

(1996) 08 MAD CK 0097
In the Madras High Court

Poongavanam Ammal and Another

APPELLANT

Vs

Appaswamy Gounder and Others

RESPONDENT

Date of Decision : 09-08-1996

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : (1997) 1 MLJ 250

Hon'ble Judges : P. Sathasivam, J

Bench : Division Bench

Judgement

P. Sathasivam, J.—Plaintiffs in O.S. No. 486 of 1979 on the file of District Munsif, Gingee, are the appellants in the above appeal. They filed the said suit for declaration of title and for permanent injunction.

2. The case of the plaintiffs as found in the plaint is briefly mentioned hereunder:

The second plaintiff is the daughter of the first plaintiff. The first plaintiff's husband is one Govindaraja Rounder. He died in or about 1961. The second plaintiff is the only issue of the said Govindaraja Kounder and the first plaintiff. The defendants 1 and 2 are brothers. They are sons of one Dhanapal Gounder. The third defendant is the son of the second defendant. The fourth defendant is the wife of one Jagadeesa Kounder, who is another brother of defendants 1 and 2. Jagadeesa Kounder died about 5 years ago. The suit properties originally belonged to Govindaraja Kounder, husband of first plaintiff. The first item of the suit property originally belonged to Murugesu Kounder and from him on 6.4.1944 Govindaraja Kounder purchased for valuable consideration. The suit 2nd item was the ancestral property of Govindaraja Kounder. During the life time of Govindaraja Kounder, he was in enjoyment of both the items of the suit properties. After his death, the plaintiffs are in enjoyment. Therefore, the plaintiffs are absolute owners of the suit property, and they alone are in enjoyment. Whiles, due to instigation by some enemies of the plaintiffs, from 19.7.1979 onwards the defendants are disputing the title of the plaintiffs and they are trying to dispute their possession which necessitated the plaintiffs to file

the above suit.

3. The first defendant filed a written statement and the same was adopted by the other defendants. It is contended that Kesava Kounder was having one daughter by name Ayyammal and one son by name Govindaraja Kounder. Ayyammal was married to Dhanapal Kounder. At the time Kesava Kounder gave away the suit 2nd item to his daughter Ayyammal as a stridhana property. Since then the suit 2nd item was in enjoyment of Ayyammal's husband Dhanapal Kounder. Patta number for the above land is 117. Dhanapal Kounder alone was paying kist for the above patta number. Dhanapal Kounder died 23 years back. Defendants 1 and 2, Jagadeesa Kounder and Arimuthu Kounder are the sons of Dhanapal Kounder. After the death of Dhanapal Kounder, they were in enjoyment. Arimuthu Kounder died without marriage. Jagadeesa Kounder died and his wife is the 4th defendant. Now the defendants are in enjoyment of the suit 2nd item. They are in enjoyment for more than 12 years. Therefore, the defendants have acquired title by adverse possession in respect of the suit 2nd item. First plaintiff is the wife of the said Govindaraja Kounder, who is the son of Kesava Kounder. The suit first item was purchased by Dhanapal Kounder from Murugesu Kounder on 6.4.1944 for a sum of Rs. 200. He purchased the suit first item benami in the names of his brother-in-law Govindaraja Kounder. After purchase, Dhanapal Kounder alone was in enjoyment till the death. Therefore, the defendants have acquired title by adverse possession of the suit first item also. Govindaraja Kounder during his life time never claimed right in the suit properties, nor paid kista for the same. Patta continued to stand in the name of Govindaraja Kounder. Since the suit first item was in the name of Govindaraja Kounder, patta for the suit first item was also stood in the name of Govindaraja Kounder. The original title deed for the suit first item was in possession of Dhanapal Kounder. The plaintiff never enjoyed the suit properties. On 25.6.1956 Govindaraja Kounder executed a registered will in respect of his properties. He never mentioned in that Will the suit properties. They never paid kists for the suit properties. With these averments they prayed for dismissal of the suit.

4. Second plaintiff was examined as P.W. 1 and they have examined two more witnesses as P.Ws. 2 and 3 apart from marking Exs. A-1 to A-8. The first defendant was examined as D.W. 1 and the defendants have also examined 3 more witnesses as D.Ws. 2 to 4. Exs. B-1 to B-12 were marked on the side of the defendants. The learned District Munsif, after framing necessary issues and in the light of the evidence on record, decreed the suit with costs.

5. Aggrieved by the decree of the trial court, the defendants filed appeal in A.S. No. 114 of 1980 before the Sub Court, Tindivanam. The learned Subordinate Judge, after framing necessary points for consideration, allowed the appeal and dismissed the suit filed by the plaintiffs.

6. Against the" decree of the lower appellate court dismissing the suit, the unsuccessful plaintiffs have filed the present appeal before this Court. While entertaining the appeal, this Court has framed the following substantial question

of law for consideration:

Whether the finding of the lower appellate court that Ex. B-3 purchase was benami and is valid in law?

