



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
RESERVED ON : 28.08.2019
DELIVERED ON : 30.10.2019
CORAM

THE HONOURABLE MRS. JUSTICE R. THARANI
S.A.(MD)No.440 of 2012

WEB COPY

1. C.Santhia
2. C.Raju
3. C.Dhas

.. Appellants/Appellants/Plaintiffs

Vs.

1.C.Antony

2.Elizy Ammal(Died)

(Memo Recorded as R2 Died,

Appellants 1 to 3 and R1, who were
already on Record and Recorded as LR's of
deceased R2, Vide Court Order 19/7/19)

.. Respondents/
Respondents/Defendants

Prayer : This Second Appeal is filed under Section 100 of the Code of Civil Procedure, to set aside the judgment passed in A.S.No.19 of 2010 on the file of the learned District Judge, Kanyakumari at Nagercoil, dated 20.03.2012, confirming the judgment and decree in O.S.No.78 of 2009 on the file of the Second Additional Subordinate Judge, Nagercoil, dated 01.02.2010.

For Appellants	: Mr.C.Dhanaseelan
For R1	: Mr.V.Meenakshi Sundaram for Mr.R.Murugan
R2	: Died

J U D G M E N T

This Second Appeal has been filed against the judgment and decree passed in A.S.No.196 of 2010 on the file of the learned District Judge, Kanyakumari at Nagercoil, dated 20.03.2012, confirming the judgment and decree in O.S.No.78 of 2009 on the file of the learned II Additional Subordinate Judge, Nagercoil, dated 01.02.2010.

2.The appellants are the plaintiffs and the respondents are the defendants. The appellants 1 to 3 and the respondent No.1 are the legal representatives of the deceased second respondent. The appellants filed a suit in O.S.No.78 of 2009 before the learned II Additional Subordinate Judge, Nagercoil, seeking a prayer for setting aside the gift deed, dated 28.08.1995. The trial Court, after taking into consideration the oral and documentary evidences, dismissed the suit. Against which, the



appellants/plaintiffs preferred an appeal in A.S.No.19 of 2010 before the learned District Judge, Kanyakumari at Nagercoil. The appeal had been dismissed by the learned District Judge, Kanyakumari at Nagercoil on 20.03.2012. Against the dismissal of the first Appeal, the appellants/ plaintiffs preferred this Second Appeal.

3.The case of the plaintiffs in O.S.No.78 of 2009 is as follows:-

The plaintiffs and the first defendant are the sons of late Chellam Chettiyar and the second defendant Elizy Ammal. The suit properties were purchased in the name of father and mother of the plaintiffs and the first defendant, out of the earnings of the plaintiffs and the first defendant and later, the third plaintiff became a pastor and he paid his money to their parents out of love and affection towards their parents. The father of the parties died on 25.01.2004. The first defendant is attempting to sell the properties. The plaintiffs issued a legal notice on 05.05.2009 and the defendants sent a reply notice stating that on 28.08.1995, the father and the second defendant executed a gift deed in favour of the first defendant. The father and mother had no right to execute a gift deed in favour of the first defendant. The document in favour of the first defendant is to be cancelled and the plaintiffs are entitled for 3/5 share in the properties and the first defendant has to restrain from alienating the suit schedule properties.

4.The case of the defendants in the suit is as follows:-

The second defendant and her husband jointly purchased the properties in the year 1975 out of the income of the second defendant's husband and by selling the jewels of the second defendant. The plaintiff never contributed any amount for the purchase of the suit properties. The second defendant and her husband educated the plaintiffs and brought them up and they gave them education and provided them sufficient money and spent for their marriage. Both the parties belong to Christian religion and the Hindu Succession Act is not applicable to this case. The properties were the absolute properties of the second defendant and her husband. The gift deed was executed through a registered deed dated 28.08.1995 and the gift was accepted by the first defendant. The first defendant mutated his name in the revenue records and he is paying kist for the suit properties from 28.08.1995 and the suit properties belong to the first defendant exclusively and the suit properties are not in joint possession. The plaintiffs are well aware of the execution of the gift deed in favour of the first defendant and there is no cause of action for the suit.

5.On the basis of the above pleadings, the trial Court



framed the following issues:-

1. Whether the plaintiffs are entitled to 3/5th share in the suit properties?
2. Whether the plaintiffs are entitled to the relief of permanent injunction restraining the first defendant from alienating the suit properties as prayed for?
3. To what reliefs the plaintiffs are entitled to?

