BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated: 22.02.2017

CORAM

The HONOURABLE MR.JUSTICE M.DURAISWAMY

S.A(MD)No.933 of 2011

Jose .. Appellant/Appellant/Defendant

Vs.

Vasantha .. Respondent/Respondent/Plaintiff

Prayer:- Second Appeal is filed under Section 100 of the Civil Procedure Code against the Judgment and Decree, dated 05.10.2009 made in A.S.No.75 of 2005 on the file of the District Court, Kanyakumari at Nagercoil, confirming the Judgment and Decree, dated 17.12.2004 made in O.S.No.39 of 2001 on the file of the Sub Court, Kuzhithurai.

For Appellant : Mr.H.Thayumanaswamy

For Respondent: M/s.J.Anandhavalli

JUDGMENT

Challenging the Judgment and Decree, dated 05.10.2009 passed in A.S.No.75 of 2005 on the file of the District Court, Kanyakumari at Nagercoil, confirming the Judgment and Decree, dated 17.12.2004 passed in O.S.No.39 of 2001 on the file of the Sub Court, Kuzhithurai, the defendant has filed the above Second Appeal.

2.The plaintiff filed the suit in O.S.No.39 of 2001 on the file of the Sub Court, Kuzhithurai, for declaration, for recovery of possession and for mense profits.

3.The brief facts of the plaintiff is as follows:-

According to the plaintiff, she is a qualified nurse working in Soudhi Arabia earning a sum of Rs.25,000/- per month and her monthly income was also increased periodically. The salary received by her was credited into Savings Bank Account in Indian Overseas Bank, Nadakavoo Branch. After her marriage, the plaintiff opened NIR account with Canara Bank at Kuzhithurai Branch. The marriage of the plaintiff with the defendant was solemnized on

12.10.1992. On the date of betrothal ie., on 05.10.1992, a sum of Rs.50,000/- was given to the defendant for marriage expenses and three sovereigns of gold chain was given to him. Apart from the said jewel, other ornaments worth 62 sovereigns were purchased by the plaintiff and presented by her parents. In addition to the gold ornaments, the plaintiff was presented with utensils worth more than Rs.10,000/- was given at the time of marriage. After marriage, the plaintiff was taken to the defendant's house and both stayed there for some time as husband and wife. At the time of leaving India to Soudhi Arabia, the plaintiff kept all her ornaments in a Bank locker. By an arrangement between the plaintiff-defendant and Bank, the defendant had taken the ornaments and pledged the same in the Canara Bank without the consent and knowledge of the plaintiff. The plaintiff resumed duty in Soudhi Arabia in the end of October, 1992. The plaintiff has entrusted more than a sum Rs.18,00,000/- with defendant for purchasing landed properties and invested the same in more profitable manner for the benefit of the plaintiff. The defendant is only the Trustee of the articles, ornaments and money entrusted by the plaintiff. By utilizing a small portion of the money, the defendant has purchased the suit properties for and on behalf of the plaintiff. On the date of sale deed, the plaintiff was at Soudhi Arabia. The defendant promised the plaintiff that the properties were purchased in the name of the plaintiff alone and demanded the plaintiff to send money. Believing the representation made by the defendant, the plaintiff provided funds for purchasing the suit properties. Accordingly, suit item Nos.1 and 2 were purchased on 20.11.1995 and suit item No.3 was purchased on 14.12.1995. The plaintiff bonafidely believed that the suit properties were purchased in her name. The defendant was a man of no means, developed ill feelings towards the plaintiff and the defendant has concealed the sale deeds from the plaintiff. Further, the defendant had illegal relationship with one Mallika of Ganesapuram, Nagercoil and the defendant became violent, when the plaintiff requested to give the sale deed for perusal. After enquiry, the plaintiff came to know that the documents to the suit properties were taken in the name of both the plaintiff and the defendant. The plaintiff is the real owner of the suit properties. Even the name of the defendant is included in the sale deed, the defendant is only the Trustee of the plaintiff and he is not entitled to claim any title over the suit properties. The plaintiff requested the defendant to execute a transfer deed for one half of the suit properties. The defendant agreed to execute a transfer for one half of the suit properties and taken the plaintiff to the Sub-Registrar's Office at Munchirai and got the signature of the plaintiff in a document and registered the same. The plaintiff put her signature in the document and consented for registration, believing that it is a surrender deed in favour of the plaintiff by the defendant in respect of the suit properties. After the execution of the document on 18.02.1998, the defendant took the plaintiff to his house and permitted the plaintiff to reside there for a few days. The plaintiff was driven away by the defendant from his house. The document executed on 18.02.1998 is not a surrender deed, but it is an agreement to reside separately. The said document is a void document. In these circumstances, the plaintiff has filed the suit.

