IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 13.04.2023

PRONOUNCED ON :09.06.2023

CORAM:
THE HONOURABLE MR.JUSTICE S.SOUNTHAR
C.S.No.16 of 2019

M.Basheer Ahmed
... Plaintiff

vs

1.Ms.J.M.H.Hazarath Bi Alias Haju
2.Aarifa
3.Zubaida
4.Mumtaz
5.Maimoonakhwaja
6.Balkhees Bi
7.H.Zainab
8.H.Mariyam
9.J.M.Haroon Rasheed
10.Imran ... Defendants

Prayer: Civil Suit is filed under Order VII Rule 1 of CPC and Order IV Rule 1 of Original Side Rules r/w Section 2(1) (c) (xi) of the Commercial Courts Act, 2015, praying to,

(a) Declaring that the plaintiff is the co-owner to an extent of 21,000 sq. ft in the suit property;

(b) For partition and separate possession of the plaintiff's share in the suit schedule property by dividing 21,000 sq ft of land in the suit schedule property by metes and bounds and allotting the same to the plaintiff;

(c) For a permanent injunction restraining the defendants from in any manner whatsoever alienating, encumbering or otherwise dealing with the suit property or dealing with the property;

(d) For a permanent injunction restraining the defendant in any manner whatsoever putting up any construction or changing the physical features of the suit property;

(e) Directing the defendants to pay to the plaintiff the cost of the suit;

(f) Grant such further or other reliefs as this Court may deem fit and proper under the circumstances of the case.

For Plaintiff : Mr.Vijay Narayan
Senior Advocate
for A.Prasanna Venkat Radha Bhujel
for M/s.APR Associates

For Respondents : Mr.V.Raghavachari
Senior Advocate
for Mr.E.Prabu
for M/s.R.Munusamy

JUDGMENT

The plaintiff laid a suit for declaration as the co-owner to the extent of 21,000 Sq.ft of the suit property and for consequential relief of partition and separate possession of plaintiff's share in the suit property. The plaintiff also sought for the relief of permanent injunction restraining the defendants from encumbering the suit property or changing the physical features of the suit property by putting up construction.

2. Plaint Averments:

The suit property along with larger extent of property was originally owned by one Mohamed Sahib and Syed Fathima. After their demise, one Kulsum Bi filed a suit for partition in O.S.No.2331 of 1981 on the file of the First Additional Judge, City Civil Court, Chennai, seeking preliminary decree for partition in respect of the suit property and other properties. In the said suit, a preliminary decree was passed on 31.01.1985 based on compromise between the parties thereto. Thereafter, an interim final decree was passed on 02.05.1988, wherein, the suit properties were allotted to the parties except three items of the suit property including the present suit property. The three items including the present suit property were directed to be sold by public auction.

2.1. It was further averred by the plaintiff that in the year 2011, the 9th defendant/ husband of 1st defendant approached the plaintiff with a proposal to jointly develop the suit property. He proposed to the plaintiff that the first defendant was having 410 sq ft of undivided land in the suit property as a co-owner and she would purchase the shares of other co-owners in terms of orders passed in O.S.No.2331 of 1981 and thereafter the suit property can be developed by constructing commercial or residential buildings. The 9th defendant requested the plaintiff to join the defendants 1, 9 and 10 in the joint venture.

2.2. The plaintiff after accepting the proposal of the 9th defendant invested a sum of Rs,2,16,38,266/-. The above said sum paid by the plaintiff was utilized for purchase of shares of defendants 2 to 8 in the name of the first defendant for the benefit of proposed joint venture and separate commercial entity. It was also agreed that once a separate business entity is formed, the property purchased in the name of first defendant would be transferred to that entity. It was also averred that the plaintiff had paid a sum of Rs.96,38,266/- by way of Demand Draft in favour of defendants 2 to 8. A sum of Rs.80,00,000/- was paid in the name of the 10th defendant, who happens to be the son of defendants 1 and 9 by way of bank transfer on 18.06.2011 and 31.08.2012. The said amount was transferred by another entity at the instance of the plaintiff. Further, a sum of Rs.40,00,000/- was paid in the name of defendants 1, 9 and 10 by way of cash on various dates between 02.07.2011 and 27.07.2011.

