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OSA NOS.251 & 258 OF 2015

IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON: 14 / 03 / 2024

JUDGMENT DELIVERED ON: 03 / 04 / 2024

CORAM:

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

OSA NOS.251 AND 258 OF 2015

AND

M.P.NOS.1 AND 1 OF 2015 IN OSA NOS.251 AND 258 OF 2015

AND

CMP NO.6385 OF 2022 IN OSA NO.258 OF 2015

OSA NO.251 OF 2015

1.Smt.Mamutha Bai (Deceased)
2.J.Latha
3.J.Indira Priyadarshini
4.J.Jayashree
5.J.Venkateswara Rao
(Appellants 2 to 5 brought on record
as LRs' of the deceased appellant No.1
vide order of this Court dated 21.10.2016
made in OSA No.251 & 258 of 2015)

... Appellants

Vs.

1.G.Ramakrishnan
2.G.Subramanian

... Respondents



OSA NOS.251 & 258 OF 2015

PRAYER: Original Side Appeal filed under Order XXXVI Rule 1 of Madras High Court Original Side Rules and Clause 15 of Letters Patent, praying to set aside the judgment and decree dated 11.02.2015 in C.S.No.633 of 2011 and allow the present Original Side Appeal.

For Appellants : Ms.AL.Ganthimathi
Senior Counsel for M/s.L.Palanimuthu

For Respondent-1 : Mr.S.Mahaveer Shivaji

For Respondent-2 : Mr.P.R.Raman
Senior Counsel for Mr.J.Suresh

OSA NO.258 OF 2015

G.Subramanian ... Appellant

Vs.

1.G.Ramakrishnan
G.Jayaraman (Deceased)
2.Smt.Mamutha Bai (Deceased)
3.J.Latha
4.J.Indira Priyadarshini
5.J.Jayashree
6.J.Venkateswara Rao
(RR3 to 6 brought on record
as LRs' of the deceased 2nd respondent
vide order of this Court dated 21.10.2016
made in OSA No.251 & 258 of 2015) ... Respondents

PRAYER: Original Side Appeal filed under Order XXXVI Rule 1 of Madras High Court Original Side Rules and Clause 15 of Letters Patent,



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praying to set aside the judgment and decree dated 11.02.2015 in
C.S.No.633 of 2011 and allow the present Original Side Appeal.

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For Appellant : Mr.P.R.Raman
Senior Counsel for Mr.J.Suresh

For Respondent-1 : Mr.S.Mahaveer Shivaji

For Respondents
3 to 6 : Ms.AL.Ganthimathi
Senior Counsel for
M/s.Meenakshi Ganesan

COMMON JUDGMENT

R.SAKTHIVEL, J.

By this common judgment, the following appeals are being
disposed of.

(i)OSA No.251 of 2015 preferred by the legal representatives
of the second defendant (D2) in C.S.No.633 of 2011.

(ii)OSA No.258 of 2015 preferred by the first defendant (D1)
in C.S.No.633 of 2011.



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2.For the sake of convenience, henceforth, the parties will be referred to as per their array in the Suit.

3.Feeing aggrieved with the judgment and decree dated February 11th, 2015 passed by the Hon'ble Single Judge of this Court in Civil Suit No.633 of 2011, D1 and D2 have preferred these appeals under Order XXXVI Rule 1 of Original Side Rules read with Clause 15 of Letters Patent, praying to set aside the judgment and decree passed therein.

Plaintiff's case

4.1.The Civil Suit has been filed by the plaintiff seeking (a) the relief of declaration that the plaintiff is the sole and absolute owner of the suit property located at 18/1 & 2, Soodiammanpet, Saidapet, Chennai– 600 015; (b) direction to deliver vacant possession of the suit property; and (c) mesne profits at the rate of Rs.30,000/- per month from the date of filing the suit.



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4.2.The plaintiff was working as an 'Examiner' in the City Civil Court, Chennai and thus, had some self-earnings. The plaintiff purchased the suit property out of his self-earned money jointly in his name and his sister, G.Saraswathi's name, on 'either or survivor' basis on October 28th, 1963, vide Document No.3204 of 1963 (Ex-P.2) on the file of Sub-Registrar Office, Thiyagaraya Nagar from one T.Narasimhalu Chettiar. The plaintiff's vendor, T.Narasimhalu Chettiar, was a prisoner at that point of time and therefore, his wife / Power Agent, has sold the property.

