IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 23.03.2015

Coram:

THE HONOURABLE Ms. JUSTICE K.B.K.VASUKI

S.A.No.1020 of 2007
and MP.Nos.2 and 3 of 2007

G.Kannammal .. Appellant/Plaintiff

vs.

1.K.Govindaswamy
2.Periakalaiah Naidu .. Respondent/Defendant

Second Appeal is filed under Section 100 of the Code of Civil Procedure against the judgment and decree dated 8.4.2003 made in A.S.No.88/2001 on the file of the Additional District Judge, Fast Track Court No.V, Chengalpet at Tiruvallur District confirming the judgment and decree dated 8.9.1998 made in O.S.No.852/1988 on the file of the District Munsif Court at Tiruttani.

For Appellant : Mr.S.Baskaran
For Respondents : Mr.A.K.Kumaraswamy (R1)
R2 died

JUDGMENT

The unsuccessful plaintiff is the appellant herein. This Second Appeal is filed against the concurrent judgments of the courts below, thereby denying her half share in the suit property.

2.The suit was filed by the plaintiff for partition of the suit property by metes and bounds into two equal half shares and for allotting half share to her. The suit relief was sought for on the strength of Ex.A1 sale deed dated 16.6.1980 jointly standing in the name of the plaintiff and the first defendant, who is none else than her husband. The plaintiff and the first defendant got married on 12.06.1975. During the subsistence of marriage, the suit property was purchased jointly in the name of the plaintiff and the first defendant under Ex.A1 dated 16.6.1980. Much after the purchase of the property, misunderstanding arose between the parties, resulting in police complaint filed by the plaintiff against her husband in 1982 and HMOP.No.59/1982 filed by the husband against the wife for dissolution of marriage on the ground that the marriage held was null and void and the decree was passed in favour of the husband by dissolving the marriage on 27.11.1984. Thereafter, the plaintiff/wife also issued a legal notice on 23.12.1986 to the first defendant/husband, claiming ½ share in the suit property stating that she has also contributed ½ share towards the sale consideration and the husband and wife had been in joint possession. The legal notice was replied by the husband, by denying her share and by denying that

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no amount was contributed by her for sale consideration of the suit property. According to the first defendant/husband, the entire amount was paid only by him and the name of his wife added was sham and nominal and she also executed a release deed on 27.6.1981 in respect of her share. The same was followed by the institution of the suit by the wife, claiming ½ share in the suit property.

3.The suit relief was claimed by the wife and the same was resisted by the husband by reiterating the same stand as taken in their exchange of notices. During trial, the parties examined themselves as PW1 and DW1. While the wife produced the registration copy of the sale deed as Ex.A1 and legal notice as Ex.A2, the defendants produced the so called relinquishment deed purportedly executed by wife in favour of the first defendant on 27.6.1981, encashment certificate purportedly issued by the Manager, IOB, Chindatripet Branch, Kist receipts standing in the name of the husband and patta pass book and small farmer's Identification Card issued by the Agricultural Officer, R.K.pet in favour of the husband/first defendant in respect of the suit property as Exs.B1 to B18 documents.

4.The trial court on the basis of the available evidence arrived at the conclusion that the suit property was purchased from and out of the funds of the husband and the husband has been in continuous possession of the suit property and the name of the wife was added in the sale deed, because of her relationship with the purchaser as his wife and the wife failed to prove her contribution and her joint possession and she has also relinquished her right and accordingly dismissed the suit. Aggrieved against the same, the plaintiff preferred AS.88/2001. The lower appellate court has, by agreeing with the findings of the trial court, dismissed the appeal thereby confirming the judgment and decree of the trial court. Hence, this second appeal by the wife/plaintiff before this court.

5.The second appeal is admitted on the following substantial question of law:

> "Whether the Courts below have committed an error of law in dismissing the suit without properly construing Ex.A1 sale deed and basing reliance on Ex.B2 -an unregistered relinquishment deed?"

6.During the pendency of this Second Appeal, the appellant has filed MP.1/2015 for raising additional substantial questions of law and the additional substantial question of law framed, as per the order made therein, reads as follows:

> "As per Section 17 of the Registration Act, whether the courts below are right in relying on Ex.B2 an unregistered relinquishment deed to dismiss the suit?"

7.Heard the rival submissions made on both sides and perused the records.