2.3. It was averred by the plaintiff that out of the larger extent of property, only an extent of 85,949 sq. ft would be acquired as mentioned above and the same was shown as a suit property. It was specifically averred by the plaintiff that only with the above said investment made by the plaintiff, the suit property namely 85,949 sq.ft of undivided land was acquired by the plaintiff for the proposed joint venture in the name of first defendant as a partner of the proposed joint venture. Subsequently, on 02.09.2015, the suit property with an extent of 85,949 sq.ft was demarcated and allotted in favour of the first defendant. It was claimed by the plaintiff that he was deemed to be in joint possession of the suit property as the property was acquired out of the plaintiff's contribution for the proposed joint venture. The said property having been purchased for and on behalf of the promoters of the proposed joint venture, the plaintiff, the defendants 1, 9 and 10 were deemed to be in joint possession of the suit property. It was further averred that the proposed joint venture turned into non-viable one and hence, the plaintiff called upon the defendants 1, 9 and 10 to constitute a firm for development of the property and transfer the suit property for the future venture. The defendants delayed the constitution of the firm and attempted to sell the property behind the back of the plaintiff and consequently the proposed joint venture got frustrated. Therefore, the plaintiff is entitled to proportionate land, namely 21,000 sq.ft, out of 85,949 sq.ft acquired through the investment made by the plaintiff. Therefore, the plaintiff was constrained to file a suit for the above said relief.

Averments found in the written statement of the defendants 1,9 and 10:

3.1. The defendants 1, 9 and 10 resisted the suit on the ground that even assuming the plaint averments were taken to be true, the suit claim is barred by Prohibition of Benami Property Transaction Act, 1988 as amended by Act 43 of 2016. It was averred by the defendants that the suit claim would fall within the meaning of 'Benami transaction' as defined under Prohibition of Benami Property Transaction Act and hence the suit is barred under Section 4 of the said Act.

3.2. The first defendant is a co-owner of the suit property with other sharers and she had acquired the shares of few other co-owners on herself. In an application filed by the first defendant in the earlier partition suit, the suit property was allotted in favour of the first defendant, taking into consideration the extent of un-divided share held by her. The allegation of the plaintiff that the 9th defendant approached him for joint development of the suit property and the plaintiff invested amount for the alleged joint venture was specifically denied. The various allegations in the plaint regarding payments made by him on various dates for purchase of shares of defendants 2 to 8 in the name of first defendant were denied by the defendants.

3.3. In nutshell, the understanding for development of the suit property by forming a joint venture and the payments of Rs.2,16,38,266/- by the plaintiff for purchase of shares of defendants 2 to 8 in the name of first defendant for the benefit of alleged joint venture was denied.

3.4. The defendants further contended that in the year 2010, the plaintiff represented to 9th defendant as if he had entered into a sale agreement for purchase of property at Chennai and he was short of funds. He requested the 9th defendant to extend financial assistance of Rs.3.75 Crores and offer to share the profits upon the sale of the said property under agreement apart from repayment of Rs.3.75 Crores. Believing the words of the plaintiff, 9th defendant paid Rs.3.75 Crores to the plaintiff. However, contrary to the promise, after purchase of land in his name, the plaintiff evaded repayment of the same. After repeated demands, the plaintiff made piece-meal payment towards repayment of the said liability. At the instructions of the 9th defendant, plaintiff, transferred a sum of Rs.96,38,266/- through bank transfer/demand draft/ cheques etc., in the name of defendants 2 to 8, who sold the shares in the suit property to the first defendant. The said payment made by the plaintiff was only towards the partial discharge of his liability to the 9th defendant.

3.5. It was also averred by the plaintiff that the defendants under the pretext of helping the first defendant to enable her to purchase the shares of three left out co-owners purchased the said shares in their name. When 9th defendant demanded the return of the balance money paid to him, he invented a false story of alleged proposed joint venture and came up with this suit. The allegation in the plaint as if the plaintiff was in joint possession of the suit property with defendants 1, 9 and 10 was denied. It was also averred by the defendants that the suit claim would not fall within the purview of the commercial dispute and the plaintiff had deliberately abused the process of the Court by filing the suit before the Commercial Division. The plaintiff admittedly, is not a co-owner and he has no cause of action to maintain the present prayer.