4.The brief facts of the defendant is as follows:-

The defendant while disputing the averments stated in the plaint has stated that the plaintiff has no exclusive right over the properties and the defendant is holding those properties as exclusive owner. Though the sale deeds were taken along with the name of the plaintiff, the properties were solely for the benefit of the defendant alone and he did not take such sale deeds as Trustee of the plaintiff. The plaintiff and defendant are living separately. At the time of separation, all the documents in between them were settled. Further, according to the defendant, the properties were purchased with his separate funds. The defendant is not the Trustee of the plaintiff. In these circumstances, the defendant prayed for dismissal of the suit.

5.Before the trial Court, on the side of the plaintiff, P.W.1 was examined and six documents Exs.A1 to A6 were marked and on the side of the defendant, D.W.1 was examined and ten documents Exs.B.1 to B.10 were marked and witness documents were marked as Exs.x.1 to x.3.

6.The trial Court after taking into consideration the oral and documentary evidences let in by the parties, decreed the suit. Aggrieved over the Judgment and Decree of the trial Court, the defendant preferred an appeal in A.S.No.75 of 2005 on the file of the District Court, Kanyakumari at Nagercoil and the lower Appellate Court also confirmed the Judgment and Decree of the trial Court and dismissed the appeal. Aggrieved over the concurrent findings of the Courts below, the defendant has filed the above Second Appeal.

7.Heard Mr.Mr.H.Thayumanaswamy, learned counsel appearing for the appellant and M/s.J.Anandhavalli, learned counsel appearing for the respondent.

8.The appellant has raised the following substantial questions in the Second Appeal:-

"a) Whether the Courts below is justified in holding that the suit is hit by Section 4 of Benami Prohibition Act, 1988 overlooking Section 4(3) of the said Act?

b) Whether the lower Appellate Court right in decreeing the suit when the suit against the purchaser not maintainable on the ground of purchase being made on behalf of plaintiff as per Section 66 C.P.C?

c) Whether the suit is barred by limitation or not?"

9.The learned counsel appearing for the appellant submitted that under Section 4(3) of the Prohibition of Benami Property Transactions Act, 1988, the plaintiff cannot claim any right over the suit properties. Further, the learned counsel submitted that the suit filed by the plaintiff for declaration, for recovery of possession and for mense profits is barred by limitation.

10.In support of his contention, the learned counsel relied upon the following Judgments:-

(i) In ***Mitilesh Kumar and another vs. Prem Behari Khare*** reported in ***1989-1-L.W.430***, wherein the Honourable Apex Court has held in paragraph No.21 and the same reads as follows:-

> *"21. As defined in Section 2 (a) of the Act "Benami Transaction" means any transaction in which property is transferred to one person for a consideration paid or provided by any other person". A transaction must therefore, be benami irrespective of its date or duration, Section 3, subject to the exceptions, states that no person shall enter into any benami transaction. This Section obviously cannot have retrospective operation. However, Section 4 clearly provides that no suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person shall lie, by or on behalf of a person claiming to be real owner of such property. This naturally relates to past transactions as well. The expression "any property held benami" is not limited to any particular time, date or duration. Once the property is found to have been held benami, no suit, claim or action to enforce any right or respect thereof shall lie. Similarly, sub Section (2) of Section 4 nullifies the defences based on any right in respect of any property held benami whether against the person in whose name the property is held or against any other person in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property. It means that once a property is found to have been held benami, the real owner is bereft of any defence against the person in whose name the property is held or any other person. In other words, in its sweep Section 4 envisages past benami transaction also within its retroactivity. In this sense the Act is both a penal and a disqualifying statute. In case of a qualifying or disqualifying statute it may be necessarily retroactive.*

For example, when a Law of representation declares that all who have attained 18 years shall be eligible to vote, those who attained 18 years in the past would be as much eligible as those who attained that age at the moment of the law coming into force. When an Act is declaratory in nature the presumption against retrospectivity is not applicable. Acts of this kind only declare. A statute in effect declaring the benami transaction to be unenforceable belongs to this type. The presumption against taking away vested right will not apply in this case inasmuch as under law it is the benamidar in whose name the property stands, and law only enabled the real owner to recover the property from him which right has now been ceased by the Act. In one sense there was a right to recover or resist in the real owner against the benamindar. Ubi jus ibi remedium. Where there is a right, there is a remedy. Where the remedy is barred, the right is rendered unenforceable. In this sense it is a disabling statute. All the real owners are equally affected by the disability provision irrespective of the time of creation of the right. A right is a legally protected interest. The real owner's right was hitherto protected and the Act has resulted in removal of that protection."

(ii) In ***Valliammai Ammal and another Vs. Palani Pillai*** reported in ***2010 (1) CTC 342***, wherein this Court has held in paragraph No.28 and the same reads as follows:-

"28.The relevant consideration with regard to the question of benami transaction is that if the property was purchased either in the name of his wife or unmarried daughter, there is a mandatory presumption that such a transaction is for the benefit of wife or unmarried daughter. The burden is on the person alleging benami transaction to rebut the presumption and to prove the transaction was not for the benefit of such person."