4.3.After purchase, the plaintiff, along with his sister, had sold back a small piece of land in the backyard of the suit property along with right of pathway to his vendor, Narasimhalu Chettiar, on June 28th, 1972 vide Document No.885 of 1972 on the file of Thiyagaraya Nagar SRO (Ex-P.3).

4.4.The plaintiff's sister, G.Saraswathi, passed away in the year 1985 and hence, the plaintiff has become the absolute owner of the suit property as per the 'either or survivor' clause. After the purchase, the



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plaintiff was the sole bread winner of the family and he lived along with his family members including D1 and D2, in the suit property. Since the plaintiff was working in the City Civil Court and his brothers did not have proper employment at that time, the plaintiff was supporting them.

4.5.The plaintiff, on oral agreement allowed the defendants to stay in a portion of the suit property on a monthly rental basis from the year 1980 onwards. Due to his work and other personal reasons, the plaintiff shifted his family in the year 1980 from the suit property to a rented premises in 8-D, MIG Flats, MKB Nagar, Vyasarpadi, Chennai – 600 039 and the defendants continued to be a tenant by paying some nominal rent to the plaintiff. After the demise of the plaintiff's mother in the year 2001 and immediately after retirement of the plaintiff from service, he orally requested the defendants to hand over the possession of the property for his own occupation. The defendants requested time till 2004, but did not keep up their promise. Then the defendants refused to vacate the property and went to the extent of denying the title of the plaintiff.



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4.6.The plaintiff came to know that the defendants were fraudulently concocting documents in their names. Then the plaintiff issued a notice dated July 19th, 2011 under Ex-P.5 to D1 and D2 asking them to vacate the suit property. D1 gave a reply under Ex-P.7 dated July 25th, 2011 claiming that the suit property belonged to him, which amounted to denial of the plaintiff's title. Thus, the plaintiff was compelled to file the suit for declaration of title and for recovery of possession.

Defendants' case

5.1.Suit is not maintainable, as the plaintiff has claimed that the defendants are tenants, therefore, the remedy open to the plaintiff is available only under the Rent Controller under the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960. Further, the legal heirs of G.Saraswathi are not impleaded in the suit and hence, the suit is bad for non-joinder of necessary parties. Furthermore, the plaintiff did not seek the relief of setting aside the subsequent documents viz., the release deed and the registered partition deed dated April 28th, 1995. Therefore, the suit is not maintainable.



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5.2.Govindarajulu, father of D1, D2 and plaintiff, was the

Administrator General and Official Trustee of Tamil Nadu (AG & OT). He had five sons, namely, (i) the plaintiff – G.Ramakrishnan, (ii) D1- G.Subramanian, (iii) D-2 – Jayaraman, (iv) Vijayaraghavan and (v) Hanumantharao. G.Saraswathi was the only daughter. After retirement, he practised as an Advocate and appeared for Mr.T.Narasimhalu Chettiar. The said T.Narasimhalu Chettiar through his wife / Power Agent executed the sale deed in favour of the *Benamis* of Govindarajulu, namely G.Ramakrishnan (plaintiff) and G.Saraswathi for the purpose of legal fees for defending their criminal case.

5.3.Though, the suit property was purchased by the plaintiff's father in the names of the plaintiff and his sister – G.Saraswathi as *Benamis*, it was only a family arrangement. From the date of purchase of the property, the plaintiff's father was residing in the suit property along with the defendants. The plaintiff has been residing separately after his marriage.



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5.4. On November 5th, 1977, there was a family arrangement whereby the plaintiff, Vijayaraghavan, Saraswathi, D1 and D2 released their right in the suit property in favour of their father – Govindarajulu. Pursuantly, the plaintiff executed a release deed dated October 17th, 1979 in favour of his father – Govindarajulu upon receiving a consideration of Rs.20,000/-. The release deed was kept pending registration in Document No.P133 of 1979, as the plaintiff did not produce the Income-Tax Clearance Certificate.

5.5. Thereafter, the plaintiff's father settled the suit property by way of his last Will dated January 24th, 1977, in favour of D1, D2 and plaintiff's sister – G.Saraswathi. After the demise of plaintiff's father and his sister, D1 and D2 are the absolute owners of the suit property. The D1 and D2 had executed a registered Partition Deed dated April 28th, 1995 dividing the property by metes and bounds.

5.6. Further, D1 and D2 along with their father were in possession and enjoyment of the suit property from the date of purchase i.e., October 28th, 1963. After the demise of their father, D1 and D2



continue to be in possession. Hence, the defendants gain title by adverse possession also.