4. Defendants 1, 9 and 10 alone filed a written statement and

contested the suit. The plaintiff gave up the defendants 3 and 10 by making an endorsement to that effect on 20.08.2020 and consequently the suit was dismissed as against them. The other defendants were set ex-parte.

5. **Issues:**

This Court after considering the pleadings of the parties framed the following issues on 30.09.2019:

(i) Whether the plaintiff is entitled to the relief of declaration that the plaintiff is the owner of 21,000 sq.ft out of 85,949 sq.ft in the suit schedule property?

(ii) Whether the plaintiff is entitled to the relief of partition by metes and bounds as prayed for?

(iii) Whether the suit is barred by law under the provisions of Prohibition of Benami Property Transaction Act, 1988?

(iv) Whether the defendants 1, 9 and 10, the parties purchased the suit schedule property to form joint venture develops the property?

(v) To what relief the plaintiff is entitled?

6. **Evidence:**

On behalf of the plaintiff, he examined himself as PW.1 and 17 documents were marked on his behalf as Exs.P1 to P17. On behalf of the defendants 1, 9 and 10, the 9th defendant was examined as DW.1 and no document was marked on behalf of the defendants.

Arguments by Plaintiff side:

7.1. Mr.Vijay Narayanan, learned Senior Counsel appearing for the plaintiff by taking this Court to the pleadings of the parties and the evidence available on record submitted that there was an oral understanding between the parties to form a partnership and in pursuance of that oral partnership agreement, the plaintiff invested a sum of Rs.2,16,38,266/- in the business of the said partnership to enable the first defendant to acquire the shares of defendants 2 to 8 in her name for the benefit of proposed joint venture or partnership firm. The learned Senior Counsel by taking this Court to Ex.P6 series income tax returns submitted that the investment made by the plaintiff to the tune of Rs.2,16,38,266/- was mentioned in the income tax return submitted by the plaintiff for the assessment years 2012-2013 to 2017-2018 as investment in the name of "Perambur Property".

7.2. The learned Senior Counsel by taking this Court to the evidence of DW.1 submitted that when DW.1 was cross examined, a specific question was put to him, whether the alleged payment of Rs.7.5 Crores by him to the plaintiff was shown in his income tax returns for the relevant year, he answered in negative and further deposed that he had taken amount from his friends as loan and paid the same to the plaintiff. Therefore, the learned Senior Counsel submitted that the defence raised by the defendants that payment made by the plaintiff were only for repayment of the loan advanced by the 9th defendant could not be believed.

7.3. The learned Senior Counsel by referring to Ex.P17 affidavit filed by the 9th defendant before the Returning Officer for election when he had contested the election in the year 2014 submitted that in the affidavit sworn by the 9th defendant, he mentioned that there was no personal loan advanced/paid to any person or entity. Therefore, the defence raised by the defendants, as if they paid loan to the plaintiff and he repaid the same by making payments on various dates got falsified.

7.4. The learned senior counsel submitted that the property was purchased in the name of first defendant out of the contribution made by the plaintiff only to facilitate quick acquisition of the shares of other co-owners. The first defendant acted for the benefit of the plaintiff in fiduciary capacity and purchased the properties in her name and therefore comes under the exception recognized by Prohibition of Benami Property Transaction Act, 1988. The learned counsel further submitted that the subject matter of the dispute is with regard to the joint venture and partnership agreement and hence it would constitute a commercial dispute within the meaning of Section 2(1) (c) xi and xv of the Commercial Courts Act, 2015 and consequently, this Court can entertain the suit.

