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S.A.No.1481 of 2011

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 28.04.2023

Delivered on : 24.05.2023

CORAM

THE HONOURABLE Mr. JUSTICE V. LAKSHMINARAYANAN

S.A.No.1481 of 2011

1.Muthiah (Deceased)

2.Mrs.Maheswari

3.Mr.Parameswari

...Appellants

(Appellants 2 and 3 brought on record as legal representatives of the deceased sole appellant vide order of this Court dated 22.03.2017 in C.M.P.No.5362 of 2017 in S.A.No.1481 of 2011 by Hon'ble SVNJ)

Vs.

1.Rajam (Died)

2.Vijaya

3.Dharmaraj

4.M.Rajini

5.M.Karthi

6.M.Aarthi

7.M.Nagalingam

...Respondents



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(Respondents 4 to 7 are impleaded as the respondents vide order of this Court dated 27.03.2023 in C.M.P.No.5622 of 2020 in S.A.No.1481 of 2011 by Hon'ble VLNJ)

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure against the Judgment and Decree dated 15.11.2010 and made in A.S.No.48 of 2009 on the file of the Subordinate Court at Mannargudi partly reversing the judgment and decree dated 29.06.2007 and made in O.S.No.334 of 2004 on the file of the learned Additional District Munsif Court, Valangaiman.

For Appellants : Mr.S. Mahimai Raj
for appellants 1 to 3

Mr.C.Jagadish
for appellants 4 to 7
(R4 to R7 transposed
as appellants 4 to 7)

For Respondents : Ms.M.Alamelu Mangan
for R2

R1 – Died

Mr.S.Karthik Ganesan
for R3



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JUDGMENT

This Second Appeal arises out of the Judgment and Decree dated 15.11.2010 in A.S.No.48 of 2009 passed by the learned Subordinate Judge, Mannargudi, in partly reversing the Judgment and Decree dated 29.06.2007 in O.S.No.334 of 2004 passed by the Additional District Munsif, Valangaiman.

2.The plaintiffs had filed a suit O.S.No.334 of 2004 on the file of the learned Additional District Munsif, Valangaiman, for the following reliefs:

"(1)வாதிகளுக்கு தாவா கூட்டுத் தொழில் மற்றும் சொத்தில் வாதிகளுக்குள்ள பங்கு சம பங்கிற்கு தீர்ப்பு செய்யும்படியும்

(2)26.05.1999ம் ஆண்டில் பங்குதாரராக குருநாதன் செட்டியார் காலமான தேதியில் தாவா கூட்டுத் தொழில் கலைந்துவிட்டதாக கருதியும்

(3)இந்த கூட்டுத் தொழிலுக்கு சொந்தமான சகல ஆஸ்திகள் விபரமும் கணக்கு விபரமும்



ரொக்கம் மேலும் சமூகம் கோர்ட்டாரவர்கள்
குறிப்பிடும் காலக்கெடுவிற்குள் 1ம் பிரதிவாதி
ஒப்படைக்கும்படி ஒரு முதல்நிலை தீர்ப்பாணை
பிறப்பிக்கும்படிக்கும்

(4)24.05.1999 முடிய இறந்த குருநாதன்
செட்டியாருக்கு பாதி வீதத்திற்கு அது நாள் வரை
செலுத்திய தொகைபோக பாக்கி தொகைகளை
1ம் பிரதிவாதி செலுத்தி வைக்கும்படிக்கும்

(5)24.05.1999க்கு பிறகு தாவா தேதி வரை
கூட்டுத்தொழில் சொத்தை கொண்டு பிரதிவாதி
ஏகதேசத்தில் அடைந்த வருமானத்தை நிர்ணயம்
செய்து அதில் வாதிகளின் பாதி வீதத்தினை 1ம்
பிரதிவாதி வழங்கும்படியும்

(6)இந்த தாவா தேதிக்குப் பிறகு கூட்டுத்
தொழில் ஆஸ்திகளை விற்பனை செய்யும் தேதி
வரை 1ம் பிரதிவாதி அடையும் லாபத்தில் பாதி
விகிதம் வாதிகளுக்கு செலுத்தி வைக்கும்படிக்கும்

(7)மேலே 3,4,5,6 பத்திகளில் கண்ட
பரிகாரங்கள் வாதிக்கு பிரதிவாதி வகை
செய்யவில்லை என்றால் வழக்கறிஞர் ஆணையரை



