

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 30.07.2019	Delivered on 04.09.2019
---	--

CORAM:

THE HONOURABLE MR. **JUSTICE R.SUBRAMANIAN**

C.S.No.1090 of 2008
and T.O.S. No.56 of 2013

Valsa Jose

... Plaintiff in CS 1090/2008
& Defendant in TOS 56/2013

Vs

1. V.B.Chandran

... 1st Defendant in CS 1090/08
& Plaintiff in TOS 56/2013

2. Thankan Mathew

3. Priya Kumari Ferrandi

... Defendants 2 & 3 in
CS 1090/2008

Prayer in CS No.1090/2008 : Plaint filed under Order IV Rule 1 of the Original Side Rules, read with Order VII Rule 1 of the Code of Civil Procedure, praying for the following judgment and decree:-

- (a) For partition and separate possession of the Plaintiffs 1/3rd share in the suit property;
- (b) For a permanent injunction restraining the defendants, their men, agents, servants or any person/s claiming through or under them from in any manner alienating or encumbering the suit property to any third parties;
- (c) To appoint an Advocate Commissioner to inspect the suit property and suggest for division of the suit property by metes and bounds and allot the 1/3rd share to the plaintiff;
- (d) Costs of the suit.

Prayer in TOS No.56/2013 : Plaintiff filed under Section 222 and 276 of the Indian Succession Act XXXIX of 1925 for the grant of Probate.

For Plaintiff : Mr. T.Velumani
Plaintiff in CS 1090/2008 for Mr.V.Paul Benjamin
& Defendant in TOS 56/2013

For Defendants : Mr. V.Manohar
1st Defendant in CS 1090/08
& Plaintiff in TOS 56/2013

Defendants 2 & 3 : Set *ex-parte*

J U D G M E N T

The Suit has been filed by the plaintiff seeking partition and separate possession of the suit property

2. The case of the plaintiff in the suit in brief is as follows:

It is the case of the plaintiff that her father late K.K.Dominic was working as a Assistant Director (Technical), All India Handloom Board, Weavers Service Centre, Chennai, for a considerable period of time. The said K.K.Dominic had married the plaintiff's mother Mrs.Treasa in the year 1935 and out of the said wed-lock, the plaintiff and the 3rd defendant were born. Even during the subsistence of the marriage, the plaintiff's father K.K.Dominic developed illicit intimacy with one Theyamma. The relationship with Theyamma had caused considerable bickering in the family which led to the plaintiff's mother separating herself from Mr.K.K.Dominic and thereafter, she started living in Kerala.

3. The maternal grandfather of the plaintiff Mr.K.D.Kuruvilla was

maintaining the plaintiff's mother and her two daughters, namely, the plaintiff and the third defendant. It is also the case of the plaintiff that one Mrs.Mary Pothan, who was the Principal of S.I.E.T. College for Women, Teynampet, Chennai 18, had also helped the plaintiff's mother in giving good education to the plaintiff as well as the third defendant. A case for maintenance was also filed by the plaintiff's mother Mrs.Treasa, which resulted in a direction to Late K.K.Dominic to pay a sum of Rs.500/- per month towards maintenance.

4. According to the plaintiff, during the year 1963, the plaintiff's father K.K.Dominic had purchased the Suit property from and out of his own resources, the Sale Deed, however, was registered in the name of one T.P.Davessy, who happens to be the sister's husband of the said Theyamma. It is alleged at the time of the purchase the T.P.Davessy was working as a School Teacher and he had no means to buy the property. The house was also named after the Pet Dog of K.K.Dominic. The said K.K.Dominic was living in the said house till his death in the year 1995 along with the said Theyamma.

