

* HON'BLE SRI JUSTICE D.V.S.S. SOMAYAJULU

+ A.S.No.336 of 1998

% 07-12-2017

Koppolu Obanna (died)
per LRs

... Appellants/
Plaintiffs

Vs.

\$ Bheemunipadu Abraham (died)
Per LRs.

... Respondents/
Defendants

! Counsel for the appellants: V.B. Subrahmanyam

Counsel for the Respondents: Karri Murali Krishna

< Gist:

> Head Note:

? Cases referred:

¹ (2014) 9 SCC 445

² Manu/TN/1543/2016

³ MANU/TN/1433/2017

⁴ 2012 (3) ALD 404

⁵ 2014 (5) ALD 385

⁶ 2001 (4) ALT 234 (DB)

⁷ AIR 2007 SC 2637

⁸ 2003 (4) ALD 855

⁹ AIR 1974 SC 658

10. AIR 1974 SC 171

^{11.} (1980) 3 SCC 72



HON'BLE SRI JUSTICE D.V.S.S. SOMAYAJULU**A.S.No.336 of 1998****JUDGMENT:**

This appeal is filed by the legal representatives of the unsuccessful appellant/plaintiff in the suit O.S.No.2 of 1985, which was dismissed on 30.06.1997 by the Sub-ordinate Judge, Cuddapah.

2. The suit was filed by one K. Obanna for a declaration of his right and title to the plaint C-schedule property and other reliefs.

3. The suit was initially filed against one B. Abraham and Smt. B. Santhamma. The averments of the plaint are that B. Santhamma, second defendant and her mother purchased the A-schedule site by sale deed dated 25.03.1965. The mother relinquished her share in favour of the second defendant, vide a registered deed dated 03.02.1969. Thus, the second defendant became the owner of the entire property, which is described as B-schedule property. Thereafter, in 1984 after the property was developed, the second defendant gifted B-schedule property in favour of the plaintiff. The plaintiff is the brother of the second defendant. The second defendant also executed a rectification deed to correct an error in the said gift deed. This property is the C-schedule property of the plaint. As per the plaint, the husband of the second defendant viz., the first defendant and his children have been proclaiming their interest to claim title

over the property. The plaintiff also states that after he got the tenants vacated, the first defendant and his sons trespassed into the property and have occupied the same. The second defendant also changed her stand and is residing with the first defendant. Therefore, the plaintiff filed the suit for declaration of his title over the C-schedule property and for other reliefs.

4. The contesting first defendant states that the first sale deed of 1965 was nominally taken by him in the name of his mother and his wife-second defendant. He states that he developed the property, constructed the house with loans, contributions etc., as are described in para-4 of the written statement. He states that his wife-second defendant was coaxed second defendant into giving the property by gift, vide deed dated 08.05.1984. The second defendant remained *ex parte*. The defendants 3 to 6, who are added as the legal representatives, adopted in the written statement filed by their father.

5. The matter went to trial and Exs.A.1 to A.6 were marked for the plaintiff. Exs.B.1 to B.13 were marked for the defendants. The plaintiff was examined as PW.1. The third defendant was examined as DW.1 and another witness was examined as DW.2. After hearing, the lower Court by its order dated 30.06.1997 dismissed the suit. Hence, the present appeal.

6. Heard Sri V.B. Subrahmanyam, learned counsel for the appellant/Legal Representatives of the plaintiff and Sri Karri Murali Krishna, learned counsel for the respondents/defendants.

7. The first and foremost point that arises for consideration in this case is whether the gift deed-Ex.A.3 dated 08.05.1984 is a genuine document or not. Basing on this point, the other points would follow. As narrated in the plaint and as can be seen from the documents; initially, the site was purchased by the second defendant and her mother, through Ex.A.1-registered sale deed 25.03.1965. The mother relinquished her half share in favour of her daughter/second defendant on 03.02.1969 (Ex.A.2). On 08.05.1984 i.e., after about 15 years, the second defendant executed a gift settlement deed in favour of the plaintiff (Ex.A.3). She also executed a rectification deed on 15.06.1984, which is marked as Ex.A.4. The contention of the plaintiff is that Ex.A.3-document is executed out of love and affection that his sister had towards him. Therefore, he also states that he has obtained title to the property.

8. In reply to this, the defendants state that the property was originally procured by the first defendant with his funds, but as he was in the government service working as head constable, he obtained the sale deed in the name of his wife and his mother-in-law. The first defendant states that the second defendant or his mother did not have any

independent source of income and that the Ex.A.3-gift deed that was given on 18.05.1984 is not a valid deed. In para-6 of the written statement, the defendants state that the plaintiff coaxed the second defendant into executing the gift deed.

