

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 10.01.2017

PRONOUNCED ON : 30.01.2017

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.Nos.1074 to 1076 of 2013

and

M.P.Nos. 1 to 1 of 2013

S.A.No.1074 of 2013

Kamalammal Appellant/Plaintiff

Vs.

1. Devagi

2.Amaravathi

3.Anjalai

4.Suseela (deceased) Respondents/Defendants
2 to 4 and 5th Defendant

(Memo filed Sr No.Nil as no surviving
legal heirs vide order of this
Court date 03.01.2017).

S.A.No.1075 of 2013

1.Kamalammal

2.Kumaresan

.... Appellants/1 & 2 Defendant

Vs.

1. Devagi

2.Amaravathi

3.Anjalai

4.Suseela (deceased) ... Respondents/Plaintiffs 2 to 4
& 5th Defendants

(Memo filed Sr No.Nil as no surviving
legal heirs vide order of this
Court date 03.01.2017).

S.A.No.1076 of 2013

Kamalammal ... Appellant/8th Defendant

Vs.

1. Devagi
2. Amaravathi
3. Anjalai
4. Government of Tamil Nadu
Rep.by its District Collector
5. District Supply Officer,
Tiruvannamalai District.
6. Executive Engineer, TNEB
Vengikkal, Tiruvannamalai.
7. Divisional Engineer (O & M)
TNEB, Chengam.
8. Junior Engineer, TNEB
Periyakulam Village and Post,
Chengam Taluk.
9. Commissioner,
Pudupalayam Panchayat Union,
Chengam Taluk.
10. The Tahsildar, Chengam ...Respondents/Plaintiffs 2
to 4/Defendants 1 to 7

Second Appeals are filed under Section 100 of Civil Procedure Code, against the judgment and decree of the District Court, Tiruvannamalai made in A.S.Nos.20 of 2010, 21 of 2010 and 22 of 2010 dated 23.11.2012 respectively in reversing the judgment and decree of the Additional Subordinate Court, Tiruvannamalai made in O.S.Nos.335 of 1993, 158 of 1995 and 376 of 2002 dated 30.04.2010 respectively.

For Appellants : Mr.S.Parthasarathy SC
for Mr.J.Ramakrishnan

For Respondent : Mr. P.R.Shankar
No.1 to 3

COMMON JUDGMENT

S.A.No.1074 of 2013

Challenge in this second appeal is made by the plaintiff in O.S.No.335 of 1993 against the judgment and decree dated 23.11.2012 made in A.S.No.20/2010 on the file of the District Court, Thiruvannamalai, reversing the judgment and decree dated 30.04.2010 made in O.S.No.335 of 1993 on the file of the Additional Subordinate Court, Thiruvannamalai.

S.A.No.1075 of 2013

Challenge in this second appeal is made by the defendants 1 and 3 in O.S.No.158 of 1995 against the judgment and decree dated 23.11.2012 made in A.S.No.21/2010 on the file of the District Court, Thiruvannamalai, reversing the judgment and decree dated 30.04.2010 made in O.S.No.158 of 1995 on the file of the Additional Subordinate Court, Thiruvannamalai.

S.A.No.1076 of 2013

Challenge in this second appeal is made by the 8th defendant in O.S.No.376 of 2002 against the judgment and decree dated 23.11.2012 made in A.S.No.22/2010 on the file of the District Court, Thiruvannamalai, reversing the judgment and decree dated 30.04.2010 made in O.S.No.376 of 2002 on the file of the Additional Subordinate Court, Thiruvannamalai.

2. (i) O.S.No.335 of 1993 has been laid by the plaintiff for declaration and permanent injunction.

(ii) O.S.No.158 of 1995 has been laid by plaintiffs for declaration, possession and accounting.

(iii) O.S.No.376 of 2002 has been laid by the plaintiff for permanent injunction.

3. The parties are referred to in the second appeals as described by the trial court in O.S.No.335 of 1993.

4. The first defendant is the wife of the deceased Ramabadra Udaiyar. The defendants 2 to 4 are born to Ramabadra Udaiyar and the first defendant. The 5th defendant is stated to be the second wife of the deceased Ramabadra Udaiyar and no issue is born to them. As regards the above facts, there is no dispute.