6. Before the trial Court, One witness was examined (P.W.1) and eleven documents were marked (Exs.A1 to A11) on the side of the plaintiffs. One witness was examined (D.W.1) and three documents were marked (Ex.B1 to B3) on the side of the defendants. The trial Court after considering both sides, dismissed the suit on 01.02.2010. Against the judgment and decree, the plaintiffs preferred an appeal in A.S.No.19 of 2010 before the learned District Judge, Kanyakumari at Nagercoil.

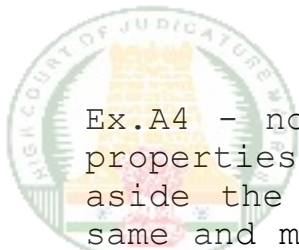
7. On the basis of the grounds of first appeal, the first Appellate Court framed the following issues:-

1. Whether the judgment and decree of the trial Court is liable to be set aside?
2. To what relief the appellants / plaintiffs 1 and 2 are entitled to?

8. After hearing both sides, the first Appellate Court, dismissed the first Appeal on 20.03.2012. Against the dismissal of the first Appeal, the appellants/plaintiffs preferred this Second Appeal on the following grounds:-

9. Both the lower Courts have failed to appreciate the relationship between the plaintiffs and the first defendant and their parents. Both the lower Courts have failed to give importance to the specific plea that all the plaintiffs and the first defendant entrusted their income with their parents and the father and mother have no right to execute the gift deed Exs.B1 and B2 in favour of the first respondent/first defendant. Both the lower Courts failed to consider that Section 4(3)(b) of the Benami Transaction(Prohibition) Act, 1988, is applicable to the facts of the case.

10. Both the Courts failed to consider that at the time of purchase of the suit properties, the father was 60 years and the mother was only a house wife and the plaintiffs and the first defendant alone were the earning members and the lower Courts failed to take adverse inference against the second respondent - mother, who has failed to enter into the witness box. The lower Courts failed to consider that the suit properties are under joint possession of the plaintiffs and the first defendant. Both the lower Courts failed to consider that the appellants/plaintiffs came to know about the gift deed dated 28.08.1995, only after



Ex.A4 - notice was issued in 'Daily Thandhi' for the sale of the properties. With regard to the claim for the relief of setting aside the gift deed, the trial court had failed to consider the same and make an observation in para-11 of the judgment that the plaintiffs did not seek any relief for setting aside the gift deed and ignoring that the plaintiffs claimed it in relief No.(iv) of the plaint and has paid separate court fee for that claim. Both the Courts below failed to frame an issue on the validity of the disputed gift deed dated 28.08.1995 (Exs.B1 and B2). Both the Courts below failed to consider that the father and mother were only Trustees of the earnings and savings of the plaintiffs and the first defendant.

11.On the above said grounds, the following Substantial Questions of Law are framed before this Court:

1.Whether the Courts below have failed to apply the principles in Section 4(3)(b) of the Benami Transactions (Prohibition) Act, 1988 to the Appellants / plaintiffs case?

2.Whether the finding given by the Lower Court that the plaintiffs have not proved that the suit properties are purchased out of the income and saving of the plaintiffs and the first defendant is perverse finding especially when she one among the surviving behamidar, the mother, second defendant has failed to enter into the witness box?

3.Whether the Courts below ought to have taken adverse inference against the second respondent / second defendant?

4. Whether the Courts below have failed to raise proper issue on the Benami nature of the suit schedule properties with respect to the undivided 3/5th share of the plaintiffs, by overlooking the specific pleadings in para 3 and 4 in the plaint and its denial by the defendants in the written statement and also with respect to relief No.(iv) for setting aside the Gift Deeds Exs.B1 and B2?

Issue No.1:

12.On the side of the appellants, it is stated that the Courts below failed to apply the principles under Section 4(3)(b) of the Benami Transactions (Prohibition) Act, 1988. The case of the appellants is that the plaintiffs and the first defendant were the earning members of the family and the father was more than 60 years old and the mother was a house wife and both the plaintiffs and the first defendant entrusted their income to their parents and out of that income, the suit properties were purchased in the name of the father and mother and that the father and mother were trustees of the properties and that the properties stated in Section 4 (3)(b) of the Benami Transaction (Prohibition) Act, is applicable to the present case.