9. It is pertinent to note that in this suit the second defendant, who is the most critical and crucial person in this entire transaction and who could have explained the circumstances under which Ex.A.3-gift deed was executed chose to stay away from the court. She did not give evidence in this matter. She supported her husband by stating in her statement that the gift deed was not voluntary and that she cancelled the same on 21.02.1986. In addition to this, first defendant also died. Therefore, the evidence of the plaintiff as PW.1 alone is available. PW.1 was examined as a witness on 10.04.1996. The written statement of second defendant was filed in the court on 08.03.1991. In the cross-examination by the second defendant, it is noted that she is present in the court and she represented that she has no objection to the suit schedule property of her share and the declaration, as the declaration and possession. This admission is not very clear. In the cross-examination of PW.1 the witness admitted that possession was not delivered to him after the gift deed as the property is in the hands of the tenant. It was also suggested to him that after the death of first defendant, second defendant joined the plaintiff. In the next line he clearly states that it is true that we compromise the matter

myself and second defendant. As mentioned, the second defendant, who filed a separate written statement supporting her husband, did not come forward to give evidence. The Court recorded her presence during the course of examination of the first defendant. In the cross-examination of PW.1, the important point that is elicited is about the possession being not delivered under Ex.A.3-gift deed. Apart from this, PW.1 admits that there is a compromise between himself and the second defendant.

10. As far as the lack of delivery of possession is concerned, both the learned counsels argued for a long time on this matter. The learned counsel for respondent argued that delivery of possession is necessary for the completion of the gift and that in this case there is no delivery at all. The learned counsel for the appellants, on the other hand, drew the attention of this Court to a decision reported in ***Renikuntla Rajamma v. K. Sarwanamma***¹ wherein three judges of the Hon'ble Supreme Court of India have clearly noticed the language in Section 123 of the Transfer of Property Act, 1882 and clearly held that a conjoint reading of Sections 122 and 123 makes it clear that the transfer or delivery of possession of property is not a *sine quo non* for making the gift a valid gift. Their Lordships of the Supreme Court have observed that Section 123 of the Act is in two parts. The first part deals with gift of immovable property,

¹ (2014) 9 SCC 445

whereas the second part deals with the gift of movable property. In case of movable property, the gift may be affected either by registered instrument or by delivery. In the case of immovable property, however, it is noticed that the registered instrument alone is stipulated and their Lordships held that if the intention of the legislature was to make delivery of possession of the property gifted a condition precedent for a failure of immovable property, the legislature would have specifically say so. Their Lordships held “absence of any such requirement can lead us the conclusion that the delivery of possession is not an essential pre-requisite for making a valid gift in case of immovable property”. In the light of the authoritative pronouncement of three judges of the Hon’ble Supreme Court, this Court holds that the failure of the plaintiff to take possession will not invalidate the gift.

11. The gift deed is a registered deed which was followed by a rectification deed also to correct an error. There are no circumstances elicited or existing to show that the gift deed was not voluntarily executed. In addition, the acceptance of the gift is visible from the following facts that the plaintiff has issued a lawyers notice to the tenants in the building. The lawyers notice issued by the first defendant, which is marked as Ex.A.5, is testimony to this. The gift deed and rectification deed are in possession of the plaintiff who produced the same along with the original sale deed. In this

connection, the case of **Duraisami v. D. Kuppuswamy**² and in **K. Cherunni v. K. Nalini and others**³ are relevant. The gift deed is therefore held to be valid and its executor is not in doubt.

12. One other point that survives for consideration is whether Ex.A.3-gift deed was cancelled by the second defendant. DW.1 marked a document (Ex.B.2), which is a deed dated 21.02.1986 by which it is said that second defendant has unilaterally cancelled Ex.A.3. The unilateral cancellation of the deed is not valid as per the settled case law on this subject. The learned counsel for the appellants also cited two judgments reported in **Kapuganti Jagannadha Gupta v. District Registrar, Srikakulam and others**⁴ and **Sudhakara Reddy v. Lakshamma**⁵. This Court is of the opinion that in view of these judgments and other judgments that the unilateral cancellation of the gift deed is not valid.

13. For all these reasons, the gift deed is held to be validly executed.

14. The last question that survives is whether the sale deed of May 1965 (Ex.A.1) is acquired with the funds of first defendant and was kept nominally in the name of second defendant and his mother. Both the learned counsels have cited case law on the subject of benami. The learned counsel for the appellants relied upon **Sharada Bai v. Jamuna Bai**

² Manu/TN/1543/2016

³ MANU/TN/1433/2017

⁴ 2012 (3) ALD 404

⁵ 2014 (5) ALD 385

*and others*⁶, *V. Shankaranarayana Rao (died) by LRs v. Leelavathi (died) by LRs*⁷, *M. Krishna Rao and another v. M.L. Narasikha Rao and others*⁸, whereas the learned counsel for the respondents relied upon *Vidyadhar Krishnarao Mungi and others, v. Usman Gani Saheb Konkani and others*⁹, *Jayadaya Poddar v. Bibi Hazra*¹⁰ and *Thakur Bhim Singh v. Thakur Kan Singh*¹¹.

15. The law on this subject is sufficiently clear and does not require repetition. It is settled that the burden of proving that the transaction is benami and that the benami purchaser is not the real owner always rests on the person asserting it. The burden has to be discharged by adducing legal evidence of a definite character which can directly prove the fact of benami or firm circumstances which would raise an inference that the property is purchased benami. This is the sum and substance of the judgments relied upon by both the parties. Therefore, there should be direct and acceptable evidence to prove the fact of benami or circumstances which would lead to a clear conclusion that the transaction is benami.