5. According to the plaintiff, she is the 3rd wife of the deceased Ramabadra Udaiyar. As regards the marital status of the plaintiff, the same is in dispute. According to the contesting defendants, no marriage took place between the plaintiff and the deceased Ramabadra Udaiyar and according to them, Ramabadra Udaiyar had kept the plaintiff as his mistress and there has been no valid marriage between them as put forth by the plaintiff. Further, according to the contesting defendants, the plaintiff married one Mottaiyan @ Govindan and

she is not the wife of the deceased Ramabadra Udaiyar. The case of the plaintiff is that out of the lawful wedlock with the deceased Ramabadra Udaiyar, three daughters were born to them viz., Meenachi, Kamachi and Manimegalai. The said fact is also controverted by the contesting defendants. But, considering the rival contentions put forth by the respective parties in the matter, it could be seen that the marital status of the plaintiff as such pales into insignificance, as the plaintiff claims title to the suit properties under the Will executed by Ramabadra Udaiyar dated 20.06.1983, which has been marked as Ex.A36.

6. The bone of contention between the parties is as regards the character/ownership of the properties purchased under Exs.A1 to 7. Now, according to the plaintiff, though Exs.A1 to 7 stand in the name of the first defendant, it is her case that the same had been purchased only by the deceased Ramabadra Udaiyar out of his own funds and income benami in the name of the first defendant for his exclusives benefit and therefore, it is contended that the properties covered under Exs.A1 to 7 are the properties belonging to the deceased Ramabadra Udaiyar. Per contra, according to the contesting defendants, the properties covered under Exs.A1 to 7 are the exclusive properties of the first defendant, she having purchased the same, out of her savings and also with the aid and assistance of her father, who had sufficient means to contribute funds to her for the acquisition of the above said properties and therefore, it is contended that Ramabadra Udaiyar cannot lay and did not make any claim over the properties covered under Exs.A1 to 7 and in such view of the matter, according to the contesting defendants, the Will executed by the deceased Ramabadra Udaiyar, in so far as the properties covered under Exs.A1 to 7 are concerned, are invalid and not binding upon the contesting defendants. Further more, the contesting defendants have also challenged the genuineness and validity of the Will marked as Ex.A36. Inasmuch as the plaintiff has raised the plea of benami, in so far as the properties covered under Exs.A1 to 7 are concerned, it has to be seen whether the plaintiff has established her case with acceptable proof and material. As regards the plea of benami, the Courts below have dealt with the various case laws as regards applicability of the Benami Transactions (Prohibition) Act, 1988, to the transactions covered under Exs.A1 to 7. It is therefore unnecessary to again refer to the same on the above aspects, however, as could be seen from the provisions of the above said Act, as per Section 3(1) of the above said Act, no person shall enter into any benami transaction. However, the provision of Section 3(1) shall not apply to the purchase of the property by any person in the name of his wife or unmarried daughter and it shall be presumed, unless the contrary is proved, that the said property had been purchased for the

benefits of the wife or the unmarried daughter. It has to be therefore seen whether the plaintiff has placed acceptable material to hold that though the title deeds marked as Exs.A1 to 7 stand in the name of the first defendant, still it is only the deceased Ramabadra Udaiyar, who had purchased the same out of his own funds benami and been in the enjoyment and possession of the same and the first defendant is only a name lender and not the real owner.

7. The first defendant claims that the properties covered under Exs.A1 to 7 absolutely belonged to her. If that be so, as rightly contended, the title deeds pertaining to the suit properties viz. Exs.A1 to 7 should have been in the custody of the first defendant and as such, she should have produce the same in support of her case. However, the title deeds Exs.A1 to 7 have been produced by the plaintiff and marked as Exhibits on her side. No explanation whatsoever has been offered by the contesting defendants as to how come the plaintiff had come to be in the possession and custody of the documents marked as Exs.A1 to 7. A perusal of Exs.A1 to 7 would go to show that the above said sale transactions had taken place between 1952 to 1955. Now, according to the plaintiff, the deceased Ramabadra Udaiyar on the apprehension that his brother Venkatachalam would claim a share in the properties, contended that the deceased Ramabadra Udaiyar had acquired the properties covered under Exs.A1 to 7 in the name of his wife viz., the first defendant. Per contra, according to the contesting defendants, oral partition had taken place between the deceased Ramabadra Udaiyar and his brother Venkatachalam even during the year 1945 and therefore, the case of the plaintiff that apprehending that Venkatachalam would lay a claim over the properties, if the same had been acquired in the name of the deceased Ramabadra Udaiyar, the deceased Ramabadra Udaiyar had purchased the properties covered under Exs.A1 to 7 in the name of the first defendant as such should not be accepted. However, as seen from the evidence adduced by the respective parties, only an oral partition is said to have taken place between the deceased Ramabadra Udaiyar and his brother Venkatachalam. In such view of the matter, considering the period of acquisition of the properties covered under Exs.A1 to 7, the motive attributed by the plaintiff for the deceased Ramabadra Udaiyar having acquired the properties covered under Exs.A1 to 7 in the name of the first defendant as such cannot be easily brushed aside.