6.After hearing both sides, the Hon'ble Single Judge has framed the following issues for trial:

“(i)Whether the plaintiff is entitled to declare himself as the sole and absolute owner of the suit property pursuant to the sale deed dated 28.10.1963 registered as document No.3204/1963 on the file of the Sub Registrar Office, T.Nagar?

(ii)Whether the defendant is bound to deliver vacant possession of the suit property to the plaintiff, pursuant to the sale deed, dated 28.10.1963 registered as Document No.3204/1963 on the file of the Sub Registrar Office, T.Nagar?

(iii)Whether the plaintiff is entitled to mesne profits from the defendants at the rate of Rs.30,000/- per month from the date of filing the present suit till the date of realization along with interest?

(iv)Whether the suit is barred by limitation?

(v)Whether this Court has got jurisdiction to entertain the suit?

(vi)Whether the defendants has perfected title by way of adverse possession as claimed?

(vii)To what other reliefs, the plaintiff is entitled to?”



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7.The Hon'ble Single Judge, after analysing the oral and documentary evidence, concluded that the plea of *benami* has not been proved by the defendants; that Ex-P.2 sale deed is valid; that it is open to the legal representative(s) of G.Saraswathi to raise the issue if they believe that they have right over the suit property and hence, the suit is not bad for non-joinder of necessary parties; that the plaintiff was not a party to the Partition Deed dated April 28th, 1995, hence, the plaintiff need not seek to set aside the said document and the suit is maintainable; that since the plaintiff's title has been admitted by plaintiff's father, limitation does not begin to run and D1 and D2 denied the plaintiff's title in the year 2011 by Ex-P.7 dated July 25th, 2011 and therefore, the suit is not barred by limitation; and that. the plea of adverse possession has not been established by D1 and D2. Accordingly, the Hon'ble Single Judge answered the issues in favour of the plaintiff and decreed the suit and granted four months to D1 and D2 to vacate the suit property.

8.Feeing aggrieved with the judgment and decree passed by the Hon'ble Single Judge of this Court, these Original Side Appeals have been preferred by D1 and D2.



9.This Court has heard the submissions made on either side and perused the evidence available on record.

Arguments

10.Ms.A.L.Ganthimathi learned Senior Counsel appearing for the appellants / defendant Nos.(4) to (7) in OSA No.251 of 2015 would argue that, though the Sale Deed stands in the name of the plaintiff and his sister – G.Saraswathi, the true owner of the property was Govindarajulu, who is the father of the plaintiff and the D1 and D2. Plaintiff and his sister had no wherewithal to buy the suit property on the date of Ex-P.2 – Sale Deed. The appellants possess the original Parent Deeds of the suit property and the same has been marked as Exs-D.30 and D.33. Further, she would argue that, the plaintiff's sister – G.Saraswathi passed away in October 1985 leaving behind one daughter. The plaintiff has not added the legal heirs of the late G.Saraswathi. Therefore, the suit is bad for non-joinder of necessary parties.

11.Further that, in the year 1977, there was a family arrangement among the family members wherein the property had been



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allotted to D1 and D2 and another property situate at Vyasarpadi was allotted to the plaintiff. Pursuant to the family arrangement, a Release Deed dated 17th, October 1979 was executed. The Registering Authority demanded 'Clearance Certificate' under section 230(A)(1) of Income Tax Act, 1961. Thereafter, since the plaintiff changed his mind and kept on dragging by not producing the Clearance Certificate, the Release Deed was not registered.

12.Further, she would vehemently contend that, even though the Release Deed was not registered, in view of the family arrangement that took place on November 5th, 1977, D1 and D2 are in open, continuous and uninterrupted possession and enjoyment of the suit property for more than the statutory period having partitioned the property vide registered Partition Deed dated April 28th, 1995 (Ex-D.2 / Ex-D.34). D1 demolished the old building and constructed a house in the year 2000 after obtaining sanction and building plan approval from Chennai Corporation. D1 and D2 have been paying tax to the Corporation. The plaintiff was aware of all these. Hence, they perfected title by adverse possession. The Hon'ble Single Judge has not appreciated the evidence properly and negated the defendants' claim. Accordingly, she prayed to allow both the appeals.