நியமித்து அவர்கள் மூலம் கூட்டுத்தொழில்
சொத்துகள் அனைத்தையும் கணக்கு எடுத்து
பகிங்கரமாக ஏலத்தில் விற்கிரையம் செய்து அந்த
விற்கிரைய தொகையில் பாதியை வாதிகளுக்கு
வழங்கவும் அல்லது கோர்ட் டிபாசிட் செய்யவும்
மேலும் 4,5,6 பாத்திகளில் கண்ட
பரிகாரங்களுக்கான தொகைகளை நிர்ணயிக்க
அறிக்கை பெற்று அதை பரிசீலனை செய்து பின்
உத்தரவாதம் தொகைகளை வாதிகளுக்கு 1ம்
பிரதிவாதி செலுத்தி வைக்க ஒரு இறுதிநிலை
தீர்ப்பாணை வழங்கவும்

(8)இவ்வழக்கில் பூரா செலவுத் தொகையினை
பிரதிவாதிகள் வாதிகளுக்கு செலுத்தி
வைக்கும்படிக்கும்

(9)இவ்வழக்கில் தன்மை குறித்து சமீகம்
கோர்ட்டார் அவர்கள் அவர்களுக்கு உசிதமாக
தோன்றும் இதர பரிகாரங்கள் அறிந்தும் தீர்ப்பும்
வழங்க பிரார்த்திக்கிறார்."



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3.The case of the plaintiffs is that a partnership had been floated on 20.01.1971 between one Gurunathan Chettiar and one Muthiah. The purpose of the partnership was to run a Cinema Theatre by name "Sri Murugan Talkies". The profit and loss were to be proportionately shared equally. The plaintiffs laid the suit in O.S.No.334 of 2004 on the file of the learned Additional District Munsif Court, Valangaiman, for the dissolution of the firm with effect from 26.05.1999 when Gurunatha Chettiar had passed away. They also claimed for allotment of shares in the suit properties and other properties belonging to the firm for rendition of accounts and for other reliefs.

4.The suit was mainly contested on the ground that the relief that has been sought for is barred under Article 5 of the First Schedule appended to the Limitation Act, 1963 and also that the property on which the Theatre stood and the machineries and fittings were the self-acquisitions of Mr.Muthiah, the 1st defendant.



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5.The said suit was dismissed by the learned Trial Judge on the ground that the suit was barred by limitation. On appeal, the learned Appellate Judge reversed the decree but held that the cutoff date for rendition of accounts by 31.12.2002.

6.At the time of admission of the Second Appeal, the following Substantial Questions of Law had been framed:

"1.Whether the suit filed by respondents 1 and 2 claiming their share of profits of the dissolved partnership as the legal heirs of the deceased partner Gurunathan Chettiar was barred under Article 5 of the Limitation Act as pleaded by the appellants?

2.Whether the suit is not maintainable under law in the absence of the plaintiffs/first and second respondents herein failing to prove the due execution and the genuineness of the alleged Will of the deceased Gurunathan Chettiar dated 26.03.1999, Ex.A19?



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3. Whether the suit was maintainable in law on the grounds of non-disclosure and non-joinder of necessary parties to the suit as the plaintiffs/first and second respondents themselves pleaded that they were entitled only for life estate and after their lifetime the second respondent's children were entitled to inherit the vested remainder?

4. Whether the claim of the plaintiffs/first and second respondents that the suit property purchased in the court auction held on 16.08.1968 by the appellant for Rs.45,000/-, which was subsequently confirmed by the Principal Subordinate Court at Kumbakkonam on 20.12.1969, could be construed as benami in nature?

5. Whether the Court auction purchased property could be discredited under law by pleading it as a benami transaction?"



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7.The facts set forth above to make out a very simple case. A partnership was formed on 20.01.1971. It was successfully carried on till 24.05.1999. On that day, one of the Partners, Tr. Gurunathan Chettiar expired. After the death of the said partner, the surviving partner had leased out the properties to the 2nd defendant @ Rs.24,000/- per year. This amount was divided equally between Muthiah, the surviving Partner and the legal representatives of the deceased Partner Gurunathan Chettiar, namely, Ms.Rajam and Ms.Vijaya, the plaintiffs. These facts are admitted by both sides.

8.Heard Mr.S. Mahimai Raj, learned counsel appearing for the appellants 1 to 3, Mr.C.Jagadish, learned counsel appearing for the appellants 4 to 7, Ms.M.Alamelu Mangan, learned counsel for the 2nd respondent and Mr.S.Karthik Ganesan, learned counsel for the respondents 3 and perused the records.