8. As regards the claim of the first defendant that she is the owner of the properties covered under Exs.A1 to 7, as rightly found by the trial court, the first defendant is unable to state clearly as to from whom, she had purchased the above said properties and for what consideration and what extent etc., she had purchased. Therefore, it could be seen that the first

defendant is unable to throw a clear picture as to the nature of the acquisitions made under Exs.A1 to 7. Further, barring Exs.B4 and 5, no document has been placed by the contesting defendants that the properties covered under Exs.A1 to 7 had been in the possession and enjoyment of the first defendant at any point of time. Further, it is found that the trial court had disbelieved Exs.B4 & 5 filed to sustain the case of the contesting defendants. As regards Ex.B4, it is found to be a mortgage deed dated 24.11.1962 executed by the first defendant in favour of the Masaar Co-operative Bank in respect of the properties covered under Exs.A1 to 7. However, other than marking Ex.B4, no other material has been placed by the contesting defendants, that it is only the first defendant, who had discharged the said mortgage deed and thereafter, derived the original documents or obtained the necessary discharge receipt of the mortgage. This would go to show, as rightly found by the trial court, that inasmuch as the first defendant had not exercised any absolute ownership over the properties covered under Exs.A1 to 7, she is unable to produce the discharge mortgage deed. As regards Ex.B4 and as adverted to earlier, she has also not produced the title deeds Exs.A1 to 7 from her custody. On the other hand, it is only the plaintiff, who had produced the above said title deeds. As regards Ex.B5, it is found to be a Chitta. No doubt the same stand in the name of the first defendant. However, a perusal of Chitta, Ex.B5 would go to show that as rightly found by the trial Court, the same stands not only in the name of the first defendant, but also in the name of the others. Therefore, it could be seen that there is no explanation whatsoever on the side of the first defendant as to how the Chitta had come to be issued in respect of various persons, other than the name of the first defendant exclusively. Therefore, no safe reliance could be attached to Exs.B4 and 5 to hold that it is only the first defendant, who had acquired the properties out of her own funds under Exs.A1 to 7 and also been in the possession and enjoyment of the same as full owner thereof.

9. It is the case of the first defendant that pursuant to the acquisition of the properties covered under Exs.A1 to 7, she had put up Rice mill, obtained electric connection, licence etc., in the above said properties. However, no document as such has been produced by the first defendant to show that she had erected the Rice mill, obtained the service connection, license etc., in her own name. On the other hand, it is found that the license of the Rice mill stands only in the name of the deceased Ramabadra Udaiyar and the professional tax receipts, license, EB receipts, Kist receipts etc., in respect of the properties covered under Exs.A1 to 7, all stand only in the name of the deceased Ramabadra Udaiyar. If really, the first defendant is the owner of the properties above referred to, necessary

documents would have been produced by the first defendant to evidence that after the acquisition of the same, it is she, who had put up the Rice mill etc in the said properties. However, it has been admitted by the first defendant examined as DW1 that the license for the Rice mill had been obtained only by her husband and it is only he, who had been paying necessary charges for the running of the Rice mill. Therefore, as rightly contended by the plaintiff's counsel, as the properties covered under Exs.A1 to 7 had been purchased benami by the deceased Ramabadra Udaiyar in the name of the first defendant for his exclusive benefit the deceased Ramabadra Udaiyar had exercised absolute ownership over the suit properties. It could be seen that all the documents pertaining to the above said properties, as rightly found by the trial Court, stand only in the name of the deceased Ramabadra Udaiyar and not in the name of the first defendant. It is nobody's case that the deceased Ramabadra Udaiyar is not economically well placed and also not owning other considerable income yielding properties.