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13.Mr.P.R.Raman, learned Senior Counsel appearing for the appellant / defendant No.(1) in OSA No.258 of 2015 would argue that D1 and D2 are in possession and enjoyment of the suit property since the date of purchase under Ex-P.2 by dividing the suit property under Ex-D.2 / Ex-D.34 - Registered Partition Deed in the year 1995. He invited attention to Ex-D.2 / Ex-D.34 – Registered Partition Deed, Ex-D.3 original plan approval and other documents marked on the side of the defendants and argued that D1 and D2 are in possession and enjoyment of the suit property openly, continuously, uninterruptedly and with necessary *animus* against the plaintiff. Hence, D1 and D2 perfected title by adverse possession. Accordingly, he prayed to allow both the appeals.

14.Per contra, Mr.S.Mahaveer Shivaji, learned counsel for the respondent / plaintiff would argue that the plea of *Benami* is forbidden by law in view of The Benami Transactions (Prohibition) Act, 1988. Though the defendants have averred that there was a family arrangement among the family members, the said plea was not proved by the defendants and the plaintiff did not execute any release deed as alleged. Moreover, the execution of the alleged Release Deed is not proved and the same is not registered as per the Registration Act, 1908. Further the defendants are



merely permitted to reside in the suit property and permissive possession will never be adverse to the real owner. The Partition Deed has been created behind the back of the plaintiff. Hence, the said document would not bind the plaintiff. Further that D1 and D2 took inconsistent plea which is not permissible under law. The plea of title and plea of adverse possession are mutually contradictory and cannot go together. The Hon'ble Single Judge after considering the evidence, concluded that the plaintiff is entitled to the relief as prayed for and hence, there is no warrant to interfere with the said judgment. Accordingly, he prayed to dismiss both the appeals.

15.The points that arise for consideration in these appeals are as follows:

(i)Whether the plea of *Benami* is available to the defendants in view of The Benami Transactions (Prohibition) Act, 1988?

(ii)Whether D1 and D2 have successfully traced their titles through the family arrangement dated November 5th, 1977 and purusnat Release Deed dated October 17th, 1979 ?



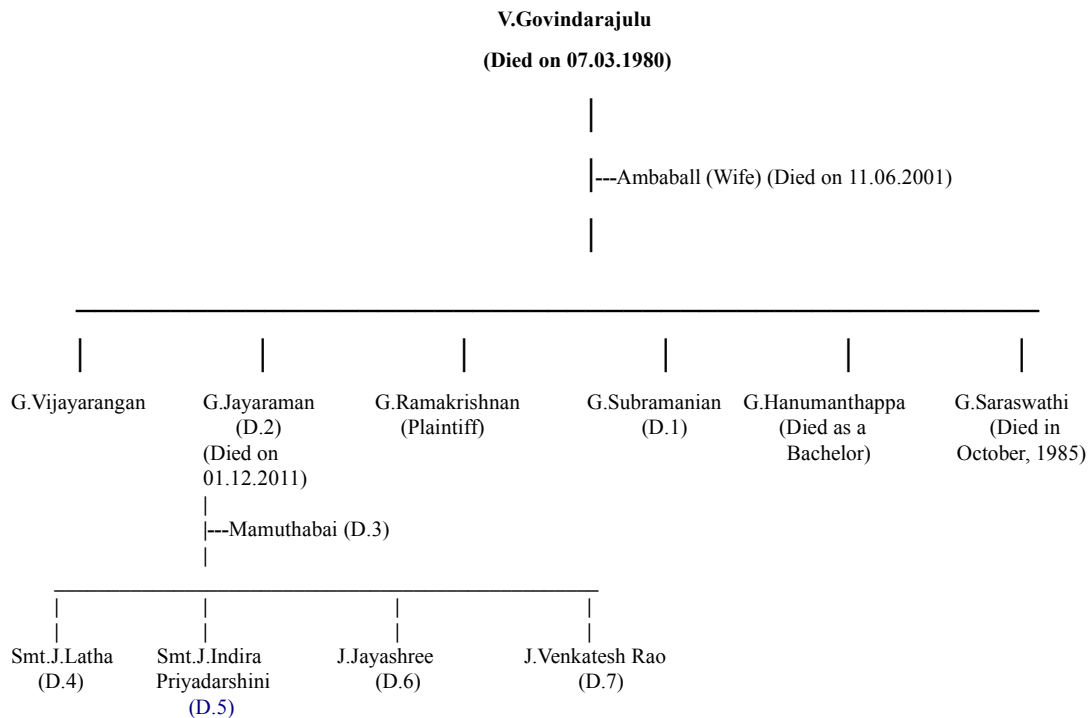
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(iii) Whether D1 and D2 have perfected title by adverse possession?