<https://hcservices.ecourts.gov.in/hcservices/> 13. On the side of the appellants, it is stated that the



provisions under Section 4(3)(b) of the Benami Transactions (Prohibition) Act, is applicable to this case, for the reason that the Act is not retrospectively applicable for transactions happened before 19.05.1988. Even in the pleadings, the plaintiffs did not describe the purchase in the name of late.Chellam Chettiar and the second defendant as Benami transaction and the properties were purchased in the name of parents from and out of the earnings of the plaintiffs in lieu of love and affection, there is no pleadings as to the purchase in the name of father and mother as Benami Transaction.

14.The learned counsel for the appellants relied on the Judgment passed by this Court in the case of **Janki Vashdeo Bhojwani and another Vs. Indusind Bank Ltd. and others** reported in **2005 (2) SCC 217**, which reads as follows:

"12..... The question whether the appellants have any independent source of income and have contributed towards the purchase of the property from their own independent income can be only answered by the appellants themselves and not by a mere holder of power of attorney from them. He power-of-attorney holder does not have personal knowledge of the matter of the appellants and therefore he can neither depose on his personal knowledge nor can he be cross-examined on those facts which are to be personal knowledge of the principal"

15.The learned counsel for the appellants relied on the Judgment passed by this Court in the case of **Lakshmi Vs. Muthusamy** reported in **2012 (1) CTC 53**, which reads as follows:

"29.In view of the foregoing discussions, I hold that Ex.A.1 is not a genuine document and it is voidable because it suffers from the vices of undue influence as well as fraud. Therefore, there can be no decree passed for Specific Performance based on the said document. Accordingly, I answer all the substantial questions of law. The Lower Appellate Court has failed to consider these aspects in their proper perspective"

16.The case of the appellants depends upon Section 4 (3)(b) of the Prohibition of Benami Properties Transaction Act, 1988, Section reads as follows:-

"Section 4(3).Nothing in this section shall apply

(a)

(b) Where the person in whose name the property is held is a Trustee or other person standing in a fiduciary capacity, and the property is held for the benefit of another person for whom he is a trustee or towards whom he stands in such capacity. "

<https://hcservices.ecourts.gov.in/hcservices/> On the side of the appellants, it is stated that the



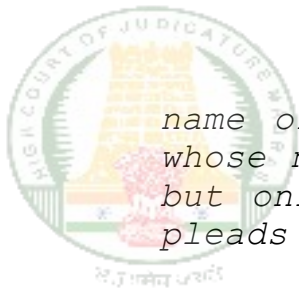
Prohibition of Benami Properties Transaction Act, 1988, protects two instances of purchase of properties available in other person's name. i.e., the properties held in the name of a co-parcener in a Hindu Undivided Family and the properties held for the benefit of the co-parcener in the family. The other instance is the one contemplated under Section 4(3)(b) i.e. the person in whose name the properties are held as a trustee or the other person standing in a fiduciary capacity and the properties are held for the benefit of another person for whom he is a trustee or towards whom he stands in such capacity. The Benami Transaction Act came into force in the year 1988 and the Benami Transaction was legal till the passing of the Act.

18. On the side of the respondent, it is stated that the burden is upon the plaintiff to prove Benami Transaction and that the plaintiff failed to produce any evidence as to the nature of the proposal that the plaintiff did not prove that they contributed for the purchase of the properties. The learned counsel for the respondents relied on the Judgment passed by the Hon'ble Supreme Court in the case of **Thakur Bhim Singh Vs. Thakur Kan Singh** reported in **1980 (3) SCC 72**, which reads as follows:

"18.The principle governing the determination of the question whether a transfer is a benami transaction or not may be summed up thus:(1)the burden of showing that a transfer is a benami transaction lies on the person who asserts that it is such a transaction; (2)if it is proved that the purchase money came from a person other than the person in whose favour the property is transferred, the purchase is prima facie assumed to be for the benefit of the person who supplied the purchase money, unless there is evidence to the contrary; (3) the true character of the transaction is governed by the intention of the person who has contributed the purchase money and (4)the question as to what his intention was has to be decided on the basis of the surrounding circumstances, the relationship of the parties, the motives governing their action in bringing about the transaction and their subsequent conduct, etc. "

19.The learned counsel for the respondents relied on another Judgment passed by the Hon'ble Supreme Court in the case of **Valliammal (died) Vs. Subramaniam** reported in **2004 (7) SCC 233**, which reads as follows:

"11.There is a presumption in law that the person who purchases the property is the owner of the same. This presumption can be displaced by successful pleading and proof that the document was taken benami in the



name of another person from some reason, and the person whose name appears in the document is not the real owner, but only a benami. Heavy burden lies on the person who pleads that the recorded owner is a benami-holder.