(iii) In ***C.Narayanan Vs. Gangadharan*** reported in ***AIR 1989 KERALA 256***, wherein the Kerala High Court has held in paragraph No.14 and the same reads as follows:-

"14.Viewed from another angle also the above argument of the counsel for the respondent is not sustainable. The 'claim' or 'action' that is prohibited is the 'claim' or 'action' to enforce any right in respect of any property held benami. The words "in respect of in their widest sense mean 'relating to' or 'with reference to1. (See AIR 1954 SC 496). Another shade of meaning is 'attributable'. (See AIR 1966 SC 1000). Having regard to the object sought to be achieved by by Section 2, and the context in

which, the words are used, the meaning 'with reference to' or 'relating to' can be adopted. So understood the words 'action to enforce any right in respect of any property held benami' must be held to include, a petition to execute the decree, the subject-matter of which is the properly held benami by the petitioner-benamidar, for the real owner, the respondent. It should, in this connection, be noted that on the suit being decreed, the property till then 'held benami', will not cease to be one "held benami' unless and until the decree is executed and the relationship of benamidar and real owner till then existed, between the parties, is extinguished. It is also significant to note that till the decree passed in a suit of the nature in hand is executed and property taken delivery of, the property cannot be said to be held not benami, because under law the person who had paid the consideration for the transaction under which the property is held, for all practical purposes is treated as the real owner on whose behalf alone the benamidar is in possession of the property. The possession of the benamidar in law is the possession of the real owner."

11.Countering the submissions made by the learned counsel for the appellant, M/s.J.Anandhavalli, learned counsel appearing for the respondent submitted that the questions of law raised by the appellant have become redundant and that the provisions of Section 4(3) of the Prohibition of Benami Property Transactions Act, 1988 has been repelled. Hence, the appellant cannot take advantage of the said provision. Further, the learned counsel submitted that Section 66 of C.P.C., was also repelled by the Prohibition of Benami Property Transactions Act, 1988 (Act 45 of 1988). The learned counsel further submitted that the plaintiff is only in a fiduciary capacity occupying a position of power and confidence with respect to the plaintiff such that he is obliged by various rules of law to act solely in the interest of the plaintiff, whose rights he has to protect. He may not make profit or advantage from the relationship without full disclosure. The category includes trustees, company promoters and directors, guardians, solicitors and clients and other similarly placed person.

12.In support of her contention, the learned counsel for the respondent relied upon a Judgment in ***Adesh Kanwarji Singh Brar Vs. Ms.Babli Brar and others*** reported in ***AIR 2011 Delhi 187,*** wherein the Delhi High Court has held in paragraph Nos.18 and 19 and the same reads as follows:-

"18.......... *The word (fiduciary) used in*

Section 3(2)(b) of Benami Transactions (Prohibitions) Act, 1988, has not been defined either in this Act or in Indian Trusts Act. Black's Law Dictionary (8th Edn.) defines fiduciary relationship amongst others as a relationship between guardian and ward. It also includes a relationship where one person assumes control and responsibility over other. It is further stated that one is said to act in a "fiduciary capacity" when the business which he transacts or the monies or properties, which he handles, is not his own or for his own benefit but for the benefit of another person. Walker has defined 'fiduciary' as under: "A 'fiduciary' is a person in a position of trust, or occupying a position of power and confidence with respect to another such that he is obliged by various rules of law to act solely in the interest of the other, whose rights he has to protect. He may not make any profit or advantage from the relationship without full disclosure. The category includes trustees, Company promoters and directors, guardians, solicitors and clients and other similarly placed."

If there is a transaction, involving a conflict of interest and duty in the person in whom confidence is reposed by another person, fiduciary relationship springs into existence. The law, in my view, reposes faith in the father, vis-a-vis the minor child, by appointing/recognizing him as the guardian of his child. The fiduciary relationship between a minor child and his father is thus created on account of their very relationship and a statutory recognition of the father as natural guardian of the child. Moreover, it cannot be disputed that it is the father who, as his natural guardian exercises control on the child and is primarily responsible for his welfare. He is under a moral obligation to protect and safeguard the interest of his minor child. The law does not permit him to misuse his position as guardian of the child by using the funds of the child to acquire a property in his own name. If he does so, he betrays the trust which law reposes in him, by vesting him with the position of guardian of his child. A child of three/five years, who in law is in the custody and care of his father, he being his natural guardian, is incapable of even understanding and appreciating a property transaction not to talk of taking a rational view with regard thereto. It is the father, who being the natural guardian not only of the person, but also of the property of the minor child, has to deal with the property of the minor. While doing so, the father is duty bound to act in the best interests of the minor *and it is this relationship of trust and confidence which creates the fiduciary relationship between them. It, therefore, appears to me that since there was a fiduciary relationship between the plaintiff and Shri Harcharan Singh Brar, he was duty bound to act in the best interest of the plaintiff and could not have abrogated the funds of the plaintiff to his personal use by obtaining lease deed of the entire plot in his sole name. If the father of a minor child, who lacks not only legal capacity to contract, but also the maturity and rationale required for handling his property, misuses the confidence reposed in him and acquires the property in his sole name, despite paying half of the consideration from the funds belonging to the minor child which he controls on account of his being the natural guardian of the minor, he holds the property to the extent it is acquired from the funds of the minor, for the benefit of the minor, his position towards the minor being akin to that of a trustee.*