(iv) Whether the suit is bad for non-joinder of necessary parties?

Discussion and Decision for point no.(i)

16. There is no dispute between the parties with regard to the relationship between them which is as follows:





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17.The case of the plaintiff is that the plaintiff and his sister purchased the suit property under Ex-P.2 – Sale Deed on 'either or survivor' basis. To be noted, on the date of execution of Ex-P.2 - Sale Deed, the transferor and transferee were alive and thus, the transfer took place between them *inter vivos*. Hence, as per Section 5 of Transfer of Property Act, 1882, the transfer under Ex-P.2 – Sale Deed is valid and not forbidden by law. Perusal of Ex-P.2 – Sale Deed would reveal that it was executed by the vendor, through his power agent, for a consideration of Rs.5,000 advanced by the purchasers towards legal fees of a Criminal Case pending against the vendor. In other words, Ex-P.2 – Sale Deed was executed for due consideration. Hence, Ex-P.2 – Sale Deed is not a champerty agreement and therefore, it is not barred under Section 6 (h) of Transfer of Property Act, 1882.

18.The defendants pleaded that the original owner Narasimhalu Chettiar executed Ex-P.2–Sale Deed in favour of the plaintiff and his sister G.Saraswathi as *Benamis* of their father-Govindaraju who served as Administrator General and Official Trustee of Madras (AG & OT) and post retirement, practiced as an Advocate. According to D1 and D2, on the date of purchase, the plaintiff and G.Saraswathi were young



and had no wherewithal to purchase the property. The original parent deeds of the property namely the Sale Deed dated January 30th, 1954 and the Sale Deed dated November 29th, 1946 are in D1 and D2's custody and the same have been produced before the Court as Ex-D.30 and Ex-D.33 respectively. D1 and D2 on the strength of the above facts, contended that the father – Govindarajulu was the real owner and plaintiff and his sister were only the name lenders. Notably, the palintiff's father demanded the plaintiff to vacate the suit property vide Ex-D.31 dated Novemebr 11th, 1978. Releavant extract is as hereunder:

“.....

I permitted you to occupy a portion in Premises No.2, Now No.18, Soodiammenpet, Saidapet, Madras-15, In February 76. You have no right whatsoever in the said premises bearing No.2, Soodiammenpet St., Saidapet. Your presence had become objectionable; hence I revoke the permission granted by me to you in respect of the portion in your occupation in New No.18, Soodiammenpet St., Saidapet, Madras, and call upon you to deliver to me vacant possession forthwith. In default I will be constrained to institute suitable legal proceedings at your risk and costs, which I wish to avoid in view of the relationship.....”

19.The releavant extract of the Plaintiff's reply for Ex-D.31 through advocate vide Ex-D.32 dated December 5th, 1978 is as follows:



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“.....

1.At the outset our client denies all the allegations contained in your notice. Our client further states that the notice under reply is nothing but false and also against your conscience. It is further stated that you have given this false notice under instigation from others who are not interested in the welfare of our client. Our client states that as a dutiful father, you must be more affectionate towards the handicapped son, instead, you are trying to harass and put him into unwanted troubles. It is suffice to say that he is the legal owner and landlord of the premises in which you and your other sons are living at the present, as licencees.

2.Even though our client could have terminated the licence granted to you and your other two sons to live in premises No.18 (Old No.2), Soodiammanpet Street, Madras – 600 015, for the provocative notice Dt.11.11.78 sent by you, our client is keeping quite due to his love and affection towards his parents and brothers. Inspite of this reply if you take any action through Court of Law, it shall be resisted strongly by our client holding you liable for all costs and consequences thereto.”

20.Thus, the plaintiff has asserted his tile over the suit property. The plaintiff's father died on March 17th, 1980. The death certificate has been marked as Ex-D.10. Notably, during the lifetime of plaintiff's father, the plea of *Benami* was available to him (plaintiff's father). However, despite Ex-D.32 – Reply Notice, plaintiff's father did not



file any suit praying to declare his title over the suit property, which shows that the plaintiff's father admitted plaintiff's title over the suit property.

21.It is pertinent to note that D1 and D2 did not take a stand that the property has been purchased in the name of plaintiff and G.Saraswathi as joint family members or in their fiduciary capacity. The specific stand taken by D1 and D2 is that the purchase of property under Ex-P.2 – Sale Deed is a *Benami* transaction.