7.5. The learned Senior counsel relied on the following judgments in support of his arguments:

(i) *Gannmani Anasuya & Ors vs Parvatini Amarendra Chowdhary and others reported in (2007) 10 SCC 296* for the proposition that even oral partnership is recognized in law and the same could be proved by the conduct of the parties;

The learned counsel also relied on the following judgments for the same proposition that the oral partnership is recognized in law and permissible:

(ii) *S.K. Parthasarathy Naidu vs K. Rama Naidu And 7 Others reported in 2002- 1 LW 41* for the same proposition oral partnership is permissible;

(iii) *Dwarkadas Khetan & Co., Bombay v. Commissioner Of Income Tax, Bombay City, Bombay reported in 1956 SCC Online Bom 44*;

Arguments on behalf of the defendants:

8.1. Mr.V.Raghavachari, learned Senior Counsel appearing for the defendants by taking this Court to the provisions of the Prohibition of Benami Property Transaction Act, 1988 and also the pleadings of the plaintiff submitted that the property was purchased in the name of the first defendant by the contribution made by the plaintiff. Hence, after coming into force of Prohibition of Benami Property Transaction Act, 1988, the plaintiff is barred to raise a plea that though the property was purchased in the name of the first defendant, it was purchased out of the contribution made by the plaintiff and consequently the plaintiff should be treated as co-owners of the suit property. The learned senior counsel further submitted that there is no fiduciary relationship between the parties in the case on hand. The plaintiff failed to prove the alleged partnership agreement or the joint venture and hence the plaintiff cannot claim that he stands in a fiduciary capacity with the contesting defendants and consequently, the case would not fall within the exception to the prohibition contained under the Prohibition of Benami Property Transaction Act. The learned senior counsel further submitted that the plea made by the plaintiff regarding proposed joint venture and the purchase of the property for the benefit of the joint venture are all very vague and self serving statements. He further submitted that the plaint does not say the date of oral agreement, the place in which the oral agreement was entered into and the witnesses of the said agreement.

8.2. The learned senior counsel also submitted that PW.1 in his cross examination admitted that there was no partnership agreement with the defendants. In such circumstances, the arguments advanced on behalf of the plaintiff, as if there was an oral partnership agreement between the parties cannot be accepted. The learned Senior Counsel further submitted that the plaintiff failed to prove that he was in joint possession of the suit property by taking this Court to the admission made by PW.1 that the suit property belonged to the family of the first defendant and that he is not in possession of the same. Hence, it is the contention of the learned senior counsel that the suit prayer for declaration and partition is under valued on the basis of the false plea that the plaintiff was in joint possession of the suit property. The learned senior counsel also by taking this Court to the evidence of PW.1 submitted that PW.1 admitted that he had received Rs.1.41 Crores through the 9th defendant.

8.3. The learned Senior Counsel further submitted that even assuming the contributions made by the plaintiff is proved, still in view of prohibition contained under Prohibition of Benami Property Transaction Act, the plaintiff was debarred to maintain the suit for declaration as a Co-owner of the property.

8.4. In support of his contentions, the learned Senior Counsel for the defendants relied on the following Judgments:

(i) Rajinder Pershad (Dead) By Lrs vs Smt. Darshana Devi reported in (2001) 7 SCC 69, for the proposition that the party is expected to cross-examine the witness of the opposite party by suggesting his case to the witness.

(ii) Laxmibai (Dead) Through LRs. & Anr vs Bhagwanthbuva (Dead) Thru LRs. & ors reported in (2013) 4 SCC 97, for the proposition that the unchallenged portion of the evidence of the witness shall be relied on;

(iii) M.Jayapal vs M.N.Sampath and others reported in 2013-1-LW-623, for the proposition that the suit for partition will not lie in case of the properties of the partnership firm.

9. Issues No.3 and 4:

It is the specific case of the plaintiff that the first defendant purchased the shares of the defendants 2 to 8 in her name out of the money paid by him. It is also the plaintiff's case that the said money was paid by the plaintiff only in pursuance of an oral arrangement entered between the plaintiff and the defendants 1, 9 and 10 to enter into a partnership to develop the suit property and earn profits. It is the further case of the plaintiff that the suit property was purchased in the name of the first defendant only for the benefit of proposed business entity in which the plaintiff and contesting defendants agreed to be the partners.

10. Admittedly, in this case, there is no written documents, in support of the plaintiff's plea that there was a partnership arrangement between the parties to develop the suit property and share the profits. The learned senior counsel appearing for the plaintiff empathetically submitted that the partnership arrangement can be formed even orally and it is not necessary that it should be only by way of written documents.