5. According to the plaintiff, the said Theyamma with evil intention to grab the property obtained the Deed of Settlement from T.P.Davessy on 27.02.1970, Registered as Doc. No.169/1970, settling the entire suit property on herself. Upon coming to know about the said transfer, the mother of the plaintiff Mrs.Treasa, had sent a letter to the Income-tax Authorities complaining that Theyamma is trying to usurp the property. Even in the year 1971, the mother of the plaintiff and the third defendant, Mrs.Treasa had written to the Income-Tax Authorities claiming that the property was purchased by K.K.Dominic out of his own funds in the name of T.P.Davessy. It is also claimed that T.P.Davessy himself had executed an affidavit on 23.12.1963, stating that he is not the owner of the property and the property was purchased in his name out of the monies provided by Theyamma from the funds gifted by her mother. The plaintiff would further allege that Theyamma's mother Mrs.Annam had written a letter stating that she has no money and the claim made in the affidavit of T.P.Davessy is false.

6. After the death of Mrs.Treasa in the year 1993, the plaintiff's father late K.K.Dominic had married Theyamma in the year 1994. Therefore, according to the plaintiff K.K.Dominic was survived by his second wife Theyamma, the plaintiff and the third defendant as his legal heirs and each of them have 1/3rd share of the Suit property. After the death of K.K.Dominic, Theyamma continued in possession of the property as a co-sharer, the plaintiff and the third defendant used to visit the property occasionally. Eventually Theyamma died on 19.10.2008 leaving behind the plaintiff and the second defendant as her legal heirs. Thus, according to the plaintiff, the plaintiff, the second defendant and the third defendant each have 1/3rd share of the suit property. The plaintiff would further claim that the second defendant had informed the plaintiff that Theyamma had executed a Will on 31.07.2006 claiming that she is the absolute owner of the property and directing the second defendant to sell the property and pay the proceeds to various persons and institutions as set out under the Will.

7. According to the plaintiff, the deceased Theyamma had no right to

execute a Will in respect of the entirety of the property even if the Will is true it could be valid only in respect of 1/3rd share of the Theyamma in the suit Property. The plaintiff would also claim that there is a doubt in respect of the execution of the alleged Will itself, since Theyamma has been suffering from various age related ailments from the year 2002 itself. She was also having serious eye problems which had resulted in eye-sight being very poor. According to the plaintiff, the first defendant had fabricated the Will so as to deny the legitimate the 1/3rd share of the plaintiff and the third defendant in the suit property as daughters of K.K.Dominic. On the above contentions, the plaintiff sought for partition and separate possession of the 1/3rd share of the suit property and for other reliefs.

8. The suit is resisted by the first defendant contending that the allegations in the plaint are far from truth. The suit itself, according to the first defendant, has been filed only to harass him and prevent him from executing the Will as per the wishes of the testator namely, Theyamma. According to the first defendant he is a family friend of Theyamma and she

was residing alone after the death of her husband K.K.Dominic. She wanted to sell the property and distribute the proceeds to various charitable organisations, a portion of consideration was also directed to be paid to the plaintiff herein.

9. The first defendant would deny the claim of the plaintiff that the suit property was purchased by K.K.Dominic, out of his own funds in the name of T.P.Davessy. According to the first defendant, the property was purchased by T.P.Davessy, who is Theyamma's sister's husband on 03.05.1963 and the said T.P.Davessy on 27.02.1970 executed a Settlement Deed settling the property on Mrs.Theyamma. Therefore, according to the first defendant, Theyamma became the absolute owner on execution of the said Settlement Deed in the year 1970. The first defendant would also rely upon the fact that K.K.Dominic, though was alive till 1995 did not seek to assert his right title and interest over the suit property.

10. The first defendant would also rely upon a Will said to have been

executed by K.K.Dominic on 28.05.1986, wherein, he had stated that his relationship between him and his daughters, namely, the plaintiff and the third defendant was highly strained. The first defendant would also further claim that after coming into the force of the Benami Transactions (Prohibition) Act 1988, now known as The Prohibition of Benami Property Transactions Act, 1988, the plaintiff cannot be allowed to plead that the purchase by T.P.Davessy in the year 1963 was a benami transaction, in view of Section 4 of the said Act. It was also claimed that it was not necessary for obtaining the Probate in view of the amendment of the Indian Succession Act in the year 2002.

11. The other defendants in the suit remained *ex parte*. Upon consideration of the pleading in the suit, the following issues were framed for trial.