22.The suit was filed in the year 2011. As per sub-section (3) of Section (1) of The Benami Transactions (Prohibition) Act, 1988, the provision of Sections 3, 5 and 8 came into force at once on September 5th, 1988 and the remaining provisions came into force from May 19th, 1988. On and after commencement of the aforesaid Act, the plea of Benami is barred.

23.The Hon'ble Supreme Court in ***Rebti Devi (Smt) Vs. Ram Dutt and Another [1997 (11) SCC 714]*** relying on ***R.Rajagopal Reddy (Dead) By LRs' and Others Vs. Padmini Chandrasekharan (Dead) by***



LRs' [1995 (2) SCC 630] and Nand Kishore Mehra Vs. Sushila Mehra

[1995 (4) SCC 572], summarised the law in this regard as follows:

“(1) Firstly, while Section 4(1) prohibited a plea of benami to be raised in a suit, claim or action and again Section 4(2) precluded a defence of benami in suits, claims or actions, — these two provisions did not come in the way of a decision on such pleas in matters pending as on 19-5-1988 if such pleas were already raised before 19-5-1988, by one party or other. This was because such pleas which were already raised before 19-5-1988 were not intended to be affected by the Act, if they were raised in suits, claims or actions pending as on 19-5-1988. The repeal provision in Section 7 repealed Section 82 of the Trust Act only in that manner and to that extent.

(2) Secondly, on the express language of Section 4(1), any right inhering in the real owner in respect of any property held benami would be not enforceable once Section 4(1) operated, even if such transaction had been entered into prior to 19-5-1988 and no suit could be filed on the basis of such a plea after 19-5-1988. The same prohibition applied in case of Section 4(2) to a defence taken after 19-5-1988 pleading benami in respect of a transaction prior to 19-5-1988. The Act could be said to be retrospective only to that extent. But from this it did not follow that where such a plea was already taken before 19-5-1988 to the effect that the property was held benami, such a plea got shut out merely because the proceeding in which such plea was raised before 19-5-1988 was pending on 19-5-1988.



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(3) *Thirdly, where a suit had been filed before 19-5-1988, and in any written statement filed on or after 19-5-1988, a plea of benami was raised, then such a plea of benami could not also be gone into. If however such a plea in defence had been raised before 19-5-1988, the Act did not preclude that question from being decided in proceedings which were pending on 19-5-1988. Mithilesh Kumari case [(1989) 2 SCC 95] was wrong in holding that such a defence could not be decided after 19-5-1988 even though the plea was raised before 19-5-1988.*

(4) *Fourthly, if such an interpretation as stated in (1) to (3) was given, it could not be validly contended that a question of invalid discrimination arose between cases where suits were filed on or before 19-5-1988 and those filed after 19-5-1988.*

(5) *Fifthly, even though the word “suit” might include appeal or further appeals, Sections 4(1) and 4(2) could not be made applicable to these subsequent stages.*

(6) *Sixthly, pleas by plaintiffs or applicants and defences after 19-5-1988 of real owners against benamidars were barred under Section 4(1) and Section 4(2), only to the extent indicated above.*

(7) *Seventhly, if in a suit, claim or action, a plea or defence based on benami is raised even after 19-5-1988 and the purchase is in the name of a wife or unmarried daughter, such a plea of benami is permissible and R. Rajagopal Reddy case [(1995) 2 SCC 630] will not come in the way merely because the plea is raised after 19-5-1988. Such a plea if raised, will however have to be decided taking into account the statutory presumption laid down in Section 3(2). This is because the Act says that if the purchase is in the name of the wife or unmarried daughter, the prohibition in Section 3(1) will not apply. Section*



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3(2) is enacted as an exception to the provisions in the Act and does not depend for its interpretation on the question as to what extent Sections 4(1) and 4(2) are retrospective.

(8) Eighthly, if the case falls within the exception in Section 4(3)(a) i.e. where the person in whose name the property is held is a coparcener in a Hindu Undivided Family and the property is held for the benefit of the coparceners in the family, or where as stated in Section 4(3)(b) 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, then in both situations if such a plea or defence is raised in a suit filed after 19-5-1988, the same can be decided by the Court notwithstanding Section 4(1) or 4(2) and notwithstanding what is decided in *R. Rajagopal Reddy case* [(1995) 2 SCC 630] .”

24.Though Ex-P.2–Sale Deed is executed long before the Act, the plea of *Benami* is taken after the commencement of the aforesaid Act, and therefore, it is barred by law and not available to D1 and D2. Hence, this Court rejects the said plea. Point No.(i) is answered accordingly.