7. Mr. P. Gopalan, learned Counsel for the appellants in the light of the substantial question of law framed earlier submitted that (1) the finding of the lower appellate court with regard to item 2 that the said properties have been given as stridhana properties to Ayyammal is erroneous in the light of the clinching evidence available on record; and that (2) the finding of the lower appellate court that suit item 1 was purchased in the name of Govindaraja Kounder as benami by Dhanapal Kounder is also erroneous and the defendants failed to establish or prove all the ingredients that the said transaction was benami. With these submissions, he prays for interference in this appeal. On the other hand, Mr. O.V. Balaswami, learned Counsel for the respondents, after taking me through the judgment of the lower appellate court, submitted that since the lower appellate court considered all the above two aspects and non-suited the plaintiffs, it is not possible for this Court to interfere with the said finding, which is based on acceptable evidence, hence prays for dismissal of the appeal. I have carefully considered the rival submissions.

8. The suit properties consist of two items. The first item is 1.78 acre in S. No. 58/40. The second item is 52 cents in S. No. 15/12. According to the plaintiffs, the suit second item is ancestral property of Govindaraja Kounder, and the suit first item was purchased by Govindaraja Kounder from Murugesu Kounder on 6.4.1944 under Ex. A-1 (original Ex. B.3). However, according to the defendants, the suit second item was given to Ayyammal, the sister of Govindaraja Kounder as stridhana property at the time of her marriage. This was seriously disputed by the plaintiffs, and according to them, 2nd item was never given to her as stridhana property. With regard to the case of the defendants that the 2nd item was given as stridhana property, admittedly, the defendants have not filed any document to prove the same. Likewise, there is also no oral evidence to prove that Kesava Rounder gave away the suit second item to Ayyammal as stridhana property. It is borne out by records that for the said item, patta stood in the name of Govindaraja Rounder and after his death, it is now standing in the name of first plaintiff. It is curious that the lower appellate court having found that admittedly there is no direct evidence available to speak that item 2 has been as stridhana property, erroneously concluded that the suit second item "ought to have been given as stridhana property to Ayyammal. The competent witnesses to speak about item 2 are Ayyammal and her husband Dhanapal Rounder, her brother Govindaraja Rounder. Admittedly, all of them are no more. After knowing all the above factual position on the basis of circumstantial evidence and on the mere assumption the lower appellate court came to the conclusion that suit item 2 has been given as stridhana property to Ayyammal. The mere production of kists receipts and patta may not be sufficient to hold that the suit item 2 was given as stridhana property Ayyammal. In the absence of any clinching evidence

as stated by me, it is possible to hold that suit 2nd item after the death of Resava Rounder came to Govindaraja Rounder and after his death, the plaintiffs are the owners of the same. One more aspect which the lower appellate court failed to note is that the title as well as patta stood only in the name of Govindaraja Rounder. In this regard, the conclusion reached by the lower appellate court as stated above is erroneous and the same is liable to be set aside.

9. Now we have to consider suit item 1. It is the case of the plaintiffs that they have got title to the suit item 1 and they are in possession and enjoyment of the same. However, it is the case of the defendants that they have no manner of right or title or possession in respect of suit item 1. It is the definite plea of the defendants that the suit item 1 had been purchased by Dhanapal Rounder benami in the name of his brother-in-law Govindaraja Rounder under Ex. B-3 dated 6.4.1944 and from the date of purchase under Ex. B-3 Dhanapal Rounder was in possession and enjoyment of the same, and after his death, the defendants are in possession and enjoyment of the same. Inasmuch as the defendants set up the case of benami. It is for them to prove all the ingredients attached to the benami transaction. Before going into the factual position with regard to the benami transaction in the present case, it is useful to refer the decisions cited by learned Counsel for the appellants on this aspect. The decisions are as follows:

- (1) Ponnuswamy Nadar Vs. Narayanan Nadar,
- (2) Kistappa Naicker and Another Vs. Elumalai Naicker,
- (3) Neikara Abdul Hye Sahib and Others Vs. Neikara Majid Sahib,
- (4) Dharmalainga Chetty v. Mathurambal (1987) 2 M.L.J. 218
- (5) Jaydayal Poddar (Deceased) through L.Rs. and Another Vs. Mst. Bibi Hazra and Others,
- (6) Vidhyadhar Krishnarao Mungi and Others Vs. Usman Gani Saheb Konkani and Others,

In all the above mentioned decisions, the following principles have been enunciated with regard to the said principles are reproduced hereunder:

The burden of proof has heavily on the person who claims against the tenor of a deed, that is, the alleged beneficiary to show that the ostensible owner was a mere name lender and the property was in fact purchased only for his benefit. The burden would be discharged by satisfying the well-known criteria viz., (1), the source of purchase money relating to the transaction; (2) possession of the property; (3) the position of the parties and their relationship to one another; (4) the circumstances, pecuniary or otherwise, of the alleged transferee; (5) the motive for the transaction; (6) the custody and production of the title deeds and (7) the previous and subsequent conduct of the parties.