1. *Whether the plaintiff has any right of succession in the suit property?*
2. *Whether the alleged claim of right through late father K.K.Dominic is sustainable under the law?*

3. *Whether the property referred in the suit was the absolute property of Smt.Theyamma or not?*
4. *Whether the said Theyamma validly testamentated the property for her succession or not?*
5. *Whether the plaintiff has right of any apportion in the suit schedule property under what capacity?*
6. *What is the relationship of the plaintiff D1 and D2 with the late Smt.Theyamma?*
7. *Whether the plaintiff is entitled to the relief of partition as claimed in the plaint?*
8. *Whether the plaintiff is entitled have the division of the property through the appointment of Commissioner?*
9. *Whether the plaintiff valued the property correctly for filing the suit?*
10. *Whether testamentary right over any other right in respect of the suit property or not?*
11. *Whether the third defendant is amenable to the suit and what is the compensation to be awarded to the third defendant*

for the harassment exerted on him?

12. What is the Court to be awarded against the plaintiff?

13. To what other reliefs, the plaintiff is entitled to?

Upon hearing the counsels, the issues were recast as follows:

- 1. Whether the plaintiff is not barred under the provisions of the Prohibition of Benami Property Transactions Act 1988, from setting up a plea of Benami after the cut off date i.e. 19.05.1988?*
- 2. Whether the plaintiff has any right to succeed the suit property?*
- 3. Whether the claim of the plaintiff through her late father K.K.Dominic is sustainable under law?*
- 4. Whether the suit property is the absolute property of Theyamma?*
- 5. Whether the Theyamma had testamentary capacity to execute the will dated 31.07.2006?*

12. The case of the plaintiff in the Testamentary Original Suit is as follows:

The third defendant in CS No.1090 of 2008 had filed OP No.411 of 2011 seeking probate of the Will of Theyamma dated 31.07.2006. Upon a caveat being filed by the fourth respondent in the said OP (plaintiff in CS No.1090 of 2008), the said Original Petition was converted into a Testamentary Original Suit and numbered as TOS No.56 of 2013.

13. The property subject matter of the Will was purchased by Mr.T.P.Davessy in the year 1963 under a Sale Deed dated 03.06.1963 in the said T.P.Davessy had settled the property on Theyamma under a Settlement Deed dated 27.02.1970, therefore, Theyamma was the absolute owner of the property. On 31.07.2006, the said Theyamma had executed a Will appointing the plaintiff as the executor and requiring him to sell the property and distribute the sale proceeds to various beneficiaries including several charitable institutions. The plaintiff is also a beneficiary under the said Will. The said Will was executed in the presence of two attesting witnesses and the same was also duly registered. On the death

of the testator namely, Theyamma, the plaintiff sought for probate of the said Will executed by her on 31.07.2006.

14. The plaintiff in CS No.1090 of 2008 filed a Caveat disputing the execution of the Will. She also claimed that she is entitled to 1/3rd share in the suit property as a heir of K.K.Dominic. The claim in the written statement in TOS No.56 of 2013 was substantially similar to the claim in the plaint in CS No.1090 of 2008.

15. On the pleadings in the Testamentary Original Suit, the following issues were framed for trial.

- 1. Whether the Will dated 31.07.2006 executed by Theyamma is true and Valid?*
- 2. Whether the Will dated 31.07.2006 has been executed by testatrix with sound and disposing state of mind without any coercion or undue influence?*
- 3. To what other reliefs, the plaintiff is entitled to?*

16. Both the Testamentary Original Suit in TOS No.56 of 2013 and Suit in CS No.1090 of 2008 were taken up for trial together. The plaintiff in CS No.1090 of 2008 was examined as P.W.1, she has also examined one Amita Joseph as P.W.2. Exhibits P1 to P9 were marked on the side of the plaintiff. The plaintiff in TOS No.56 of 2013/first defendant in CS No.1090 of 2008 was examined as D.W.1 and he has produced Exhibits D1 to D5. Ex.P10 was marked in Cross-examination of D.W.1. Mr.V.M.Joseph, who figures as an attesting witness in the Will has been examined as D.W.2.