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9.Mr.S.Mahimai Raj, learned counsel appearing for the appellants 1 to 3 would argue as follows:

- Article 5 of the Limitation Act bars the suit as on the death of Gurunathan Chettiar, the partnership had dissolved. Since the suit was presented on 29.09.2003 and not within three years from the date of death of Gurunathan Chettiar, i.e., on or before 23.05.2002, the suit is barred.
- He would further submit that the property on which the Cinema Theatre stood is the absolute property of Mr.Muthiah, which he had purchased by way of a Court auction in E.P.No.28 of 1958, on 16.12.1968 and therefore, no claim can be made with respect to the said property.
- He would then argue that the suit in any event is barred by virtue of Benami Prohibition Act.
- Finally that the plaintiffs had not proved the case as only the power of attorney of the plaintiffs had entered and deposed the witness box on their behalf and the plaintiffs had avoided the



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same. Hence, he would request that the appeal be allowed and the suit be dismissed.

10.Mr.C. Jagadish and Mr.Varadhan, learned counsels appearing for the appellants 4 to 7 and the contesting respondents would argue that the movable and immovable properties are partnership properties under Section 14 of the Partnership Act and therefore, the plea of Benami would not arise. They would further submit that Article 5 of the Act is inapplicable in this case, as what is sought for is not merely a suit on accounts and share of profits but further reliefs had been sought for. They would argue that the plea of benami had not been taken in the trial Court as well as the Lower Appellate Court and was being urged in the Second Appeal. Finally that both sides had examined only their respective powers of attorney and therefore, no fault would be found on either parties.

11.I have considered carefully the arguments of both the Counsels. I have gone through the pleadings, evidence and judgment and decree of both the Courts below. I have looked into the papers in



light of the substantial questions of law framed by this Court.

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12. On the first plea of limitation, I have to hold that Article 5 of the Limitation Act does not apply to the facts of the present case. This is for the reason that Article 5 would apply for a suit simpliciter seeking for accounts and share profits of a dissolved partnership. It is on record that Gurunathan Chettiar and Muthiah were carrying on their business activities, without any issues, from 1971 to 1999. It is on the death of Gurunathan Chettiar, the partnership is deemed to have been dissolved by virtue of Section 42(c) of the Partnership Act. By virtue of this Section, a partnership is said to dissolve on certain contingencies. The third of the contingencies contemplated is on the death of a partner. This can be obviated, if there is a contract to the contrary. However, in a case like this where there were only two partners and one of them has died by virtue of Section 42(c) of the Act, partnership is deemed to have been dissolved on that day.

13. Now the issue is whether the suit which is presented on



29.09.2003 can be treated to be in time for the purpose of granting the reliefs.

14.It is here that I have to take note of Section 88 of the Indian Trust Act. By virtue of this provision, the surviving partner is treated to be in a fiduciary capacity to protect the interest of another partner and the former is to hold the advantage that he gains out of such relationship for the benefit of latter.

15.Illustration (f) to the Section would resolve the problem that has been presented before me by the learned counsel appearing for the appellants 1 to 3. The said illustration (f) reads as follows:

"(f) A and B are partners. A dies. B, instead of winding up the affairs of the partnership, retains all the assets in the business. B must account to A's legal representative for the profits arising from A's share of the capital."

16.Therefore, the relationship between Muthiah and the plaintiffs was not that of a partnership but one in a fiduciary capacity. To reach



this conclusion I rely upon a Judgment of a Division Bench of the Calcutta High Court in **Nilmadhab Nandi and others v. Nirada Sundari Dasi** [MANU/WB/0276/1941]. A Division Bench comprising of Syed Nasim Ali and Pal, JJ., had held that the right given to the legal representatives of a deceased partner is not a right to a share of the profits of a dissolved partnership within the meaning of Article 106 of the Limitation Act, (present Article 5 of the Limitation Act, 1963) but it is a right accruing to them by a subsequent dealing with the assets belonging to the deceased partner.

17.It is here that the Written Statement filed by Mr.Muthiah becomes relevant. In Para 11 of the Written Statement, it is stated as follows:

"11.குருநாதன் செட்டியார் இறந்தபிறகு, வாதிகளை இந்த பிரதிவாதி நேரில் அணுகி, வாய்மொழி மூலமாக கூட்டாண்மை ஒப்பந்தப் பத்திரத்தை நீட்டித்துக் கொண்டுள்ளார்கள். மேற்படி திரையரங்க மாத கூட்டுத் தொழில் வருமானம் வாடகையாக ரூ.3,000/- (ரூபாய்



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முன்றாயிரம்)ம் என்று நிர்ணயம் செய்யப்பட்டு,
இந்த பிரதிவாதி 1/1/2 வருடத்திற்கும்
வருமானமாக தொகையை பெற்றுக் கொள்ளும்படி
ஒப்பந்தம் செய்யப்பட்டுள்ளது. மேற்படி வாதிகள்
வாடகை பணத்தை பெற்றுக் கொண்டுள்ளார்கள்."

