

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 8 .1.2015.

CORAM

THE HON'BLE MR.JUSTICE R.MAHADEVAN

S.A.No.975 of 2006

Angamuthammal ...Appellant/1st Defendant

vs.

Govindaraj ...Respondent/Plaintiff

Second Appeal is filed under Section 100 of CPC against the judgment and decree dated 19.1.2006 made in A.S.No.21 of 2005 on the file of the Sub Court, Dharmapuri, confirming the judgment and decree dated 8.12.2004 made in O.S.No.783 of 1993 on the file of the District Munsif, Dharmapuri.

For appellant : Mr.V.Ragavachari

For respondent : Mr.R.Subramanian

JUDGMENT RESERVED ON :25.11.2014

JUDGMENT

The judgment and decree, dated 19.1.2006 made in A.S.No.21 of 2005 on the file of the learned Sub Judge, Dharmapuri, confirming the judgment and decree, dated 8.12.2004 made in O.S.No.783 of 1993 on the file of the learned District Munsif, Dharmapuri, are under challenge in this memorandum of second appeal.

2. The appellant is the first defendant in the suit in O.S.No.783 of 1993, whereas the respondent is the plaintiff.

3. For easy reference and for the sake of convenience, the appellant may hereinafter be referred to as the first defendant and the respondent be referred to as the plaintiff wherever the context so require.

4. The brief facts of the case of the plaintiff are as under:-

a. The plaintiff had married the first defendant in the year 1977 and they had two children, viz., Mohan Harirajan aged about 16 years and Mahalakshmi, aged about 10 years.

b. The plaintiff had purchased the property measuring south-north 40 feet and east-west 60 feet from one Manickam for a sum of Rs.12,600/- by borrowing money outside and out of his savings.

c. At the time of registration, since the first defendant was pregnant and she has urged the plaintiff to register a part of the property in her name, he had registered the property measuring east - west 60 feet and south - north 10 feet in her name on 27.4.1983 under document No.192/83 and the remaining portion was registered in his name, i.e., 60 x 30 feet on the same day under document No.191/83.

d. From the date of purchase, both the properties have been in possession and enjoyment of the plaintiff as part of his residence, whereas the first defendant was not in possession of the property stands in her name in any manner.

e. While so, due to the misunderstanding between the plaintiff and the first defendant, the plaintiff had obtained a decree of divorce on 19.3.1990 from the District Court, Krishnagiri.

f. Since the defendants are attempting to encroach the suit property, the plaintiff has filed the suit for declaration and permanent injunction.

5. The first defendant has resisted the suit by filing her written statement contending that she had made arrangements to purchase the property by obtaining the money from her parents and jewel loan and at that time, as she was in the advanced stage of pregnancy, she was admitted into the hospital and therefore, she instructed the plaintiff to register the property, but the plaintiff clandestinely registered the property measuring 60 x 30 feet in his name and the remaining portion measuring 60 x 10 feet in her name. While so, due to the misunderstanding between the plaintiff and the first defendant, there was a breakdown in her marriage. The plaintiff does not have any right over the suit property and he was not in possession and enjoyment of the suit property and since the suit has been filed without any cause of action, it is liable to be dismissed. Further, the plaintiff is bound to pay Rs.2,000/- to the first defendant towards her expenses.

6. Based on the material proposition of facts arising from the pleadings of the parties to the suit, the trial Court has formulated as nearly as five issues for the better adjudication of the suit.

7. In order to substantiate their respective cases, both the plaintiff and the defendant were directed to face the trial. Accordingly, the plaintiff was examined as P.W.1 and three other witnesses were examined on his part. During the course of their examination, Exs.A1 to A9 were marked. On the other hand, the defendant was examined as D.W.1 and during the course of her examination, Exs.B1 to B5 were marked. That apart, the Commissioner's Report and Sketch were marked as Exs.C1 and C2.

8. On evaluating the evidences, both oral and documentary, the trial court had decreed the suit as prayed for.

9. Having been aggrieved by the impugned judgment and decree of the trial Court, dated 8.12.2004, the first defendant had preferred an appeal in A.S.No.21 of 2005 on the file of the learned Subordinate Judge, Dharmapuri. That appeal was also dismissed confirming the judgment and decree of the trial Court.

10. Challenging the correctness of the judgment and decree of the courts below, the present second appeal has been filed by the first defendant.

11. The second appeal has been admitted on the following substantial question of law:-

" Whether the Courts below were justified in granting decree for declaration contrary to the provisions of Section 4 of the Benami Transactions (Prohibition) Act."