Issues Nos.1, 2 and 3:

17. The essential plea of the plaintiff in the suit where she seeks partition and separate possession of her 1/3rd share in the suit property is that the Suit property was purchased by her father K.K.Dominic in the name T.P.Davessy and the said T.P.Davessy is only a benami and name lender. Therefore, according to the plaintiff, the settlement deed executed by T.P.Davessy in favour of Theyamma on 27.02.1970 will not confer any right on Theyamma. A substantial defence that is taken in the Written Statement of the first defendant is that the suit itself is barred under the

provisions of the Prohibition of Benami Property Transactions Act, 1988.

18. Mr.T.Velumani, learned counsel appearing for the plaintiff would attempt to bring the suit under the exemptions provided in the Act. Mr.V.Manohar, learned counsel appearing for the first defendant would point out that the pleading in paragraph 10 of the plaint would show that the case of the plaintiff is that the purchaser under the Sale Deed of the year 1963, namely T.P.Davessy is only a Benami and a name lender. In the light of the said pleading, Mr.V.Manohar would contend that the plaintiff cannot now turn around and attempt to bring the suit within any of the exemptions under the Prohibition of Benami Property Transactions Act, 1988. Drawing my attention to Section 4 of the said Act, Mr.V.Manohar, learned counsel would submit that the plea or a defence based on benami is barred under the provisions of the Act. Neither the plaintiff nor the defendant could set up a plea based on benami, after the coming into force of the Act. Section 4 of the Prohibition of Benami Property Transactions Act, 1988 as it stood prior to the amendment in 2016 reads as follows:

,

***“4. Prohibition of the right to recover
property held benami.—***

*(1) 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 the real owner of such
property.*

*(2) No defence 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, shall be
allowed in any suit, claim or action by or on
behalf of a person claiming to be the real
owner of such property.”*

19. After the amendment of the Benami Transactions Prohibition

Amendment Act 2016, Sub Section 3 of Section 4 has been deleted and the exemptions have been incorporated as exceptions in the definition Clause namely Sub Section 9 of Section 2 of the Act.

20. I have considered the rival submissions.

21. While considering the retrospectivity or otherwise of the Principle Act, the Hon'ble Supreme Court in **Rajagopal Reddy V. Padmini Chandrasekharan**, reported in **AIR 1996 SC 238**, had held that the Act is not retrospective in operation. Eventually after considering the law on the retrospectivity of enactments similar in nature, the Hon'ble Supreme Court held that the bar enacted under Section 4 cannot be applied to proceedings which had been initiated prior to 19.05.1988 or cases in which a plea of Benami had been set up prior to 19.05.1988.

22. The essence of the conclusion of the Hon'ble Supreme Court is that no suit or defence setting up a plea of Benami can be filed after 19.05.1988. I have no doubt that the said interpretation placed by the

Hon'ble Supreme Court would apply to the case on hand. Proceeding to consider the claim of the plaintiff in the light of the unamended Section 4, I find that the plaintiff has neither pleaded nor proved that the ostensible owner, namely, T.P.Davessy in any manner stood in a fiduciary capacity to the actual owner, according to the plaintiff, Mr.K.K.Dominic. There is no plea to the effect with the plaint and the evidence is also silent in this regard.

23. No doubt Mr.T.Velumani learned counsel would try to project a case of fiduciary relationship between T.P.Davessy and K.K.Dominic by referring to the letter, which has been marked as Ex.P4, said to have been written by Mrs.Annam, mother of Theyamma, wherein, she had stated that she is actually living in penury. The said letter apart from expressing the difficult circumstances under which the author was living does not throw much light on the so called fiduciary relationship between K.K.Dominic and T.P.Davessy.