11. The learned senior counsel also relied on the following judgments in this regard:

(i) Gannmani Anasuya & Ors vs Parvatini Amarendra Chowdhary and others reported in (2007) 10 SCC 296;

(ii) S.K. Parthasarathy Naidu And ... vs K. Rama Naidu And 7 Others reported in 2002- 1 LW 41;

(iii) Dwarkadas Khetan & Co., Bombay v. Commissioner Of Income Tax, Bombay City, Bombay reported in 1956 SCC Online Bom 44;

12. This Court has no quarrel over the legal submission made by

the learned senior counsel appearing for the plaintiff that there can be a valid partnership by oral arrangements. In the case on hand, the plaintiff pleaded oral partnership and the same was denied by the defendants. Therefore, it is incumbent on the plaintiff to prove oral partnership arrangement. In order to prove the same, the plaintiff examined himself as PW.1. However, the plaintiff failed to examine any independent witnesses in support of the plea of oral partnership. As rightly contended by the learned senior counsel for the defendants even in the plaint averments, the plea regarding the oral partnership is very vague and bereft of material particulars. The plaintiff has not pleaded the date, place etc., in which the oral agreement was entered into. There is no plea in whose presence the oral arrangement between the parties was entered into. Even during trial, the plaintiff has not examined any independent witnesses in support of the oral partnership agreement. Therefore, except the interested testimony of PW.1, there is no other acceptable evidence available on record to suggest oral partnership agreement. In such circumstances, we cannot come to a conclusion that there was an oral partnership agreement between the plaintiff and the contesting defendants.

13. The main legal plea raised by the contesting defendants is

that the plaintiff is not entitled to maintain a suit prayer that he is a co-owner of the suit property on the ground that he contributed financially for purchase of the suit property. It is specific contention of the defendants such a plea is barred by provisions of Prohibition of Benami Property Transaction Act, 1988, Section 2(9) of Prohibition of Benami Property Transaction Act, reads as follows:

Benami transaction" means,—

(A) a transaction or an arrangement—

(a) where a property is transferred to, or is held by, a person, and the consideration for such property has been provided, or paid by, another person; and

(b) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration, except when the property is held by—

(i) a Karta, or a member of a Hindu undivided family, as the case may be, and the property is held for his benefit or benefit of other members in the family and the consideration for such property has been provided or paid out of the known sources of the Hindu undivided family;

(ii) a person standing in a fiduciary capacity for the benefit of another person towards whom he stands in such capacity and includes a trustee, executor, partner, director of

a company, a depository or a participant as an agent of a depository under the Depositories Act, 1996 (22 of 1996) and any other person as may be notified by the Central Government for this purpose;

(iii) any person being an individual in the name of his spouse or in the name of any child of such individual and the consideration for such property has been provided or paid out of the known sources of the individual;

(iv) any person in the name of his brother or sister or lineal ascendant or descendant, where the names of brother or sister or lineal ascendant or descendant and the individual appear as joint owners in any document, and the consideration for such property has been provided or paid out of the known sources of the individual; or

(B) a transaction or an arrangement in respect of a property carried out or made in a fictitious
name; or

(C) a transaction or an arrangement in respect of a property where the owner of the property is not aware of, or, denies knowledge of, such ownership;

(D) a transaction or an arrangement in respect of a property where the person providing the consideration is not traceable or is fictitious;

Explanation.—For the removal of doubts, it is hereby declared that benami transaction shall not include any transaction involving the allowing of possession of any property to be taken or retained in part performance of a contract referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882), if, under any law for the time being in force,—

(i) consideration for such property has been provided by the person to whom possession of property has been allowed but the person who has granted possession thereof continues to hold ownership of such property;

(ii) stamp duty on such transaction or arrangement has been paid; and

(iii) the contract has been registered.

14. Section 4 of the said Act, which reads as follows:

"*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."