10. It is the case of the first defendant that out of her small savings by the joint exertion in the properties belonging to Ramabadra Udaiyar, she had saved considerable amount and out of such amount and also with the assistance offered by her deceased father, she had acquired the properties covered under Exs.A1 to 7. However, as rightly found by the trial Court, as regards the above case of the first defendant, no material whatsoever has been placed by her to evidence that she had considerable savings with her and that her father had contributed funds to her for the acquisition of the properties covered under Exs.A1 to 7. It is not even pleaded or established by the first defendant that her father had acquired various properties prior to Exs.A1 to 7 and had been getting income from the said properties and thereby, was in a position to contribute necessary funds to the first defendant for enabling her to acquire the properties covered under Exs.A1 to 7. Accordingly, it could be seen that no effort has been taken by the first defendant to establish before the trial Court that her father was well placed and also earning sufficient income, so as to be in a position to offer assistance to her for acquiring the properties covered under Exs.A1 to 7. As rightly found by the trial court, as regards the case of the first defendant that she had been making considerable savings by jointly doing agricultural work with her husband is also not borne out by any reliable material. In such view of the matter, it could be seen that no exception could be taken to the findings of the trial court that the properties covered under Exs.A1 to 7 had been purchased benami in the name of the first defendant by the deceased Ramabadra Udaiyar and accordingly, it could be seen that it is only Ramabadra Udaiyar, who had exercised absolute ownership over the said properties and the

plaintiff has established the same by adducing acceptable and convincing materials. The motive aspect adduced for the acquisition of the properties benami in the name of the first defendant by the deceased Ramabadra Udaiyar is also found to be reasonable and acceptable. Further, the custody of the title deeds is only with the plaintiff. The first defendant, barring Exs.B4 & 5, is unable to place any other material to enable the court to hold that she is the real owner of the properties covered under Exs.A1 to 7. As seen above, the first defendant has neither pleaded nor established that her father had owned properties by various acquisition and thereby, was in a position to offer assistance to her in the acquisition of the properties covered under Exs.A1 to 7.

11. The trial Court has disbelieved the case of the first defendant and accordingly upheld the plaintiff's case. Aggreieved over the same, it is found that the contesting defendants had preferred the first appeals. It is found that before the first appellate court, an application had been taken out by the daughters of the first defendant since deceased for receiving additional evidence in support of their case in I.A.No.7 of 2011. In the said application, it has been stated that the first defendant's father had acquired various properties during the years 1945 to 1970 under various sale deeds and as the said title deeds/sale deeds could not be traced earlier, notwithstanding the exercise of due diligence, it has become necessary on the part of the contesting defendants to produce the same as additional documents in the appeals in support of their case and accordingly, the petition has been laid for the reception of the additional evidence. Stiff resistance was offered to the same by the plaintiff and the plaintiff has disputed the acquisitions of the father of the deceased first defendant under various sale deeds as put forth and further, according to her, no income as such had been derived by the father of the deceased first defendant, so as to enable him, to contribute funds to his daughter for the acquisition of the properties covered under Exs.A1 to 7 and furthermore, it is also contended that the contesting defendants have not placed any reason that their application for the reception of the additional evidence come under the parameters as envisaged under Order 41 Rule 27 CPC and in such circumstances, the additional evidence should not be received and the application for the same should be rejected.

12. The first appellate court has chosen to allow the application for the reception of the additional evidence by giving the following reasonings.

" At this juncture, it is to be stated that in the appeal, the appellant also filed

I.A.No.07/11 to receive the documents under Order 41, Rule 27 C.P.C. Those are numbering 15 documents, all are purchased in the name of Muthusamy Udaiyar, the father of Pachaiyammal ranging from 01.02.1954 to 1965 and 1970. On perusal of those documents that has been produced, this court finds that all are the original documents of the year 1945, 1950, 1952, 1954, 1956, 1957, 1960, 1962, 1964, 1965 and the 15th document is dated : 09.11.1970 which are produced by Pachaiyammal from the custody of her brother, after the demise of her father Muthusamy Udaiyar. As observed above, these are all original sale deeds produced from the proper custody which are more than 30 years old and accordingly, this court has no hesitation to come to the conclusion that they are ancient documents as defined under section 90 of the Indian Evidence Act. On going through those documents, it is seen that 2 documents are of the year 1940s, 8 documents are of the year 1950s, 4 documents are of the year 1960s and on document is of the year 1970 since those are more than 30 years old and which are all original documents produced from proper custody assumes the character of ancient documents and can be marked without any further proof as per Section 90 of the Indian Evidence Act. Accordingly, the I.A.No.07/2011 is allowed and these 15 documents are marked as Ex.B29 to B 43 in the appellate stage. "