Discussion and Decision for point no.(ii)

25.The plaintiff in his evidence has deposed that the defendant's are residing in the suit property as permissive occupants since 1968. According to D1 and D2, in the year 1977, a family arrangement



took place among the family members. Relevant extract of D1's written statement is as follows:

“13.

On 05-11-1977 there was a family arrangement executed by plaintiff, Vijayarangan and G.Saraswathi in favour this defendant's father; this defendant and the 2nd defendant they have released their rights over the suit property, in continuance of the same the plaintiff has executed a release deed dated 17-10-1979.

14.This defendant submit that on 17-10-1979 this plaintiff has executed a registered release deed in favour of this defendant's father and he has received a consideration of Rs.20,000/- on the same day. This amount being paid to the plaintiff by the father for releasing all his rights in future as a legal heir. And the said release deed was kept pending document No.P133 of 1979.”

26.Relevant extract of the written statement of the legal representatives of D2 is as follows:

“....

On 05.11.1977, there was a family arrangement amongst the family members of the plaintiff and defendants 1 and 2 in which the plaintiff and G.Saraswathi have released



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their rights over the suit property in favour of the defendants 1 and 2 herein. In continuation of the said family arrangement, the plaintiff and the said G.Saraswathi have executed a registered release deed dated 17.10.1979 whereby they have released their rights over the suit property in favour of the father of defendants 1 and 2 herein. The plaintiff has received a sum of Rs.20,000/- from his father on 17.10.1979 and has executed the said release deed on the same day.

..... ”

27.Further, D1 in his statement has mentioned that V.Govindarajalu executed a will dated January 24th, 1977 in favour of D1 and D2. The legal representatives of D2 in their written statement has stated that V.Govindarajalu executed a will dated January 24th, 1977 in favour of D1, D2 and their sister G. Saraswathi; and that, after the demise of Govindarajalu, D1 and D2 became the absolute owners of the suit property and entered into Ex-D.2 / Ex-D.34 – Registered Partition Deed.

28.It is a settled legal position that a family arrangement can be made orally; that if made orally there being no document, no question of registration arises; that if the family arrangement is reduced into writing and purports to create, declare, assign, limit or extinguish any right or title



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or interest of any immovable property, it must be stamped and duly registered as per the Indian Stamp Act and Indian Registration Act; that whether the terms have been reduced to the form of a document is a question of fact in each case to be determined upon consideration of the nature of phraseology of the writing and the circumstances in which and the purpose with which it was written; and that the document in the nature of memorandum evidencing a family arrangement already entered into and had been prepared as a record of what had been agreed upon, in order that there are no hazy notions in future, need not be stamped or registered. **(vide *A.C.Laksmipathy and Ors Vs.A.M.Chakrapani Reddiar and Ors* reported in *AIR 2001 MAD 135*).**

29. In this case, there is no clear plea or proof as to whether the alleged family arrangement was oral or written. Though D1 and D2 in their written statement have stated that family arrangements took place on November 5th, 1977, no proper description about it has been mentioned in the written statement. Further, though D1 and son-in-law of Jayaraman was examined, their evidence is not sufficient to prove the said arrangement. Further, the defendants alleged that, pursuant to the family arrangement, the plaintiff executed a Release Deed dated October 17th,



1979. In this regard, the defendants relied on Ex-D.1 - RTI letter dated December 20th, 2012. Ex-D.1 reads as follows:

'1979ம் வருட நிலுவை ஆவண எண் 133

இது ஒரு விடுதலை ஆவணமாகும்.
திரு. G.ராமகிருஷ்ணனால் திரு. V.கோவிந்தராசலு
நாயுடுக்கு எழுதி கொடுக்கப்பட்டது.
திரு. G.ராமகிருஷ்ணன் எழுதிக் கொடுத்ததை
ஒப்புகொண்டதின் பேரில் மேல் எழுத்து பதிவு
செய்யப்பட்டது. இந்த ஆவணத்திற்கு 1961ம் வருட
இ.வ.வ.சட்டம் பிரிவு 230A(1)படி வருமான வரி சான்று
தாக்கல் செய்ய கோரி 22.10.79, 20.07.83, 05.11.85, 17.08.90,
ஆகிய தேதிகளில் எழுதி கொடுத்தவருக்கு அறிவிப்பு
அனுப்பியும் வருமான வரி சான்று தாக்கல்
செய்யப்படாததால் பதிவு மறுதளிக்கப்பட்டது.