18.This would show that even after the death of Gurunathan Chettiar, Mr.Muthiah Chettiar continued to give 50% of the profits arising out of the business to the plaintiffs in due discharge of his fiduciary capacity. Therefore, it cannot be said that Article 5 of the Limitation Act would apply. I am also supported by the Judgment of a Division Bench of Punjab and Haryana High Court in ***P.S.Nagarunjan Vs. Mr.Robert Hotz*** [*AIR 1954 P&H 278*]. I would also rely upon a Judgment of the Bombay High Court in ***Fatima Correa nee Fatima Yakub Ali v. Hasina Mohamed Shafik Laijee and others*** [2015 7 *Bom. C.R. 306*].

19.This leaves a few more authorities to be dealt with under

Section 88 of the Indian Trust Act and the Limitation Act.



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20.The first of the judgments is the case of *Hajee Siddeck Hajee Summar Said and Anr v. Mohomed Husshum Sait* [AIR 1917 Madras 71 (DB)] which was decided by a Bench of Abdur Rahim and Seshagiri Aiyar, JJ. It was a case where a partner died on 5th of October 1907 and a settlement was arrived at on 13th November, 1907. The settlement was through a registered settlement deed. By the said deed, a sum of Rs. 16000 which was due to the estate of the deceased, was to remain in the business. For the said amount, it was agreed that interest @ 7 ½ % would be paid. Without challenging the said settlement, a suit was brought for account. The Division Bench, on facts, found

- that the settlement by the mother was in the best interests of the minor,
- that the partnership was paying interest on the amounts due from time to time and it was utilized for the benefit of the minor
- that the settlement was accepted and acted upon for more than



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a decade.

- that in order for Section 88 of the Indian Trust Act to operate, there should be some act of the surviving partner which aims at gaining advantage to himself at the expense of the legal representatives.

As discussed above, in the case at hand, there was no settlement of accounts on the death of Gurunathan Chettiar. His assets continued to remain with the surviving partner. Apart from that, the unfair advantage that O.P. Muthiah attempted to gain was claiming that moveable and immovable assets of the firm, which was utilized as belonging to the firm till the death of Gurunathan Chettiar, was his own. Therefore, this judgment does not help the appellant.

21. The next judgment that would throw considerable light on the rights of the legal representatives of a deceased partner *vis-a-vis* the surviving partner is the case of ***Kasi @ Alagappa Chettiar v. Rm. A. Rm. V. Ramanathan Chettiar @ Sreenivasan Chettiar*** [(1947) 2 MLJ 523]. A Division Bench consisting of Rajamannar CJ and A.V

Viswanatha Sastri J have succinctly laid down the law on this issue.



Justice Sastri spoke for the bench. I extract the relevant portion, for

none

could have laid it out better. The Division Bench held : -

“...The obligations of a surviving partner in a dissolved firm, to the representatives of a deceased partner, are not more onerous than those of a partner to his other partners in a running partnership. A Partner though an agent is, in no sense, a trustee for his co-partner [vide Piddocke v. Burt]. He has no higher duty than to deal fairly and honestly with him (S. 9 of the Partnership Act). He is bound to indemnify his co-partners for any loss caused by his fraud (S. 10) and is liable, in the absence of a contract to the contrary, to account to them for profits earned by him by use of the firm's property or by carrying on a competing business (S. 16). If he clandestinely secures a personal profit to himself in a partnership transaction, he must share the profit with the other partners (Section 88 of the Trusts Act). He is not in the position of an insurer or a guarantor of his other partners. He is under no positive duty to make or earn a profit or avert a loss in the



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conduct of the partnership business. All that the law imposes on him is an obligation of good faith and all that is required of him is that he must not act in a manner antagonistic or prejudicial to the interests of the firm. As the management of the partnership business is in the hands of all the partners, each of them being entitled to act in the absence of a provision to the contrary in the articles, no one partner can be considered to be a trustee for the others.

After dissolution, the partnership continues only for the purpose of winding up the business, realising the assets discharging liabilities, and adjusting the rights of the partners. The authority, rights and obligations of the partners continue only for this limited purpose. On a dissolution by the death of a Partner, the representative of the deceased partner is entitled to call upon the surviving partners to account for the deceased partner's share as it stood on his death and to have his claim satisfied out of the assets of the dissolved partnership after discharging all liabilities incurred before dissolution and such only of the liabilities incurred thereafter by the surviving partners, as are incidental to and necessary for the winding up of the business (Ss. 46.