13. Therefore, it could be seen that the first appellate court on the footing that the additional evidence viz., the sale deeds being ancient documents and as such documents do not require any further proof for accepting the same, proceeded to entertain the application for the reception of the same as additional evidence. Accordingly, the first appellate court had marked Exs.B29 to 43 as additional documents in support of the case of the contesting defendants.

14. The reception of the additional evidence by the first appellate court is seriously impugned in the second appeals. According to the plaintiff's counsel, the first appellate court, without considering whether the ingredients of Order 41 Rule 27 CPC had been satisfied by the contesting defendants, without

giving acceptable reason, had erred in marking the additional evidence in support of the case of the contesting defendants and therefore, it is pleaded that no reliance whatsoever should be placed upon the additional evidence for upholding the case of the contesting defendants. In this connection, reliance is placed upon the decisions reported in 2014-1-LW 103 (Govt. of Karnataka and Anr. Vs. K.C.Subramanya and Ors), 2007 (3) CTC 456 (T.Tamilarasan Vs. Arokkiasamy, Thomas and Devasagayam) and 2015 (5) CTC 78 (Kaliyammal Vs. Ganapathi). A perusal of the above said decisions and also, the principles of law outlined under Order 41 Rule 27 CPC would go to show that, as rightly contended, the first appellate court has erred in marking the additional evidence as Exs.B29 to 43 in support of the case of the contesting defendants without satisfying itself that the contesting defendants had fulfilled the requirement of Order 41 Rule 27 CPC. As rightly pointed out, it is not the case of the defendants that the additional documents are not within their knowledge or within the knowledge of the first defendant during the course of the trial. Therefore, it could be seen that the contesting defendants have not pleaded that the additional documents are not within their knowledge during the course of trial and thereby, they had been prevented from marking the same before the trial Court. That apart, they have also not pleaded as to when they had come to know about the existence of the additional documents exhibited as Exs.B29 to 43 and from whom and when they had taken the custody of the said documents so as to enable them to file the same before the first appellate court. With reference to the same, no plea or reason has been given in the petition. Therefore, it could be seen that the contesting defendants have not satisfied the essential ingredients for marking the additional evidence as contemplated under Order 41 Rule 27 CPC and also, as pointed out in the above said authorities. Even the first appellate court has not given any reason in the impugned order in I.A.No.7 of 2011 that the contesting defendants had satisfied the requirements of Order 41 Rule 27 CPC and therefore, he is entertaining the said application. With reference to the same, nothing has been discussed by the first appellate Court. Further, it has not even been held by the first appellate court that the additional documents produced by the contesting defendants are essential for enabling him to pronounce judgment in the case. Therefore, it could be seen that none of the essential ingredients of Order 41 Rule 27 CPC has been satisfied in the case for the reception of the additional evidence and without any application of mind or oblivious to the principles of law enunciated under Order 41 Rule 27 CPC, it could be seen that the first appellate court had chosen to entertain the reception of the additional evidence. On the other hand, it is found that the first appellate court had proceeded to receive the additional evidence on the footing that the same could be entertained as they being