24. Mr.T.Velumani, would also draw my attention to the affidavit

dated 23.12.1963 executed by T.P.Davessy, wherein, he had declared that he had purchased the property under a Sale Deed dated 03.05.1963 out of the monies given to him by Theyamma and he is not the owner of the same. The contents of the affidavit are relied upon the claim that the statement made therein to the effect that Theyamma's mother had gifted her certain monies and that were used for purchase of the property. Even assuming the contents of the affidavit and the contents of the letter are contradictory, I do not think the plaintiff can draw any advantage from the said documents.

25. Admittedly the plaintiff and the third defendant were not living with their father at the time when the property was purchased. The case of the plaintiff as pleaded in the plaint is that the transaction namely the Sale Deed dated 03.05.1963 is a Benami Transaction and the property was purchased out of the monies of the father of the plaintiff K.K.Dominic in the name of T.P.Davessy, at the instance of Theyamma, who, according to the plaintiff, was the mistress of Mr.K.K.Dominic. I have already pointed out that there is no pleading regarding any fiduciary relationship between

T.P.Davessy and K.K.Dominic. Except the affidavit dated 23.12.1963 the undated letter, which have been marked as Exs.P5 and P4 respectively and of course, the complaints said to have been lodged by Terasa with Income Tax Authorities in the year 1971. There is no other evidence to prove the claim of the plaintiff that the sale transaction dated 03.05.1963 is a Benami Transaction. Let alone proof of the alleged fiduciary capacity which is now sought to be pressed into service by the learned counsel for the plaintiff.

26. On both the aspects, I find that the plaintiff's evidence is totally insufficient. Even otherwise in the absence of a plea on the so called fiduciary relationship the suit as framed would definitely be barred under Section 4 of the Benami Transaction Prohibition Act. The suit itself came to be filed on 21.11.2008 that is nearly 10 years after the coming into force of the Benami Transactions Prohibition Act, 1988, as on the date of the filing of the suit, the suit with a plea that the property is held Benami is barred. Hence I am constrained to conclude that the Suit is barred under Section 4 of the Prohibition of Benami Property Transactions Act 1988, as

it stood prior to the amendment in the year 2016.

27. Once it is found that the suit is barred under Section 4 of the Prohibition of Benami Property Transactions Act 1988. The issues 1 to 3 will have to necessarily be answered against the plaintiff and in favour of the defendant.

Issue No.4:

28. The property was purchased by T.P.Davessy under the Sale Deed dated 03.05.1963, he had executed a registered Settlement Deed in the year 1970, settling the property on Theyamma, the execution of the said settlement deed is not in dispute, in fact the mother of the plaintiff Treasa had referred to the execution of the Settlement Deed in her complaint to the Income Tax Authorities dated 30.10.1971. Therefore, on the execution of the Settlement Deed Theyamma became the absolute owner of the property and the Revenue Records are also mutated in her name and she exercised her right of ownership till her death in the year 2006.

29. Hence Issue No.4 is answered to the effect that Theyamma is the absolute owner of the property. Once Theyamma is found to be the absolute owner of the property, it naturally followed that she had the testamentary capacity to execute the Will dated 31.07.2006.

Testamentary Original Suit Issues 1 & 2:

30. These issues relates to the validity of the Will executed by Theyamma on 31.07.2006. While answering the issues in the suit it has been found that the Theyamma is the absolute owner of the property and she had the testamentary capacity to execute the Will. The Will has been registered with the office of the District Registrar, Madras Central. From the endorsement made in the Will, it appears that the Will was registered at the residence of Theyamma, namely, the suit property between 6.00 pm and 7 pm on 31.07.2006. One of the attesting witnesses to the Will has been examined as D.W.2. He has filed the proof affidavit, wherein, he had stated that the Will was executed in the presence of D.W.2 and one Saravanan by Theyamma. The witness has also stated that Theyamma

fixed her left thumb impression in his presence in the Will in six places and requested them to sign as attesting witnesses.