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and 47 of the Partnership Act). The surviving partners have the right and duty to realise the partnership property and in this sense and for this purpose, they hold a fiduciary relationship towards the deceased partner's representatives as regards his interest in the partnership property [Bourne v. Bourne, Govinddas v. Official Assignee, Madras]. The surviving partner's right to deal with and dispose of the assets of the dissolved firm or to incur fresh liabilities, so as to bind the interests of the deceased partner, is limited to the purposes of realisation and winding up and for completing transactions begun but unfinished at the time of the dissolution...”

This judgment categorially lays down the principle that there exists a fiduciary relationship between the surviving partner and the legal representatives of the deceased partner and it extends as regards the interest of the deceased in the partnership property. I should add here that the learned Division bench was guided by the principles of the Privy Council in Babu @ Govindoss Krishnadoss v. Official Assignee of Madras, (1934) 67 MLJ 167. The Judicial Committee speaking through Lord Thankerton held : -

“...It is clear on these authorities that the right of the



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representatives of the deceased partner is one of property and does not rest merely on contract, and that the surviving partners, who have the right and duty to realize the partnership property, hold a fiduciary relationship towards the deceased partner's representatives as regards his interest in the partnership property, though the latter have no such right in any individual asset of the partnership property as will entitle them to interfere with the surviving partners' right to deal with and dispose of any such asset, for the purpose of realization... ”.

22. One might ponder was to why I have been laboring on the capacity of surviving partner. I could have applied Section 37 of the Partnership Act, 1932 and disposed the appeal on the point of limitation. The reason being the effect of Section 10 of the Limitation Act, 1963 on such relationships. This provision reads as follows: -

10. Suits against trustees and their representatives.

*—Notwithstanding anything contained in the foregoing provisions of this Act, **no suit** against a person in whom property has become vested **in trust for any specific purpose**, or against his legal representatives or assigns*



(not being assigns for valuable consideration), for the purpose of following in his or their hands such property, or the proceeds thereof, or for an account of such property or proceeds, **shall be barred by any length of time.**

Explanation.—For the purposes of this section any property comprised in a Hindu, Muslim or Buddhist religious or charitable endowment shall be deemed to be property vested in trust for a specific purpose and the manager of the property shall be deemed to be the trustee thereof.

The legislative mandate is if a person holds the property in trust for a specific purpose, there shall be no limitation for accounting of such property.

23.This view of mine finds support in a very recent pronouncement of a Division bench of the Bombay High Court in *Hasina Mohamed Shafik Laljee and Ors v. Fatima Correa Nee Fatima Yakumali*, (2021) 5 Bom.C.R. 574. The argument before Division Bench has been extracted in paragraph 120 of the said judgment. I extract it here for better appreciation:



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“102. The appellants in their statement of defence raised a preliminary issue of limitation in respect of the claim made by the respondent. The appellants relied upon Article 5 of the Limitation Act, 1963 and contended that any claim for account or share in the profit of a dissolved partnership firm is required to be made within 3 years from the date of the dissolution of the partnership firm. Any claim in respect of any particular property or asset of the a dissolved partnership firm is also required to be made within 3 years from the date of the dissolution of the partnership firm. It was the case of the appellants that upon death of Yakubali, neither the respondent nor her mother Zarina Yakubali raised any claim in respect of the assets and/or properties of the partnership firm nor sought for any share in the accounts of the partnership firm. No letters were addressed by the respondent or by her mother to the appellants making any claim in respect of the assets of the partnership firm or for accounts of the partnership firm for a period of more than 30 years.”

24.The Division Bench answered this query in paragraph 126 in the said judgment. It reads:



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“126. Under Section 10 of the Limitation Act, it is made clear that notwithstanding anything contained in the earlier provisions in the said Limitation Act, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns for the purpose of following in his or their hands such property, or the proceeds thereof, or for an account of such property or proceeds, shall be barred by any length of time. Section 10 of the Limitation Act has to be read with Section 88 illustration (f) of the Indian Trusts Act which makes it clear that where a trustee, executor, partner, agent, director of a company, legal adviser, or other person bound in a fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage, or where any person so bound enters into any dealings under circumstances in which his own interests are, or may be, adverse to those of such other person, and thereby gains for himself a pecuniary advantage, he must hold for the benefit of such other person the advantage so gained. Illustration (f) makes it clear that if one partner out of the two dies and surviving partner instead of winding up the affairs of the partnership, retains all the assets in the business, the



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surviving partner must account to the legal representatives of the deceased partner for the profits arising from deceased partner's share of the capital.”

