismissing the suit. No costs.