ancient documents and require no further proof. That aspect of the matter should be gone into only after being satisfied whether the sine qua non requirements for the reception of the additional evidence had been satisfied. At the first instance when the reception of the documents as additional evidence itself had not been made out by the contesting defendants and when it is not even the case of the first appellate court that the said documents are essential for the just decision of the case, it could be seen that the first appellate court has completely erred in marking the additional documents as Exs.B29 to 43. Therefore, as rightly pointed out by the plaintiff's counsel, the order passed in I.A.No.7 of 2011 cannot be sustained any further and the same has to be thrown out. I therefore hold that the principles of law governing the issue as regards the reception of the additional evidence at the appellate stage adumbrated under Order 41 Rule 27 C.P.C and in the above said decisions cited by the plaintiff's counsel and also the another decision of the Apex Court reported in (2012) 8 SCC 148 (Union of India Vs. Ibrahim Uddin and Another) have not been diligently followed by the first appellate court. Consequently, the impugned order passed in I.A.No.7 of 2011 is set aside. Resultantly, it could be seen that the additional evidence marked as Exs.B29 to 43 have to be eschewed, cannot be taken or considered for any purpose in support of the case of the contesting defendants. Therefore, the additional evidence marked as Exs.B29 to 43 are branded as improper evidence marked in the case and not permissible under law and therefore, there are excluded from the zone of consideration for deciding the issues involved in the matter. Barring Exs.B29 to 43, no other material has been placed by the contesting defendants to hold that it is only the first defendant, who had purchased the properties covered under Exs.A1 to 7, As seen above, the contesting defendants have not placed any material to hold that the first defendant had considerable savings with her to enable her to acquire the properties covered under Exs.A1 to 7. When that plea is ruled out, the other plea is only the contribution of funds to her by her father. For the same, no document has been produced in the trial court. However, before the appellate court the additional documents marked as Exs.B29 to 43 have been marked. However, for the reasonings aforementioned when Exs.B29 to 43 are put out from the domain of consideration for the reasons that they had been received as additional evidence against the cannons of the well established principles of law as adumbrated under Order 41 Rule 27 CPC, it could be seen that there is nill evidence on the part of the contesting defendants to enable the court to hold that the first defendant had been possessed of sufficient means to enable her to acquire the properties covered under Exs.A1 to 7. A reading of the judgment of the first appellate Court would only go to show that mainly upon Exs.B29 to 43 alone, it had upheld the case of the first

defendant and thereby, reversed the well considered reasonings and conclusions of the trial court for disbelieving the defence of the first defendant as regards the acquisition of the properties under Exs.A1 to 7.

15. As adverted to above, voluminous documents have been marked on the side of the plaintiff to show that it is only the deceased Ramabadra Udaiyar, who had owned and exercised absolute ownership over the properties covered under Exs.A1 to 7 and no contra evidence has been adduced on the side of the contesting defendants for holding otherwise.

16. In the light of the above discussions, the reasonings and conclusions of the trial court for holding that it is only the deceased Ramabadra Udaiyar, who is the real owner of the properties covered under Exs.A1 to 7 and the first defendant is only the ostensible owner and as such, the deceased Ramabadra Udaiyar is entitled to Will, the properties covered under Exs.A1 to 7, do not call for any interference and no infirmity is ascribed to the same.

17. As regards the Will executed by Ramabadra Udaiyar marked as Ex.A36, it is found that the plaintiff has examined the attesor to the Will as PW3. As regards the proof of the validity of the Will Ex.A36 is concerned, it could be seen that both courts have accepted the evidence of the attesor PW3 and found that he had by his clear and cogent evidence established that it is only Ramabadra Udaiyar, who had executed the Will out of his own wish and volition in favour of his three wives as above referred to. Therefore, the conclusions of the courts below that the plaintiff has established the genuineness and the validity of the Will Ex.A36 are found to be in order. According to the plaintiff, as per the Will Ex.A36, the "C" schedule properties described thereunder had been bequeathed her and they are the suit properties in the lis laid by her.

18. As regards certain properties covered under the Will viz., items No.4 & 8 of the suit properties, it is found by the Courts below that item 8 of the suit properties had been subsequently settled in favour of DW3 Ezhumalai under Ex.B1 and from the documents marked as Exs.B14 to 28, it is found that DW3 had accepted the settlement deed and been in possession and enjoyment of the said property as absolute owner. Further, the scribe of the settlement deed Ex.B1 has been examined as DW4 and he has also tendered acceptable evidence. Therefore, it could be seen that as regards item 8 of the suit properties, the Will cannot have any effect. As regards item 4 of the suit properties is concerned, it is found that the deceased Ramabadra Udaiyar had settled the same in favour of the Co-operative society under Ex.B2 and inasmuch as the same has also been not

controverted by the rival parties, it is thus found that the Will cannot have any effect in respect of item 4 of the suit properties also. Accordingly, it is found that the courts below have also found that as regards items 4 & 8 of the suit properties, the plaintiff cannot be granted the reliefs. It is found that the trial court has upheld the case of the plaintiff only as regards items 1 to 3 and 5 to 7 of the suit properties and dismissed her case in respect of items 4 to 8 of the suit properties. No exception could be taken to the same.