To complete the narration, this Judgment carried on appeal before Supreme Court in S.L.P (C) 7034 of 2021 and the petition for special leave was dismissed on 4th of November, 2022. That leaves me with the judgment of this court in *M.M. Valliammai Achi and Ors v. Kn.Pl. V. Ramanathan Chettiar and ors*, AIR 1967 Madras 267 and *Ahamed Meera Sahib v. Mohammed Mohideen Maracayar and Ors*, (1976) 89 L.W.356. A casual reading of these judgments would support the case of the appellant. However, on a detailed study of these cases, it is seen that the attention of the learned judges were not drawn to the effect of Section 10 of the Limitation Act, 1963. Apart from that, even factually, this case would not support the case of the appellant. In *M.M. Valliammai Achi's* case, Justice Mosur Natesan was dealing with a matter where a suit had been filed after nearly 25 years. Throughout this lengthy period, no action was initiated by the legal representatives. Further, it was observed that one of the surviving partners had also died soon after the death of the first partner. Hence, this judgment does



not come to the rescue of the appellants.

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25.Furthermore, in this case, even if I were to treat it a suit for recovery of money, at the instance of the estate of the deceased partner, the fact that there was a sharing of profit for a period of 3 years post the death of Gurunathan Chettiar, the period of limitation stands extended.

26.I would like to look at this issue through another angle. On the death of Gurunathan Chettiar, a duty was cast upon Tr.Muthiah to finalize the accounts and settle his dues to his legal representatives. As long as the said duty had not been discharged, the liability continues day to day and therefore, it cannot be treated that the cause of action for the suit is the death of Gurunathan Chettiar. Muthiah Chettiar had enjoyed the benefits of the partnership from 1971 to 1999 and even thereafter. He had leased out the property to the 2nd defendant/3rd respondent herein. He had also shared the profits @50% each. This shows that the accounts were never settled or finalized and Tr.Muthiah had not discharged his fiduciary duty towards the legal representatives of the deceased Gurunathan Chettiar. Therefore, I would hold that



Article 5 of the Limitation Act would not apply. The Authorities cited by the learned counsel for the appellants 1 to 3 in **MIR Abdul Khaliq (dead) by legal representatives v. Abdul Gaffar Sheriff (dead) by legal representatives and others [(1985) 2 SCC 14]** does not apply to the facts of this case because that was a case the suit was brought for rendition of accounts by one partner as against other and that too, 3 years after the dissolution of the firm. Even in the said appeal, the suit had been dismissed only as against the 2nd defendant and not its entirety. That was not the case where the suit had been brought by the legal representatives of a deceased partner as against the surviving partner who continued the business and shared the profits. Therefore, I hold that the suit is in time.

27.The purpose of the Limitation Act is to effectuate a beneficent purpose. It is to prevent the taking away from one what he has for long been permitted to consider as his own and on the faith of which he plans his life, habits and expenses. [**See, Nav Rettanmal Vs. State of Rajasthan (1963 1 SCJ 426)**].



28. The purpose of the law of limitation is to extinguish the legal remedy available for enforcement of a right. It does not extinguish the right itself. As seen from the above, the surviving partner on the death of his partner owes the fiduciary duty to his legal representatives. The Limitation Act does not put an end to performance of duties. It is the duty of the surviving partner to present the accounts for the assets of the partnership, even without any demand from the legal representatives of the deceased partner immediately. If I were to accept the argument of Mr. Mahimai Raj, I would have to read the Limitation Act as extinguishment of the duty that a partner owes to the legal representatives. The Law being clear that what is extinguished is the right to seek enforcement, I am not willing to read Article 5 as putting an end to the duty of the surviving partner. Therefore, even on first principles the argument premised on Article 5 of the Limitation Act must fail. Let us take a situation where the surviving partner presents the accounts, and the legal representatives receive the same and did not do anything for a period of three years. That would extinguish their right to claim an enforcement through the Court. As long as the first duty of presentation of accounts has not been presented by the legal



representatives, the duty continues day to day. Therefore, I am of the clear view that both on first principles as well as on settled position of law, the argument on Article 5 of the Limitation Act has to fail.