12.This court in a number of judgments has held that it is well-established that burden of proving that a particular sale is benami lies on the person who alleges the transaction to be a benami. The essence of a benami transaction is the intention of the party or parties concerned and often, such intention is shrouded in a thick veil which cannot be easily pierced through."

20.The learned counsel for the respondents relied on another Judgment passed by the Hon'ble Supreme Court in the case of **Jaydayal poddar (deceased) Vs. Mst.Bibi Hazra** reported in **1974 (1) SCC 3**, which reads as follows:

"6.It is well settled that the burden of proving that a particular sale is benami and the apparent purchaser is not the real owner, always rests on the person asserting it to be so. This burden has to be strictly discharged by adducing legal evidence of a definite character which would either directly prove the fact or benami or establish in circumstances unerringly and reasonably raising an inference of that fact."

21.The contention of the appellants is that the appellants and the first defendant entrusted their income with the father and mother from which the properties were purchased in the name of the father and mother. The contention of the first respondent/ first defendant is that the properties were purchased by the father and mother out of the income of the father and from the income by selling the jewels of the mother. Though the father and mother are in fiduciary capacity, the onus is upon the plaintiffs to prove that the father did not have any individual income and that the plaintiffs and the first defendant entrusted their income to their parents and that the properties were purchased in the name of the parents for the benefit of plaintiffs and the first defendant. All these facts are not proved by the plaintiffs. Section 4(3)(b) of the Benami Transactions (Prohibition) Act, provides two conditions. Section 4(3)(a) is applicable only for a Hindu Coparcenary Family and is applicable for properties held in the name of a person standing in a fiduciary capacity and the properties are held for the benefit of another person for whom he is a trustee or towards whom he stands in such a capacity. The properties were purchased in 1975 in the name of parents and purchased. The plaintiffs failed to let in evidence to show that the properties are purchased for the benefit of the entire family.



22. In the above circumstances, since the plaintiffs failed to prove that the plaintiffs/ appellants and the first defendant/ first respondent had earned money and handed over the income to their parents and the properties were purchased in the name of the parents on behalf of the plaintiffs and the first defendant. Since all these factors are not proved by the appellants, the question of law raised by the appellants is not maintainable.

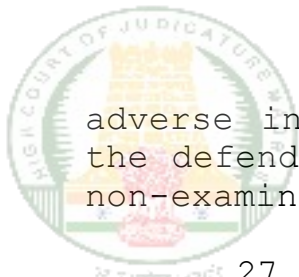
Issue Nos.2 & 3 :

23. On the side of the appellants, it is stated that the second respondent/ second defendant did not enter into the witness box and she has failed to substantiate the claim of the first respondent/ first defendant and the second respondent / second defendant did not prove that the properties in Exs.B1 and B2, sale deeds were purchased out of the income and savings of the second respondent/ second defendant and her husband.

24. On the side of the appellants, it is stated that initial burden of proof was discharged by the plaintiffs and the lower Court failed to consider that the relationship between the parents and sons and the plaintiffs have given oral and documentary evidence and have pointed out the factual circumstances that the properties under Ex.A1 was purchased out of the earnings and savings given by the plaintiffs and the first defendant in the name of the parents. P.W.1 has deposed that he gave Rs.9,000/- and the second plaintiff gave Rs.2,000/- and the third plaintiff gave Rs.5,000/- to their father at the time of purchase of the suit properties.

25. On the side of the appellants, it is stated that the properties were purchased in the name of the parents through a single sale deed in the year 1975 and there is no necessity for the parents to execute two sale deeds on the same day in favour of the first defendant and that the first defendant might have misrepresented the facts and thus committed a fraud upon his parents and also by exercising undue influence as the eldest son in the family and that there is no reason for excluding the other sons and that the mother is illiterate and the father was more than 80 years old at the time of execution of the gift deed and he died the next year itself and that all these facts were not considered by both the lower Courts.