12. Heard Mr.V. Ragavachari, learned Counsel appearing for the appellant and Mr.R.Subramanian, learned counsel appearing for the respondent.

13. The learned counsel for the first defendant/appellant has submitted that the courts below should have given more weight to the documentary evidence than the interested oral testimony of the plaintiff and that the first defendant being the owner of the property cannot be enjoined by a decree of the Court.

14. The learned counsel has further submitted that the lower appellate court had committed a serious error in relying upon the divorce proceedings and failed to note that it is the obligation of the plaintiff to maintain his children and his spouse and even otherwise, those proceedings are irrelevant for the purpose of adjudicating the title to the suit property.

15. The learned counsel has also contended that the Courts below should have appreciated the fact that the first defendant had pledged her jewels for raising loan for purchasing the suit property and the plaintiff was authorised to purchase the property, but he has misused the trust reposed on him by purchasing the major portion of the property in his name and the remaining portion was purchased in the name of the first defendant and the source for the purchase of the property has been proved by marking Exs.B1 to B3, however, the courts below have not accepted the case of the first defendant by accepting the oral evidence of P.W.2 and decreed the suit, which is unjust and improper.

16. The learned counsel has added that the Courts below should have appreciated that the suit itself is not maintainable and it is barred under the provisions of Section 4 of the Benami Transactions (Prohibition) Act, 1988.

17. The learned counsel has vehemently contended that the courts below have not followed the principles laid down by the Apex Court as well as this Court in the decisions reported in 1995 (4) SCC 572: 1996 (1) L.W. 107 (SC) (Nand Kishore Mehra .v. Sushila Mehra) 1974 SC 171 (Jaydayal Poddar through LRs. and another v. Mst.Bibi Hazra and others), and 2004 (2) L.W. 123 (DB) (U.Bhaskaran .v. Bank of India & others).

18. Per contra, the learned counsel appearing for the plaintiff has submitted that the plaintiff has purchased the property by borrowing money from outside and out of his savings and as the first defendant had urged him to purchase the property in her name at the time of her advanced stage of pregnancy, he purchased the major portion of the property in his name and the remaining portion in her name and therefore, based on the sale deed dated 27.4.1983, the first defendant cannot make any claim over the suit property.

19. The learned counsel has contended that the execution of the sale deed in the name of the first defendant is only a benami transaction and that too, it had happened before the Benami Transactions (Prohibition) Act, 1988, came into force and therefore, the provisions of Section 4 of the Act cannot be made applicable to the case on hand.

20. Further, the learned counsel has added that the property was purchased by the plaintiff and he is in possession and enjoyment of the same and therefore, the first defendant cannot make any claim merely on the basis of the sale deed stands in her name.

21. First of all, this Court is at a loss to understand considering the totality of the facts and circumstances of the case, what was the necessity for the plaintiff to make benami transaction and how the execution of the sale deed in respect of meagre portion

of the suit property in the name of the first defendant can be called as benami transaction and these questions have not been dispelled in the manner known to law.

22. It is not in dispute that the plaintiff and the first defendant are the husband and wife and their marriage held in the year 1977. The first defendant was working as a teacher in private schools. The first defendant had initiated steps to purchase the suit property by obtaining money from her parents and pledging the jewels and to prove the same Ex.B1 has been marked and the jewels were pledged on 22.4.1983, i.e., five days prior to the purchase of the suit property. At the time of purchase, since the first defendant was hospitalised due to the advanced stage of her pregnancy, the plaintiff was asked to register the suit property in her name. But the plaintiff had registered the suit property measuring 60 x 30 feet in his name and registered the suit property measuring 60 x 10 feet in the name of the first defendant.

23. On the other hand, the plaintiff has not proved as to how he had mobilised the money to purchase the suit property and from whom he borrowed the money and it has not been proved by examining those persons from whom he borrowed money or by producing any documentary evidence, which shows that at the time of purchase of the suit property, the plaintiff did not have money to purchase the suit property, whereas the first defendant has proved by marking Ex.B1 Pledging card and obtained money by pledging the jewels five days prior to the purchase of the suit property.

24. If the plaintiff had mobilised the entire money for the purchase of the suit property, he would have proved the same by adducing oral and producing documentary evidence. There is absolutely no evidence for the same. Even if he had purchased the suit property by utilising his money, he would not have purchased the suit property under two different sale deeds, i.e., the major portion in his name and the meagre portion in the name of the first defendant.