29.Moving on to the next point of Mr.S.Mahimai Raj, the learned counsel for the appellants 1 to 3 that the suit is barred by virtue of Section 66 of the Code of Civil Procedure and also the Benami Prohibition Act. I am not in agreement with him on more than one ground. Section 66(1) of the CPC (prior to its amendment) reads as follows:

"No suit shall be maintained against any person claiming title under a 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 someone through whom the plaintiff claims."

30.The learned counsel for the appellants 1 to 3 would argue that this provision applies to the claim in respect to the immovable property. He would rely upon the Judgment of the Supreme Court in

***Girja Nandini And Ors vs Bijendra Narain Choudhury* [AIR 1967**



SCC 1124]. It has to be noticed that on the date on which the Plaint was presented under Section 66 (1) of CPC had been repealed by.

Therefore, I cannot give effect to a provision in a statute which has already been repealed. The statute was repealed by virtue of the Benami Transactions Prohibition Act, 1948. It was repealed on 19.07.1988. There is no saving clause and therefore, the said present provision cannot be pressed into service.

31. Even otherwise, the Supreme Court in the Judgment relied upon by the learned counsel for the appellants 1 to 3 very clearly holds that Section 66 (1) is not a bar in the cases similar to present one. That was a case where one Bijendra Narain claimed that the properties were purchased in the name of the 24th defendant Bashista Narain for and on behalf of everyone in the joint family. The very same provision was pressed into service before the Supreme Court and the Court has held as follows:

“It was alleged by Bijendra Narain that any property was purchased by the 24th defendant on his behalf or on behalf of another person through whom



he, Bijendra Narain claimed. Bijendra Narain claimed that all properties standing in the same of Bidya Narain and his sons and also of Bashistha Narain (Defendant 24) were joint family properties, and that properties were acquired in the name of the 24th defendant by Bidya Narain and his sons with a view to defeat his claim. He did not set up the 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. His claim was that the properties belonged to the joint family, because they were purchased by Bidya Narain and his sons with the aid of joint family funds in the name of the 24th defendant. Such a claim does not fall within the terms of Section 66(1).”

32. Apart from this a perusal of the Partnership Deed shows the following:

“நம் இருவர் சார்பாகவும், நம்மில் இரண்டு இலக்கமிட்டவர் பெயரில் கும்பகோணம் சப்கோர்ட்



38 1958ல் ஏற்பட்ட இ.பி.28 1958ல் 16.12.1968ல்
போடப்பட்ட ஏலத்தின் மூலம் தஞ்சை ஜில்லா,
வலங்கைமான் கிராமத்திலுள்ளதும் இதனடியில்
விபரமாகக் குறிப்பிடப்பட்டவைபடியுமான தியேட்டர்
வகையறா சொத்துக்களை ஏலம் எடுத்து ண்
ஏலவிற்பனையும் ண் கோர்ட்டாரால் 20.12.1969ல்
ஊர்ஜிதம் செய்யபடபட்டு நம் இருவருக்கும்
சொந்தமானது,”

33.A reading of this clause shows that even at the time of the commencement of the business, Muthaiah had agreed that the property was purchased in his name, jointly, by Muthaiah and Gurunathan Chettiar. Having agreed in the year 1971 and having continued the business till 31.12.2002 treating it as the property of the partnership firm “*Sri Murugan Talkies*”, it is too late in the day for the appellants to turn around and state that it is not a property belonging to the partnership but the property which belongs to him exclusively. If that had been the situation, Muthaih Chettiar would not have agreed to pay a sum of Rs.24,000/- for a period of 1 and ½ years after the death of



Gurunathan Chettiar to the plaintiffs.

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34.I would agree with Mr. Jagdish and Mr. Varadhan on this point here. I would read the Partnership Deed as bringing in the immovable property as the property of the firm. Section 14 of the Partnership Act reads as follows:

"Section 14: The property of the firm. Subject to contract between the partners, the property of the firm includes all property and rights and interest in property originally brought into the stock of the firm, or acquired, by purchase or otherwise, by or for the firm for the purposes and in the course of the business of the firm, and includes also the goodwill of the business. Unless the contrary intention appears, property and rights and interest in property acquired with money belonging to the firm are deemed to have been acquired for the firm."

35.If Tr.Muthiah wanted to exclude the movable and immovable property from the partnership business, he would have expressly stated so as in terms of Section 14. On the contra, the clauses extracted above would show that both Muthiah and Gurunathan had agreed that the



property had been purchased on both their behalf in equal contribution in the name of Muthiah. Clause 1 extracted above would show that the immovable property had brought in as a stock of the firm and hence, no exclusive right can be claimed by Muthiah in and over the same.