19. However, though accepting the validity of the Will Ex.A36 in all aspects, the first appellate court on the footing that the other items of the suit properties, to which, the plaintiff had been granted a decree by the trial court, holding that the said properties are the properties of the first defendant and not the properties of the deceased Ramabadra Udaiyar, and further holding that the deceased Ramabadra Udaiyar has no legal competency to execute the Will in respect of the said properties, and therefore, dismissed the case of the plaintiff in entirety. However, in the light of the above discussions, it has been found that the properties covered under Exs.A1 to 7 belonged to the deceased Ramabadra Udaiyar and not to the first defendant. Therefore, it could be seen that as per the Will executed by the deceased Ramabadra Udaiyar, the plaintiff gets title to the above said properties and therefore, no exception could be taken to the findings and conclusions of the trial court for upholding the plaintiff's case as regards the above said items.

20. It is also found from the evidence adduced by the respective parties that the first defendant has accepted the Will in question by receiving certain items from the plaintiff and this could be seen from the document marked as Exs.A140. Ex.A140 is dated 06.02.1994 whereunder, the first defendant, in the presence of the panchayatar, had received the Pump, starter etc., from the plaintiff and passed the said receipt. A reading of Ex.140 wholly would go to show that only after making reference about the Will executed by the deceased Ramabadra Udaiyar marked as Ex.A36, it is found that the first defendant had received the articles mentioned therein from the plaintiff and passed the acknowledgment in respect of the same. Therefore, it is contended by the plaintiff's counsel that as per the doctrine of election adumbrated under Section 180 of the Indian Succession Act, 1925, the plaintiff having accepted the benefit and elected to confirm the Will in question under the said document, the plaintiff cannot take a different stand and impugne the Will in question. In other words, it is stated that the plaintiff having chosen to elect a benefit under the Will in question by her conduct must confirm to all its provisions and renounce all the rights that are inconsistent with it. In this

connection, reliance is placed upon the authorities reported in AIR 1965 Supreme Court Cases 241 (V 52 C 43) (C.Beepathuma and others V. Velasari Shankaranarayana Kadambolithaya and others), and 1993 1 MLJ page 678 (S.Nagarathinam Vs. S.Balakathiresan and others). A perusal of the above said decisions, coupled with the evidence marked in this case viz. Ex.A140, it is found that the first defendant had by her conduct chosen to confirm the Will Ex.A36 by passing on the said receipt to the plaintiff. Therefore, it is too late for the first defendant to raise the plea that Ex.140 is only a normal receipt and she has not confirmed the authenticity of the Will Ex.A36 thereunder as such cannot be accepted. In such view of the matter, the conclusion of the first appellate court that Ex.A140 is only a receipt simpliciter passed on by the first respondent and nothing more cannot be sustained as the said conclusion seems to have been reached by the first appellate court without considering the recitals found in document wholly and in the right perspective. Therefore, the reasoning of the first appellate court that Ex.A140 is only a receipt and the first defendant has not elected to confirm the Will under the said document as such cannot be countenanced.

21. Further, it is found the daughters of the first defendant i.e. the contesting defendants had also sold the properties to Ezhumalai under Ex.A156 and it is found that the said properties had been bequeathed to the first defendant under the Will Ex.A36 by the deceased Ramabadra Udaiyar. It is therefore found that even under Ex.A156, the contesting defendants had confirmed the authenticity of the Will executed by the deceased Ramabadra Udaiyar.

22. Furthermore, it is also found that PW2 Kumaresan, who is the third defendant in O.S.No.158 of 1995, had acquired certain properties from Susila, the plaintiff and her daughters under Ex.A146, the same is found to be one of the items bequeathed to Susila under the Will Ex.A36 as her life estate and thereafter, to be taken by the plaintiff or her heirs. Accordingly, it could be seen that confirming the terms of the Will, the parties had also acted upon the same and accordingly, a portion of the property bequeathed to Susila the plaintiff and her daughters falling under "B" schedule properties of the Will, had been alienated to PW2 Kumaresan under Ex.A146. Further, it is also found that subsequently patta had been mutated in respect of the said property in favour of PW2 marked as Ex.A147 and that, he had also been enjoying the same evidenced by the kist receipt marked as Exs.A148 to 150. Therefore, it could be seen that the parties are aware of the Will executed by the deceased Ramabadra Udaiyar bequeathing certain properties in favour of his three wives and accordingly, they had also confirmed the same by their conduct as above discussed.