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8.The sale deed in respect of the suit property admittedly stands jointly in the name of the plaintiff and the first defendant during

the subsistence of their matrimonial relationship. It is nobody's case that there was any misunderstanding between them on the date of purchase. The two grounds on which the plaintiff's claim for ½ share in the suit property was denied by the courts below, are that (i)she was only a name lender and no amount was contributed by her towards sale consideration of the suit property and (ii)she has already relinquished her right under Ex.B2 unregistered document.

9.As far as the second ground is concerned, the act of relinquishment presupposes the existence of some right over the property and unless and otherwise the plaintiff's right is admitted, the question of execution of any release deed either voluntarily or involuntarily does not at all arise herein. The fact that the release deed was obtained by the first defendant, would only establish the plea of the plaintiff that she has right over the suit property on the strength of Ex.A1 registered sale deed. Even assuming it to be true that the signature found in Ex.B2 unregistered document was admitted and the document was voluntarily executed by the plaintiff, the unregistered document will not convey any right to other party, as the execution of Ex.B2 release deed for want of registration does in no manner affect the plaintiff's right of ½ share in the suit property. Both the courts below have by placing undue reliance on Ex.B2 unregistered release deed, wrongly upheld the claim of the husband that he is the exclusive owner of the property and such finding of the courts below on misconception of law and by overlooking the relevant provisions of the Registration Act, is hence perverse and unsustainable.

10.The other finding rendered by the courts below is that the entire sale consideration was paid only by the husband and the same is also based on Ex.B3 document which is purported to be the Encashment Certificate issued by Manager of IOB to the effect that one Kannusamy Govindasamy, holder of Indian Passport on the date of certificate, encashed the Traveller's Cheques of Thomas Cook amounting to 920 pounds equivalent to Rs.16,716.40. The certificate also contains the particulars of number of Traveller's Cheques, its denomination and its total value etc. and the same also contains the signature of the Branch Manger of IOB. As the amount is stated to be above Rs.16,000/- as on 10.6.1980 and as the sale deed was executed on 16.6.1980 for Rs.15,000/-, the courts below have easily arrived at the conclusion that this money encashed by the husband was utilised for the purpose of purchase of the suit property. The courts below again erred in placing more importance to this document merely on the basis of the evidence of DW1. This certificate is purportedly issued to "whomsoever it may concern" by the Branch Manager. Though the document is dated 10.6.1980, it does not contain the seal of the bank. Neither the Bank Manager, who is the author of the document nor any one associated with the same branch is brought into the witness box to prove that it was actually issued by the Bank manager and the particulars mentioned therein were true and acceptable. In the absence of one such evidence, Ex.B3 does not advance the case of the 1st defendant in any manner.

11.Even assuming it to be true that the property was purchased out of the funds of the husband, the same by itself will not prove the sham and nominal and benami nature of the transaction. The

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Hon'ble Supreme Court in the decision reported in (2007) 4 MLJ 1076 (SC) (Binapani Paul v. Pratima Ghosh and others) cited on the side of the appellant has referred to the earlier Division Bench authority reported in (2004) 7 SCC 233 (Valliammal (D) by Lrs. v. Subramaniam and others), wherein, the Division Bench held that "it is well established that the burden of proving that a particular sale is benami lies on the person who alleges the transaction to be a benami and the essence of a benami transaction is the intention of the party or parties concerned and often, such intention is shrouded in a thick veil which cannot be easily pierced through. But, such difficulties do not relieve the person asserting the transaction to be benami of any part of the serious onus that rests on him, nor justify the acceptance of mere conjectures or surmises, as a substitute for proof". In both the cases decided by the Apex Court, purchase involved is of the year 1935. In (2004) 7 SCC 233 (Valliammal (D) by Lrs. v. Subramaniam and others), the Division Bench of the Apex Court held as follows:

> "13. This Court in a number of judgments has held that it is well established that burden of proving that a particular sale is benami lies on the person who alleges the transaction to be a benami. The essence of a benami transaction is the intention of the party or parties concerned and often, such intention is shrouded in a thick veil which cannot be easily pierced through. But such difficulties do not relieve the person asserting the transaction to be benami of any part of the serious onus that rests on him, nor justify the acceptance of mere conjectures or surmises, as a substitute for proof. Refer to Jaydayal Poddar v. Bibi Hazra, Krishnanand Agnihotri v. State of M.P., Thakur Bhim Singh v. Thakur Kan Singh, Pratap Singh v. Sarojini Devi and Heirs of Vrajlal J. Ganatra v. Heirs of Parshottam S. Shah. It has been held in the judgments referred to above that the question whether a particular sale is a benami or not, is largely one of fact, and for determining the question no absolute formulas or acid test, uniformly applicable in all situations can be laid. After saying so, this Court spelt out the following six circumstances which can be taken as a guide to determine the nature of the transaction:
>
> (1) the source from which the purchase money came;
> (2) the nature and possession of the property, after the purchase;
> (3) motive, if any, for giving the transaction a benami colour;
> .(4) the position of the parties and the relationship, if any, between the claimant and the alleged benamidar;
> (5) the custody of the title deeds after the sale; and
> (6) the conduct of the parties concerned in dealing with the property after the sale. (Jaydayal Poddar v. Bibi Hazra, SCC p. 7, para 6)