15. A close reading of the above said provisions would suggest that if a property is purchased by a person out of the contribution made by another person and the property is held for the immediate or future benefit either direct or indirect of the person who has provided the contribution, the same can be termed as benami transaction. By virtue of Section 4 of the Act, no suit, claim or action to enforce any right in respect of any property held in Benami against the person in whose name property held or against any other persons shall lie by on behalf of the person claiming to be a real owner of such property. In the case on hand, admittedly, the property stands in the name of first defendant, as per the averments found in the plaint that there was an understanding between the plaintiff, the defendants 1, 9 and 10 to purchase the properties in the name of first defendant for the benefit of future business entity to be formed by them to exploit the property. The plaintiff claims that the first defendant acquired the shares of defendants 2 to 8 out of the contribution made by him. He relied on Exs.P7 and P8. Though perusal

of Exs.P7 and P8 coupled with Ex.P1 to P4 would suggest that the plaintiff contributed to the extent of Rs.96,38,266/- for the purchase of 9168 sq ft of land under Exs.P7 and P8, there is no other evidence available on record to show that the plaintiff contributed for purchase of 21,000 sq ft of land. Even if the plaintiff produced evidence to show that he contributed Rs.96,38,266/- the defendants claimed that the said amount was paid for repayment of loan already paid to plaintiff in respect of different transaction. However, a perusal of Exs.P7 and P8 would suggest the demand drafts produced by the plaintiff in the name of Arifa, Zubaidha and Mumtaj for the value of Rs.46,99,800/- are mentioned in Ex.P6. Likewise, the demand drafts produced by the plaintiff in the name of H.Maimoonakawaja, H.Balkhees Bi, H.Zainab and H.Mariyam for the value of Rs.46,99,000/- are mentioned in Ex.P7. Therefore, there is some evidence available on record atleast to show that the plaintiff contributed to the extent of Rs.96,38,266/- to enable the first defendant to acquire land with an extent of 9168 sq.ft. However, there is no evidence available on record to support the case of the plaintiff that he contributed Rs.2,16,38,266/- to enable the first defendant purchased the suit property to the extent of 21,000 sq.ft.

16. In any event, even assuming the suit property was purchased by first defendant out of the contribution made by the plaintiff, it is the case of the plaintiff that it was purchased in the name of the first defendant for the benefit of future business entity to be formed by plaintiff and the defendants 1, 9 and 10. Therefore, it can only be treated as property purchased in the name of first defendant for the benefit of plaintiff and the contesting defendants. In such circumstances, the same would come under the Prohibition of Benami Property Transaction Act, as per the definition contained in Prohibition of Benami Transaction Act.

17. As far as contention raised by the learned Senior Counsel for the plaintiff that the 1st defendant stands in fiduciary capacity and hence exception recognized under Benami Prohibition Act gets attracted, is concerned, as discussed earlier, this Court already concluded that the plea of oral partnership was not proved by plaintiff. Hence, there is no fiduciary relationship between the plaintiff and the 1st defendant.

18. As a result, the plaintiff cannot seek a declaration that he is

the co-owner of the property and for consequential relief of partition and permanent injunction in view of the specific bar contained under Section 4 of the Act.

19. In view of the discussions made earlier, this Court comes to a conclusion that the suit is barred by Section 4 of Prohibition of Benami Property Transaction Act even assuming the plaintiff proved that he contributed for purchase of the suit property in the name of the first defendant. Therefore, issues No.3 and 4 are answered against the plaintiff.

20. Issue Nos.1 and 2:

In view of the conclusion reached by this Court with regard to issues No.3 and 4, the plaintiff is not entitled to relief of declaration and partition as prayed for. Therefore, issues Nos.1 and 2 are answered against the plaintiff.

21. Issue No.5:

In view of the answers to Issue Nos.1 to 4, the plaintiff is not entitled to any other relief and issue No.5 is answered, accordingly. In the facts and circumstances of the case, the defendants are entitled to costs of the suit.

22. Conclusion:

(a) The plaintiff is not entitled to any relief and the suit is dismissed;

(b) The plaintiff is directed to pay costs of the suit to the defendants.

09.06.2023

Index : Yes / No
NCC : Yes / No
ub

S.SOUNTHAR, J.

ub

Pre-delivery order made in
C.S.No.16 of 2019

09.06.2023