23. As regards the status of the plaintiff being the third wife of the deceased Ramabadra Udaiyar, the trial court has found from various records, particularly, the school records of the children of the plaintiff and the voters list etc., found that on account of long cohabitation as seen from the above documents and also from the oral evidence adduced in the matter held that Ramabadra Udaiyar had married the plaintiff as his third wife and they had been recognized as husband and wife and accordingly, held that Ramabadra Udaiyar had willed the "C" schedule properties in her favour under Ex.A36.

24. Further, as regards the superstructure put up on the properties, S.C.No.82, trees etc (item 7 of the suit properties), bequeathed to the plaintiff, it is found by the trial court that though the properties, as above mentioned, are not specifically mentioned in the Will, the patta in respect of the same has been mutated only in favour of the plaintiff marked as Ex.A37 and the trial Court has found that only for the benefit of the plaintiff, the terraced house, S.C.No.82 etc. had been put up /erected on the properties willed to the plaintiff under Ex.A36 and accordingly, based upon the document marked by the plaintiff, the patta had been transferred in the name of the plaintiff, so found the properties above mentioned had been intended to be willed by Ramabadra Udaiyar for the benefit of the plaintiff under Ex.A36 and no exception could be taken to the findings of the trial court for accepting the above aspect of the plaintiff's case.

25. In the light of the above discussions, the status of the plaintiff as the third wife need not be dwelt at length as when it is found that the deceased Ramabadra Udaiyar had the competency to deal with the properties covered under Ex.A36 Will as he desires and accordingly, he had chosen to Will the properties to his three wives and the said Will having been found to be a valid and genuine one by the Courts below, it could be seen that the reasoning of the first appellate court that the plaintiff can only be termed as a lady, who had been having long cohabitation with the deceased Ramabadra Udaiyar and through whom he had be gotten three daughters and cannot be termed as his legally wedded wife as such does not assure much significance in the matter. In this connection, it is to be mentioned that the contesting defendants have failed to establish that the plaintiff had married Mottaiyan @ Govndan as pleaded by them.

26. In view of the above discussions, having regard to the scope and ambit of section 3(2) of the Benami Transactions (Prohibition) Act, 1988, and also the establishment of the plaintiff's case that the properties covered under Exs.A1 to 7 had been purchased benami in the name of the first defendant by the deceased Ramabadra Udaiyar without any ambiguity and by adducing necessary proof and material and thereby having rebutted the statutory presumption that could be raised under the above said Act, the findings and conclusions of the first appellate court for negating the plaintiff's case are found to be unacceptable and not sustainable in the eyes of law. Similarly, the first appellate court having found that Ex.A36 Will has been proved to be a genuine document erred in upsetting the judgment and decree of the trial court by giving unacceptable conclusions and findings sans the support of any legal evidence in the matter. Further, the first appellate court, as seen above, without assigning any valid reason erred in receiving the additional documents produced by the contesting defendants and also allowing I.A.No.7 of 2011. Accordingly, the substantial questions of law formulated in the second appeal are answered in favour of the plaintiff and against the contesting defendants.

In conclusion, the judgment and decree of the District Court, Tiruvannamalai made in A.S.Nos.20 of 2010, 21 of 2010 and 22 of 2010 dated 23.11.2012 respectively are set aside and the judgment and decree of the Additional Subordinate Court, Tiruvannamalai made in O.S.Nos.335 of 1993, 158 of 1995 and 376 of 2002 dated 30.04.2010 respectively are confirmed. Accordingly, all the second appeals are allowed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

sms

To

1. The District Court,
Tiruvannamalai.

2. The Additional Sub Court,
Tiruvannamalai.

+3cc to Mr.J.Ramakrishnan, Advocate Sr.5535 to 5537
+3cc to Mr.P.R.Shankar, Advocate Sr.5668 to 5670

S. A.Nos.1074 to 1076 of 2013
and
M.P.Nos. 1 to 1 of 2013

nm[co]
srg 15/2/2017



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