26. On the side of the appellants, it is stated that the Courts below failed to take adverse inference against the second respondent / second defendant, who did not enter into the witness box and that the second defendant failed to support the case of the first defendant and that P.W.1 has admitted in his cross-examination that his mother is living separately and it can be presumed that the mother was hale and healthy and therefore,



adverse inference can be taken against them. The only proof for the defendants' case is the testimony of the second respondent and non-examination of the second defendant is fatal to the case.

27. On the side of the appellants, it is further stated that where a party to the suit did not enter into the witness box and state his own case on oath and did not offer herself to be cross-examined by the other side, a presumption would arise that the case set up by her is not correct. In this regard, a judgment of the Hon'ble Supreme Court published in **2010 (10) SCC 512 (Mankaur (dead) Vs. Hartar Singh Sangha)** is cited.

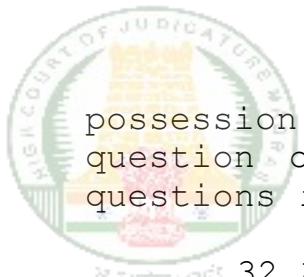
28. On the side of the respondents, it is stated that the question raised in the Second Appeal is against Sections 101 and 103 of Indian Evidence Act and that it is against the basic principle of burden of proof of the plaintiffs. Non-examination of the second defendant can not automatically prove the case of the plaintiffs as the burden lies on the shoulders of the plaintiffs to prove the nature and intention of the transaction. The plaintiffs failed to discharge the burden and that there is a presumption regarding the validity of a registered document and that the defendants need not prove or disprove the case of the plaintiffs and that there is no question of adverse inference since the plaintiffs did not prove even the initial burden.

Issue No.4:

29. On the side of the appellants, it is stated that the lower Court failed to frame the issue regarding the fourth prayer sought for in the plaint and it is stated that both the lower Court failed to consider the plaintiffs' claim for a relief of setting aside the gift deeds Ex.B1 and B2 and they made observations that the plaintiff failed to seek for a relief to set aside the plaint documents. It is seen that both the lower Courts did not frame any issue as to the validity of gift deeds, though there is a prayer sought for in the suit.

30. The issue regarding the share of the plaintiffs can be decided only after deciding the validity of the gift deeds Ex.B1 and B2. In the above circumstances, no specific issue is necessary regarding the validity of the gift deeds Ex.B1 and B2. Non framing of an issue on a particular point when the particular point was covered by another issue is not fatal. It is seen that the gift deed was accepted by the first defendant and revenue records were transferred in the name of the first defendant.

31. The plaintiffs claim 3/5 share and not in proportionate amount said to have been given by them and no independent witnesses were examined on the side of the plaintiffs to prove the genuineness of the transactions. No document was filed to prove joint



possession. The questions raised by the appellant is only a question of facts and not question of law and therefore, this questions is not maintainable.

32.All the issues are decided against the appellants/ plaintiffs. Hence, it is decided that the appellants/ plaintiffs are not entitled for 3/5 share in the properties and the appellants are not entitled for setting aside the gift deeds (Ex.B1& B2) executed in the name of the first defendant.

33. In the above circumstances, there is nothing sufficient enough to interfere in the judgment and decree of the first appellate Court and the trial Court. Hence, this Second Appeal is dismissed by confirming the judgment passed in A.S.No.19 of 2010 on the file of the learned District Judge, Kanyakumari at Nagercoil, dated 20.03.2012, confirming the judgment and decree in O.S.No.78 of 2009 on the file of the II Additional Subordinate Judge, Nagercoil, dated 01.02.2010. No costs.

Sd/-

Assistant Registrar (CS-II)

// True Copy //

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Sub Assistant Registrar(CS)

Ls

To

1.The District Judge,
Kanyakumari at Nagercoil.

2.The Second Additional Subordinate Judge,
Nagercoil.

3.The Section Officer,-2 copies
VR Section,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.R.MURUGAN, Advocate (SR-94850[F] dated 30/10/2019)
+1 CC to M/s.C.DHANASEELAN, Advocate (SR-95358[F] dated
31/10/2019)

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