Each of the abovesaid circumstances taken by itself, is of no particular value and affords no conclusive proof of the intention to transfer the ownership from one person to the other. But, a combination of some or all of them and a proper weighing and appreciation of their value would go a long way towards indicating whether the ownership has been really transferred or where the real title lies. In every benami transaction, the intention of the parties is the essence. The test to determine whether the transaction is benami or not to look to the intention of the parties viz., whether it was intended to operate as such or whether it was meant to be colourable, if colourable, the transaction is benami otherwise the transaction is not benami. On the other hand, if the parties intended that it should take effect, the transaction cannot be said to be benami. The issue cannot be disposed of by a mere conjecture or suspicion as to the various circumstances surrounding the transaction since the very object of a benami transaction is secrecy. In our case, it is true that the Original sale deed, namely, Ex. B-3, in respect of item 1 has been produced by the defendants. Ex. A-1 is the registration copy of the same produced by the plaintiffs. It is seen from Ex. B-3 that one Murugesan Rounder has sold the same in favour of Govindaraja Rounder for a sum of Rs. 200 in the year 1944. Admittedly patta stands in the name of Govindaraja Rounder. The lower appellate court, after analysing the entire evidence with regard to suit item 1, observed in the following manner:

It is true that the circumstances under which Dhanapal Rounder had purchased benami in name of his brother-in-law Govindaraja Rounder is not known.

Having observed that the defendants, who have pleaded benami failed to discharge the circumstances or reasons under which Dhanapal Rounder had purchased benami in the name of his brother-in-law Govindaraja Rounder, it is not safe to hold that the defendants have proved all the ingredients relating to benami transaction. Admittedly, the competent witnesses to speak the circumstances to which Ex. B-3 was purchased are Dhanapal Rounder and Govindaraja Rounder and who are not alive. It is seen from the records that both of them died 20 years back. In this respect, it is relevant to note that P.W. 2 vendor of Ex. B-3 was examined on the side of the plaintiffs. P.W. 2 has deposed that Govindaraja Rounder paid consideration for the purchase of item 1 and he had executed the sale deed. In the absence of competent witnesses, namely, Dhanapal Rounder and Govindaraja Rounder, the evidence of P.W. 2, a vendor of Ex. B-3 is the best witness to speak about the transaction and the plaintiffs by examining P.W. 2 have proved their case positively. However, the lower appellate court erroneously rejected the evidence of P.W. 2 as un-worthy witness. There is no basis for such conclusion. According to me, P.W. 2, is the best witness to speak about the transaction under Ex. B-3 and it is safe to accept his evidence as trust-worthy. The lower appellate court very much relied on the oral evidence of D.W. 2. As stated above, in as much as P.W. 2 is the vendor under Ex. B-3, his evidence is more probable and acceptable than D.W. 2.

10. It is also seen from the records that with regard to suit item 1 the title deed

stands in the name of Govindaraja Rounder. Patta also stands in his name. In order to prove possession, the plaintiffs have filed Exs. A-5 to A-6 which are kist receipts for the period from 1978 to 1980. The "Adangal Extract" which is marked as Ex. A-4 also supports the plaintiffs' case apart from Ex. A-2 and A-3 which are certified copies of chitta extract for patta No. 117. Admittedly the defendants have not filed any adangal extract to prove their enjoyment in their own right. The defendants have not properly explained under what circumstances Ex. B-11 was issued in favour of them. They have not examined village karnam in this regard. The above discussion clearly proves the plaintiffs' case that they alone are in possession and before them, Govindaraja Rounder was in possession will have to be believed. Hence, the theory of adverse possession pleaded by the defendants cannot be Accepted. Except the original title deed, viz., Ex. B-3 which is with the defendants, they (the defendants) have failed to prove the other requirements as seen from catena of decisions of this Court as well as the Apex Court on the benami transaction.

11. Though Mr. O.V. Balaswami, learned Counsel for the respondents, submitted that since the conclusion of the lower appellate court is based on evidence, it cannot be interfered u/s 100, C.P.C. I am unable to accept his submissions for the reasons mentioned above. I have already discussed that the plaintiffs have established their case and the defendants who have pleaded that the transaction under Ex. B-3 is a benami, have failed to prove their case. It is settled law that the finding which is not supported by acceptable evidence or based on misconception or erroneous, certainly, the High Court can interfere in the second appeal. I have already held that the finding of the appellate court is erroneous, perverse and based on misconception.

12. Under these circumstances, the judgment and decree of the lower appellate court are set aside and the judgment and decree of the trial court are restored. The second appeal is allowed, however, in the circumstances of the case, there will be no order as to costs.