

Madras High Court

S.P. Swami Naidu vs Natesa Aiyar Alias Subramania ... on 6 January, 1937

Equivalent citations: (1937) 1 MLJ 616

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JUDGMENT Venkataramana Rao, J.

1. This is a petition to revise the order of the Additional Subordinate Judge of Coimbatore declining to dispauper the plaintiff under Order 33, Rule 9, Civil Procedure Code. The plaintiff instituted the suit, out of which this petition arises, on a mortgage executed by defendants 1 to 4, in favour of his mother and deceased sister, the mother of the sixth defendant in the suit. The case on which the plaintiff came to Court was, though the mortgage was executed in favour of both the plaintiff's mother and sister, they were really benamidars for the father of the plaintiff, and the plaintiff was the person solely entitled to the amount due under the mortgage, and therefore he prayed for a mortgage decree for the entire amount to be passed in his favour. The case of the sixth -defendant is that his mother is entitled to half the amount, that the allegations relating to benami are false and that he was entitled to half the mortgage amount in the right of his mother. Among the issues framed in the suit, are the following:

1. Was the mortgage deed in question taken by the plaintiff's father benami in the names of the plaintiff's mother and sister as alleged by the plaintiff?

6. Is the sixth defendant entitled to any portion, of the mortgage amount?

2. On 13th December, 1936, the plaintiff and sixth defendant filed a joint memo, into Court in and by which the plaintiff agreed that the sixth defendant is entitled to one half of the amount. The result of the arrangement embodied in the said memo, is that the plaintiff gives up his contention as to benami. The fifth defendant who is a subsequent purchaser of the suit property has filed an application to dispauper the plaintiff on the ground that the plaintiff has subsequent to the suit entered into an arrangement with reference to the subject-matter of the suit in and by which the sixth defendant has obtained an interest therein and therefore he is liable to be dispaupered. The lower Court has negatived the contention and dismissed the application and the question is, is the view of the lower Court sound? I am inclined to think it is. Order 33, Rule 9(c) contemplates an agreement in and by which an interest is transferred or created in the subject-matter of the suit in favour of a person who is not entitled to it, and would not cover a case such as this where by virtue of a family settlement between the parties there is a recognition of an antecedent title in one of the parties to the suit. The joint memo, does no more than declare that the plaintiff's sister was from the inception entitled to half the entire mortgage amount and that the sixth defendant as her heir would be entitled to it. Order 33, Rule 9(c) is not intended to affect cases of this description. Mr. Krishna Bharathi contends that as under the memo, the plaintiff is now entitled to get a decree' for half the amount the lower Court ought to have found-out whether the plaintiff would not be in a position to pay the court-fee for half the amount and given a finding in regard thereto, but this was not made a ground for dispaupering the plaintiff. It is open to the fifth defendant if he is so advised, to prefer a separate petition. I therefore do not propose to deal with the said matter in this Revision Petition.

3. In the result the Civil Revision Petition is dismissed with costs.