25. Further, as claimed by the plaintiff at the time of purchase of the suit property, if the relationship between them was not cordial and the first defendant was not living with him, then absolutely there is no reason for executing the sale deed, even though the meagre portion, in the name of the first defendant.

26. From the evidence of D.W.1, it could be presumed that she gave money by pledging the jewels and obtaining the money from their parents to purchase the property in her name. Since she was hospitalised, she asked the plaintiff to execute the sale deed. But the plaintiff has cleverly executed the sale deed in respect of major portion in his name and the meagre portion, i.e., 60 x 10 feet in the name of the first defendant and when she came to know about this

cheating, the dispute arose between the husband and the wife, which ended in the breakdown of their marriage.

27. At this juncture, it is pertinent to see what is benami transaction and what are its ingredients.

28. The first and foremost requirement is that a property should have been transferred in the name of a person for consideration paid or provided by another person. In other words, the consideration for the transaction should not have flown from the person in whose name the property is purchased. If the person in whose name the property is purchased also has contributed consideration for purchase of the property in his/her name along with others whose names not reflected in the sale deed, it would not amount to a benami transaction as defined under the Act.

29. Secondly, the object of such purchase, namely, whether the property is purchased in the name of a person with the intention of evading public revenue and whether there is any dishonesty in not mentioning the names of the real contributors of the fund for purchase of the property is to be looked into.

30. If the intention to purchase the property is to avoid payment of any tax or to conceal any unaccounted income, then before applying the provisions of the Act, a careful consideration of the nature of the transaction has to be looked into. The above principle has been laid in *M. Printer vs. Marcel Martins* (AIR 2002 Karn. 191).

31. If the above principle is applied to the facts of this case, the inevitable conclusion should be that the plaintiff is the benami of the first defendant as it is proved that the money has been flown from the first defendant.

32. Further, it is not the case of the plaintiff that the property was purchased in the name of the first defendant only to evade the public revenue. It is also not the intention of the plaintiff to avoid payment of any tax or to conceal any unaccounted income by purchasing the property in the name of the first defendant.

33. Though the question whether a particular purchase is benami or not, is largely one of the fact and for determining this question, no absolute formulae or acid test, uniformly applicable in all situations, can be laid down, yet in weighing the probabilities and for gathering the relevant indicia, the Courts are usually guided by the following circumstances, as laid down in *Rajinder Prashad Malik vs. Shanti Devi Malik* (AIR 2003 P & H 29).

- a. the source from which the purchase money came;
- b. the nature and possession of the property, after the purchase;
- c. motive, if any, for giving the transaction a benami colour;
- d. the position of the parties and the relationship, if any, between the claimant and the alleged benamidar;
- e. the custody of the title deeds after the sale; and
- f. the conduct of the parties concerned in dealing with the property after the sale.

34. Even if the above principles are applied to the case on hand, it cannot be held that the transaction is a benami transaction.

35. In *Suseelan vs. T.P. Leela* A.I.R. 2004 Ker. 312 (DB), it is held that after the introduction of the Benami Transactions (Prohibition) Act, 1988, even though husband can purchase properties in the name of his wife or unmarried daughter, there is a presumption that it is for the benefit of the wife or unmarried daughter unless the contrary is proved.

36. In the case on hand, as laid down in *Suseelan vs. T.P. Leela* A.I.R. 2004 Ker. 312 (DB), this Court finds that since the suit property measuring 60 x 10 feet purchased in the name of the first defendant only for the benefit of the first defendant as the plaintiff has not proved the contrary.

37. In the light of the above discussions and on analysis of the judgments of the courts below, this Court finds that the courts below did not consider both oral and documentary evidence adduced and produced on either side in a proper perspective and did not apply the correct legal principles laid down by the Apex Court as well as this Court and therefore, they came to a wrong conclusion by decreeing the suit as prayed for.

38. For the aforesaid reasons, the second appeal deserves to be allowed partly. Accordingly, the second appeal is partly allowed thereby setting aside the judgment and decree of the courts below in respect of the declaration that the plaintiff is entitled to the suit property measuring 60 x 10 feet. It is declared that the appellant/first defendant is entitled for the suit property measuring 60 x 10 feet. However, there will be no order as to costs.

mra

-s/d-

Assistant Registrar(CO)

Dt:23/1/2015

True Copy

Sub-Assistant Registrar

To

1. The Sub Judge, Dharmapuri.
2. The District Munsif, Dharmapuri.
3. The Section Officer,
V.R. Section,
High Court, Madras.

+ 1 cc to M/s.V.Raghavachari, Advocate SR 840

+ 1 cc to M/s.R.Subraanian, Advocate SR 978.

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