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> 14. The above indicia are not exhaustive and their efficacy varies according to the facts of each case.

Nevertheless, the source from where the purchase money came and the motive why the property was purchased benami are by far the most important tests for determining whether the sale standing in the name of one person, is in reality for the benefit of another. We would examine the present transaction on the touchstone of the above two indicia.

....

....

18. It is well settled that intention of the parties is the essence of the benami transaction and the money must have been provided by the party invoking the doctrine of benami. The evidence shows clearly that the original plaintiff did not have any justification for purchasing the property in the name of Ramayee Ammal. The reason given by him is not at all acceptable. The source of money is not at all traceable to the plaintiff. No person named in the plaint or anyone else was examined as a witness. The failure of the plaintiff to examine the relevant witnesses completely demolishes his case."

12.In the case reported in 1997-2-LW.908 (Parvathi Ammal v. Solai Ammal and another), the purchase is much before Benami Transaction (Prohibition) Act 1988 and the Division Bench of our High Court under identical circumstances, observed that "Normally, the general presumption should be that the husband thought fit to purchase some of the items of the properties in the name of his wife for her benefit and welfare"..... "In such cases, Courts have been insisting upon very strong and specific claim at the instance of the defendants who project the claim of benami, in making it also obligatory on the part of such person to prove the same that the acquisition was not meant to be for the benefit or welfare of the person in whose name it was acquired but it was for the family only and that the ostensible owner was merely a name lender". It is further held therein that the question as to whether a particular sale or purchase is benami has different shades or characteristics taking colour from the facts and circumstances, present in each case before the court, the parties who assert such claim, the manner in which it is asserted and the mode of proof adopted. But, such difficulties were held not sufficient to relieve the person asserting the transaction to be benami, of the onerous burden cast upon him to prove the object or intention in acquiring such properties, by any one in the name of another, particularly as in this case wherein the purchase had been by husband in the name of his wife".

13.As far as the present case is concerned, the first defendant both in his written statement and in the witness box as DW1, except stating that the entire sale consideration was paid by him, not raised any specific plea that the plaintiff has no right over the suit property and the purchase was, on the date of purchase not meant for or intended to benefit the wife. That being so, both the courts below have erred in accepting the claim of the first defendant that he is the exclusive owner of the property on the basis of the documentary evidence produced on his side, particularly kist receipts standing in the name of the first defendant to prove his continuous and separate possession of the property. The courts below, while

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doing so, failed to see the relationship between the parties before, on the date of and after the date of purchase of the suit property and the prevailing social system in ordinary Hindu families, as observed by the Hon'ble Supreme Court in para 8 of its judgment reported in AIR 1965 SC 271 (Kanakarathanammal v. V.S.Loganatha Mudaliar and another). In the case cited above, the claim made by the plaintiff was recovery of possession of the properties on the ground that it exclusively belonged to the mother. The same was resisted by the defendants on the ground that the properties belonged to the father. The trial court rejected such plea. Whereas the High court upheld their claim and held that the sale deed in respect of the property was taken by the appellant's father in the name of the appellant's mother benami. When the same was challenged before the Apex Court, it was held that though the father provided the money for acquiring the property in the mother's name, it was with the intention of conferring the beneficial interest solely upon the mother and such a transaction amounts to a gift and the appellant as the sole heir of her mother is entitled to the decree insofar as the property in question. While doing so, the Apex Court has in para 8 observed as follows:

> "It is true that the actual management of the property was done by the appellant's father; but that would inevitably be so having regard to the fact that in ordinary Hindu families, the property belonging exclusively to a female member would also be normally managed by the Manager of the family; so that the fact that appellant's mother did not take actual part in the management of the property would not materially affect the appellant's case that the property belonged to her mother. The rent was paid by the tenants and accepted by the appellant's father; but that, again would be consistent with what ordinarily happens in such matters in an undivided Hindu family. If the property belongs to the wife and the husband manages the property on her behalf, it would be idle to contend that the management by the husband of the properties is inconsistent with the title of his wife to the said properties. What we have said about the management of the properties would be equally true about the actual possession of the properties, because even if the wife was the owner of the properties, possession may continue with the husband as a matter of convenience."