19.It was contended by the learned senior counsel for the applicant/defendant that since trust of immovable property can be setup only by way of a registered instrument or by a Will, as provided in Section 5 of Indian Trusts Act, 1982, and no such instrument was executed in this case, it cannot be said that Shri Harcharan Singh Brar was a trustee for the plaintiff. I, however, find no merit in this contention. A careful perusal of Clause (b) of sub-Section 3 of Section 4 of the Benami Transactions (Prohibition) Act, 1988 would show that it excludes, from the operation of Section 4(1) and 4(2), two types of transactions, firstly where the person holding the property is a trustee for another person and the other where the person holding the property though not trustee in the strict sense of the expression, stands in a fiduciary capacity vis-a-vis the person for whose benefit the property is held by him."

13.In the case on hand, admittedly, the plaintiff was working in Soudhi Arabia as a qualified nurse. Her monthly incomes were credited in her Account in India. The defendant, who was her husband, purchased the suit properties jointly in the name of the plaintiff and the defendant. The plaintiff had established that she was earning sufficient income for the purchase of the suit properties. The plaintiff contended that the defendant is a man of no means and had no individual income to purchase the properties. Though the defendant had contended that he had purchased the properties from his separate funds, absolutely, there is no evidence to support his case. Except the defendant, no one was examined on his side to prove that he had sufficient income for purchasing the suit properties.

14.From the available evidence, the Courts below found that the suit properties were purchased out of the funds provided by the plaintiff. The plaintiff also contended that the defendant had fraudulently purchased the properties in the joint names. From the evidence it is also clear that the defendant was dealing with the plaintiff's money in India. Therefore, it is also clear from the available evidence that the defendant was only acting as a Trustee of the plaintiff. When he was acting as a Trustee of the plaintiff, he should not have purchased the properties in his name. The defendant should have produced sufficient evidence to show that he had separate income and he was also having sufficient funds for the purchase of the suit properties. On the other hand, the plaintiff clearly established that she had sufficient income for the purchase of the suit properties. When the defendant had no means to purchase the suit properties, he cannot take a stand that the suit properties absolutely belongs to him. The Judgment relied upon by the learned counsel for the respondent squarely applies to the facts and circumstances of the case.

15.The provision of law mentioned in the substantial question Nos.1 and 2 were already repelled. Sofar as the limitation is concerned, the defendant has not raised it as a defence in the written statement and the limitation was also not raised as an issue before the trial Court. Since the defendant had acted only as a Trustee of the plaintiff, the suit filed by the plaintiff for declaration, for recovery of possession and for mense profits is well within the period of limitation. With regard to the question of the Prohibition of Benami Property Transactions Act, 1988 is that if the property was purchased either in the name of his wife or unmarried daughter, there is a mandatory presumption that such a transaction is for the benefit of wife or unmarried daughter, the burden is on the person alleging benami transaction to rebut the presumption and to prove the transaction and not for the benefit of such person.

16.In the case on hand, the plaintiff has clearly established her case by oral and documentary evidences. Further, she proved that the purchase of the property was not for the benefit of the defendant. The Courts below have rightly decreed the suit. Though there is no dispute with regard to ratios laid down by the learned counsel for the appellant, the Judgments relied on by the learned counsel for the appellant is not applicable, since the facts and circumstances of the present case are different.

17.In these circumstances, I do not find any ground much less any substantial questions of law to interfere with the concurrent findings of the Courts below and the second appeal is liable to be dismissed. Accordingly, the second appeal is dismissed. However there shall be no order as to costs.

Sd/-
Assistant Registrar(CSII)

/True Copy/

Sub Assistant Registrar

ps

To

1.The District Judge,
Kanyakumari at Nagercoil.

2.The Subordinate Judge,
Kuzhithurai.

+1cc to Mr.H.Thayumanaswamy,Advocate Sr.No. 9979

+1cc to M/s.J.Anandhavalli Advocate Sr.No. 9843

JAM/16.03.17 /PM/10p-5c

S.A(MD)No.933 of 2011

22.02.2017