16. It is needless to say that the onus is on the person impeaching the document. The tests laid down by the Hon'ble Supreme Court are to this effect only. Viewed against this

⁶ 2001 (4) ALT 234 (DB)

⁷ AIR 2007 SC 2637

⁸ 2003 (4) ALD 855

⁹ AIR 1974 SC 658

¹⁰ AIR 1974 SC 171

¹¹ (1980) 3 SCC 72

backdrop, it is clear that there is no direct evidence adduced by the defence pertaining to the sale deed of March 1965, Ex.A.1. In the written statement, it is pleaded very clearly by the first defendant that first defendant has invested the money for purchasing the said site. In para-4, it is further stated that the defendant raised a loan from the Kadapa Cooperative House Building Cooperative Society Limited and constructed the house in 1971. He also states that he raised a loan from his Provident Fund Account for the construction. In addition to this, he is pleaded that the two sons who were the government service and unmarried in 1971 saved their salaries and used the same in the construction. It is pleaded that the brothers of the defendants also lend the money for the construction. The first defendant and his sons have been discharging the loan to the society till the date of written statement. The loans raised from the friends and relatives have been discharged earlier. These positive statements in the written statement about the loans obtained, loans discharged etc., have however not been proved. If the loan was obtained from the Cooperative Society or from the defendant's own P.F. account, the same would be borne by the record. Similarly, the other facts about the loan being discharged till date of the written statement are also not borne out by record. To prove the alleged borrowings, another witness was examined as DW.2, who is the younger brother of first defendant. He clearly admitted in his cross-examination that there is no

written document to show that he lent the money or that he repaid the same. Even the first defendant who gave evidence does not clearly speak about the loan being obtained for the improvement of the property. No details are also furnished of the same.

17. The matters that are pleaded are not borne out by evidence. Since the source of consideration for 1965 sale deed-Ex.A.1 is not directly available, the construction of the houses by the first defendant from his own funds or borrowings would have strengthened his case that he is the real owner and that the property was kept benami in the name of his wife and mother-in-law. The sale deed-Ex.A.1 was in March 1965 and if the construction in 1971 was made by first defendant with the funds obtained as alleged in para-4, it would have strengthened the case of the defendant. Similarly, if he could prove that from 1971 till the filing of the written statement in the court by first defendant i.e., August 1985, they were discharging the loan, it would have helped in establishing the case of benami. Due to the lack of any evidence whatsoever this Court is constrained to hold that defendants 1, 3 to 6 failed to prove that the property was purchased benami by the first defendant in the name of the second defendant and her mother.

18. In addition to the above, the learned counsel for the appellants also brought to the notice of this Court a Division Bench decision of this Court reported in **M. Krishna**

Rao (8 supra) wherein this Court held that if a government servant without the prior permission acquires benami property, the Court should not uphold the benami plea of the government servant. In this case, admittedly, both from the pleadings and from the evidence, it is clear that the case of the first defendant is that as he was in government service, the property was acquired in the name of the second defendant. This Division Bench judgment is binding on this Court and it mandates that a declaration of the nature sought cannot be given.

19. In the light of all the above, this Court is of the opinion that the judgment and decree of the lower Court has to be set aside. As far as issue No.1 is concerned, the lower Court concluded that the gift deed is not valid for the reason that the possession was not delivered and the property is in the hands of the tenants. This admission of the plaintiff resulted in this issue being held against him. However, in view of the judgment of Hon'ble Supreme Court reported in **Renikuntla Rajamma** (1 supra), delivery of possession is no longer an essential ingredient to uphold the validity of a job. The execution of the gift deed is also accepted by the court and the cancellation of the gift deed is invalid in view of the law on the subject. Therefore, this Court is of the opinion that the plaintiff is entitled to declaration of his title to the plaint C- schedule property. This issue is accordingly answered in his favour.

20. As far as issue No.2 is concerned, this Court is of the opinion that if the evidence available is judged on the basis of the citations relied upon by both the learned counsels, it does not lead to a conclusion that the source of funds or the consideration came from the first defendant. The burden was squarely on the first defendant to prove that as to how the sale deed was benami. The probabilities and inferences do not lead to a conclusion that the source of funds are from the first defendant. Lastly, the Division Bench of this Court also held that this Court should not support a government servant who acquired property benami.

21. For all the above reasons, the appeal is allowed. The judgment and decree dated 30.06.1997 in O.S.No.2 of 1985 by the Sub-ordinate Judge, Cuddapah is hereby set aside. The plaintiffs are declared as the owners of C-schedule property. The defendants are directed to deliver the vacant possession of the C-schedule property within 60 days from the date of this judgment. The plaintiffs/appellants are entitled to costs through out. As the other prayers in the plaint are scored out, nothing else remained is to be ordered.

22. Miscellaneous Petitions, if any, pending in this appeal shall stand closed.

D.V.S.S. SOMAYAJULU, J

Date: 07.12.2017

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