14.In other judgment reported in 1977 -1- LW. 444 (Rasu Kavundar v. Ponnusamy Gounder & others), the Division Bench of this Court held as follows:

> "The learned Judge of the first appellate Court also failed to keep into consideration the well settled principles of law repeatedly laid down and reiterated by Courts concerning also the normal and general presumption enuring in favour of a wife even when it is shown that the consideration really proceeded from the husband of such purchaser and that no inference can be drawn from the said factor alone that the wife was only a benamidar, having regard to the nature of the relationship between the parties and the normal tendency of the husband to benefit his wife

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either by payment of money or by making the purchase of the property in her name and for her benefit.....” “Even if it be assumed that the consideration flowed from the husband of P.W. 2 the inevitable presumption only would be that the husband of P.W. 2 wanted to benefit her by purchasing the property to her in her name and it cannot by itself be indicative of the fact that she was a name lender only, particularly in this case, in the teeth of only motive urged as though for avoiding land ceiling which was found to be a misnomer even according to the finding of the first appellate Court”.

“In taking such a view, strong reliance seems to have been placed on the decisions reported in (1963) II M.L.J. 151 = 76 LW 261 Thangayi Ammal v. Gurunatha Gounder, 1979 II MLJ 73 - Krishna v. Shanmugham and Ors. (DB), 1975 II MLJ 184 = 88 LW 63, S.N.Kandaswami Chettiar and Others v. Gopal Chettiar and Others (DB), 1976 II MLJ 470 = 89 LW 471 Krishnappa Naicker and Others v. Elumalai Naicker, 1980(1) MLJ 21 Muthusamy Gounder v. Rangammal (DB). A careful perusal of these decisions and the principles laid down therein would go to show that the nature as well as the extent of onus as also the burden of proof will vary from case to case”.

15.As rightly argued by the learned counsel for the appellant, the principles so laid down by the Apex court and the Division Bench of our High court are squarely applicable to the claim made by the appellant herein that even though the consideration flowed from the husband, it would only lead to an inevitable presumption that the husband wanted to benefit his wife by purchasing the property to her in her name and it cannot by itself be indicative of the fact that she was a name lender only. The above argument merits due consideration particularly on the failure of the first defendant/husband to put forth any reason to purchase the property jointly in the name of the husband and wife and such failure would only strength the claim of the plaintiff to get ½ share in the property.

16.Though the learned counsel for the appellant has cited other authority reported in (2003) 2 MLJ 475 (P.R.Hemachandra Babu and another v. P.R.Janardhanam (deceased) and others) arising out Section 3 of the Benami Transactions (Prohibition) Act (XLV of 1988 Act) which raises a mandatory presumption that any transaction is for the benefit of the wife or unmarried daughter and the burden is on the person alleging benami transaction to rebut the presumption and prove that the transaction was not for the benefit of such persons, the provision of benami transaction is not applicable to the facts of the present case as the sale transaction was much earlier to the enactment. However, the principles laid down by the Apex Court and the Division Bench of this court in the other judgment cited above and the cases reported in 1997-2-LW.908 (Parvathiammal v. Solai Ammal and another) and (2007) 4 MLJ 1076 (SC) (Binapani Paul v. Pratima Ghosh and others) are in respect of the transactions effected much before the Benami Transaction (Prohibition) Act 1988. In my considered view, both the courts below have, on misconception of law,

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arrived at adverse finding against the wife and dismissed the suit and the judgment and decree of the courts below to that effect are hence legally unsustainable and warrants interference by this Court and the substantial question of law and additional substantial question of law are accordingly answered in favour of the plaintiff.

17.In the result, the second appeal is allowed by setting aside the judgment and decree of the courts below. The suit in O.S.No.852 of 1988 is decreed by granting preliminary decree for the plaintiff's ½ share in the suit property. Considering the relationship between the parties, there is no order as to costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Asst.Registrar (CS II)

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Sub Asst. Registrar

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To
1.The Additional District Judge, Fast Track Court No.V,
Chengalpet at Tiruvallur District.

2.The District Munsif Court at Tiruttani.

3.The Section Officer,
VR Section, High Court,
Madras.

+1 cc to Ms.S.Hemalatha, sr.16255
+1 cc to Mrs.Baskaran, sr.16173.

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