31. Mr. T.Velumani, would contend that the fact that the Will has been registered between 6 pm and 7 pm creates considerable suspicion regarding execution and registration of the Will. It is common knowledge that the Registering Officials do registration even outside office hours on payment of particular fee and on proof of the fact that the execution of the document is not in a good physical condition to appear before them. Therefore, I am unable to accept the said contention of the learned counsel with regard to the time at which the will was registered. Though D.W.2 has been extensively cross-examined, nothing has been elicited from him to discredit his evidence regarding execution and attestation of the Will. He has specifically stated that he attested the Will at the request of Theyamma and that Theyamma contacted him over a landline Phone No.2598 4523. He had also stated that his father and Theyamma's husband were friends.

32. Mr.T.Velumani would try to point out a few contradictions here

and there in the evidence of said witness in order to persuade me to disbelieve his evidence. The will was executed some time in 2006 and the witness was examined during November 2018 and January 2019, this huge time gap between the event and the deposition would justify minor contradictions in the evidence. The Hon'ble Supreme Court in In **Gopal Swaroop v. Krishna Murari Mangal and others**, reported in **2010 (14) SCC 266**, had held that the Court should not expect proof with mathematical certainty in the matter of proof of documents.

33. I am therefore, of the considered opinion that the fact that the Will is a registered instrument and the fact that the attesting witness namely, D.W.2 has spoken about the execution of the Will in a cogent and convincing manner would lead to the conclusion that the plaintiff in TOS No.56 of 2013 has proved the Will and he is entitled to grant of Probate. The so called suspicious circumstances pointed out by the learned counsel for the defendant in TOS No.56 of 2013 are not strong enough to reject the grant as prayed for.

34. In view of the above, both the issues in the Testamentary Original Suit are answered in favour of the plaintiff therein. In fine, the Suit in CS No.1090 of 2008 will stand dismissed and the Testamentary Original Suit in TOS No.56 of 2013 will stand decreed granting Probate in respect of the Will dated 31.07.2006 in favour of the plaintiff.

04.09.2019

jv
Index: Yes
Internet: Yes/No
Speaking order/Non Speaking order

List of Witnesses examined on the side of the plaintiff:

P.W.1 - Valsa Jose सत्यमेव जयते

P.W.2 - Amitra Joseph

WEB COPY

List of Witnesses examined on the side of the Defendants:

D.W.1 – V.B.Chandran

List of Exhibits marked on the side of the Plaintiff:

Sl. No.	Exhibits	Description of Documents
1	Ex.P1	Original Legal notice dated 05.11.2008
2	Ex.P2	Series (4 nos.) Original Maintenance Receipts
3	Ex.P3	Original letter dated 02.01.1973 by Theyamma's brother to his relative
4	Ex.P4	Original letter by Theyamma's mother Mrs.Annam to Theyamma
5	Ex.P5	Xerox copy of the Affidavit dated 23.12.1963 executed by T.P.Davessy
6	Ex.P6	Xerox copy of the settlement deed dated 27.02.1970 executed by T.P.Davessy in favour of Theyamma
7	Ex.P7	Xerox copy of the letter dated 30.10.1971 from Mrs.Treasa to Income Tax Authorities
8	Ex.P8	Copy of the alleged Will dated 31.07.2006 executed by Mrs.Theyamma
9	Ex.P9	Xerox copy of the letter dated 07.04.2000 written by Mrs.Theyamma
10	Ex.P10	Reply letter from Mr.V.Ramesh Advocate to Mr.T.Velumani, Advocate

List of Exhibits marked on the side of the Defendants:

Sl. No.	Exhibits	Description of Documents
1	Ex.D1	The Original Will dated 31.07.2006 executed by testator Mrs.Theyamma
2	Ex.D2	The Original Death Certificate Theyamma dated 19.10.2008
3	Ex.D3	The Original Death certificate of K.KDominic.
4	Ex.D4	Affidavit of assets
5	Ex.D5	The original affidavit of attesting witness Mr.V.Joseph

jv

04.09.2019

To
The Sub Assistant Registrar,
Original Side,
High Court, Madras.

27/28

C.S.No.1090 of 2008
and TOS No.56 of 2013

R.SUBRAMANIAN,J.

jv



Pre Delivery Judgment
C.S.No.1090 of 2008
and T.O.S. No.56 of 2013

WEB COPY

04.09.2019