36.The position that, in the absence of contract to the contrary, the property which belongs to a person does not automatically belong to the partnership is a settled position. In **Arjun Kanoji Tankar v. Santaram Kanoji Tankar**, [(1969) 3 SCC 555], the Supreme Court was pleased to hold as follows:

“13.....Property belonging to a person, in the absence of an agreement to the contrary, does not, on the person entering into a partnership with others, become the property of the partnership merely because it is used for the business of the partnership. It will become property of the partnership only if there is an agreement - express or implied that the property was, under the agreement of partnership, to be treated as the property of the partnership.”

37.In this particular case, we have already seen that under the



Partnership Deed both Muthiah and Gurunathan Chettiar had agreed that the purchase of the land was at the instance of both the parties and they brought it as the properties of the Firm. In other words, there was a contract to the contrary and both the parties have agreed that it shall constitute a partnership firm. Consequently, I have to hold that the immovable property purchased in the Court auction sale form a part of the capital of the firm and was included in the properties of the firm.

38. Turning to the point on Benami Prohibition Act, 1988 I have already concluded that the relationship between the Muthiah and the legal representatives of the deceased Guruanathan Chettiar is one of fiduciary capacity. This is statutorily recognized under Section 88 of the Indian Trust Act. The Benami Prohibition Act excludes the operation of the Act, where one person holds the property in a fiduciary capacity for other. This is clear from Section 4 (2) (b) of the said Act. Therefore, the argument that the Benami Prohibition Act would apply, though seems very attractive, by virtue of Section 88 of the Indian Trust Act read with Section 14 of the Partnership Act and the Partnership Deed, it must fail.



32.I further must add that the plea relating to benami was not taken before the Trial Court or before the Lower Appellate Court and has been pressed into service first time before me. The plea of benami requires foundational pleadings and is not a mere question of law but is a mixed question of law and fact. Therefore, even on that ground the plea of benami must be rejected.

39.I would now turn to the argument on the power of attorney's examination. Mr.Mahimai Raj, learned counsel for the appellants 1 to 3 argued only the power of attorney has been examined on behalf of the plaintiff and the plaintiffs did not enter the witness box, therefore, according to him, the entire evidence has to be rejected.

40.A perusal of the evidence let in on behalf of the plaintiff would show that the 2nd plaintiff's husband had deposed on behalf of the first and the second plaintiffs. When the husband of the one of the parties is deposing, the question of power of attorney does not arise. This is by virtue of Section 120 of the Evidence Act which reads as follows:



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“120. Parties to civil suit, and their wives or husbands. Husband or wife of person under criminal trial. — In all civil proceedings the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses. In criminal proceedings against any person, the husband or wife of such person, respectively, shall be a competent witness. “

41.From this it is clear that, in a Civil proceeding, a husband or wife of any party is a competent witness. Apart from this, it is also on record that the son in law of the first plaintiff and the husband of the second plaintiff had engaged himself in the running of the Theatre business even during the lifetime of Gurunathan Chettiar. It is on record that from 1981 onwards, the son-in-law was involved in running of the Cinema Theatre. Therefore, he is a competent witness to depose.



42.The Judgment relied upon by the learned counsel for the appellant in **Man Kaur v. Hartar Singh Sangha, (2010) 10 SCC 512** summarizes the principles relating to the power of attorneys deposing before the Court. The said paragraph commences with the word “*personal knowledge*”. Here is a case where there is no personal knowledge involved with respect to the matters in issue. The case related to evidence and not merely oral evidence but evidence based on record. The crucial evidences are Ex.A.1- Partnership Agreement, the terms of the Partnership Agreement and the relationship between the parties have not been disputed. None of these documents have been denied by the appellants. When the matters are borne out of record, the Court will not look beyond the same. The Lower Appellate Court, in the view of this Court has rightly come to the conclusion on the basis of these uncontroverted records. Consequently, the fact that only the husband of the 2nd plaintiff was examined makes no difference to this case. No other points were argued before me.

In the result, the Second Appeal is dismissed. The Judgment and



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Decree of the learned Subordinate Judge in A.S.No.48 of 2009 dated 15.11.2010, in partially reversing and Judgment and Decree in O.S.No.334 of 2004 dated 2007 is confirmed with costs throughout.

24.05.2023

Index : Yes/No
Speaking : Yes/No
Neutral Citations : Yes/No
mps

To

1.The Additional Principal District Munsif,
Valangaiman,
Kumbakonam.

2.The Subordinate Judge,
Mannargudi.



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V. LAKSHMINARAYANAN, J,

mps

Pre-delivery Judgment in
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24.05.2023