மாவட்டப் பதிவாளர்
தி.நகர்
சென்னை - 600 017.'

30.A bare reading of Ex-D.1 would show that a Release Deed dated October 17th, 1979 was presented before the Sub Registrar for registration and thereafter, the same was returned for want of 'Clearance Certificate' under section 230(A)(1) of Income Tax Act, 1961. Admittedly, the suit property is valued more than Rs.100/-. Hence, if any sharer wants to release his share, it should be made in writing and it should be stamped and registered. Then only, the said Release Deed confers title to the releasee. In this case, the alleged Release Deed was not registered. May



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the reason assigned by D1 and D2 be true, even then, such a Release Deed requires registration under Section 17 (1) (a) of the Registration Act, 1908.

In the absence of valid registered Release Deed, the plaintiff's father cannot acquire title over the suit property. Further, the alleged will dated January 24th, 1977 has neither been marked nor proved. Hence, this Court is of the view that the pleas of family arrangement, pursuant Release Deed dated October 17th, 1979 and the Will dated January 24th, 1977 are not proved by the defendants 1 and 2. In this case, D1 and D2 trace their title through the alleged family arrangement, pursuant Release Deed and alleged will dated January 24th, 1977 and since they have not been proved, the defendants miserably failed to trace their title and consequently, Ex-D.2 / Ex-D.34 - Partition Deed dated April 28th, 1995 would not bind the plaintiff. D1 (Appellant in OSA No.258 of 2015) filed a petition in CMP No.6385 of 2022 in OSA No.258 of 2015 under Order 14 Rule 8 of Original Side Rules read with Order 41 Rule 27 and Section 151 of Code of Civil Procedure praying to permit him to adduce additional oral evidence in respect of the original Will dated 24th January 1977 allegedly executed by Mr.V.Govindarajulu. As stated supra, since the family arrangement pursuant to the Release Deed dated October 17th, 1979 were not proved, this Court is of the considered view that no fruitful purpose



would be served, even if we allow the Civil Miscellaneous Petition in CMP No.6385 of 2022 in OSA No.258 of 2015. Hence, CMP No.6385 of 2022 in OSA No.258 of 2015 deserves to be dismissed and accordingly, it is dismissed. Point Nos.(ii) is answered accordingly in favour of the plaintiff and against D1 and D2.

Discussion and Decision for point no.(iii)

31.Point No.(iii) relates to Adverse Possession. This Court deems fit to summarise the law in this regard. Adverse Possession commences with wrongful possession and is asserted against rightful ownership. Essential pleadings include actual, conclusive, open and uninterrupted hostile possession with clear intent to claim ownership of the property in question, contrary to the true owner's rights. In order to claim adverse possession, specific averments as to when and how the possession became adverse to the true owner are necessary for computing the limitation period from thereon. The plea of adverse possession is essentially a factual plea and such plea should be pleaded specifically and proved by adducing substantive legal evidence. Long Possession by itself would not be sufficient to prove adverse possession. *Animus Possidendi*



against the true owner is also necessary. Further, permissive possession would never be adverse to the real owner.

32. Further, the Hon'ble Supreme Court in ***Karnataka Board of Wakf Vs. Government of India and Others*** reported in **2004 (10) SCC 779** held as follows:

'11. In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is "nec vi, nec clam, nec precario", that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period. (See S.M. Karim v. Bibi Sakina [AIR 1964 SC 1254], Parsinni v. Sukhi [(1993) 4 SCC 375] and D.N. Venkatarayappa v. State of Karnataka [(1997) 7 SCC 567] .) Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law



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but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession. [Mahesh Chand Sharma (Dr.) v. Raj Kumari Sharma [(1996) 8 SCC 128]'

33.Vide Ex-D.2 / Ex-D.34 – Partition Deed dated April 28th, 1995, D1 and D2 partitioned the suit properties. Thereafter, after obtaining Plan Approval (Ex-D.3), the defendants put up construction over the suit property and have been paying electricity charges and property tax in their names. Further, perusal of the death certificate of plaintiff's father (Ex-D.10) would show that he passed away in the suit property. Ex-D.26 – Death Certificate of the plaintiff's mother would show that she was residing there. Further, D1's son's marriage took place in the suit premises. The property tax receipt and water tax receipt would show that D1 and D2 are residing in the suit property since 1968.



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34.The learned Senior Counsels for the appellants submitted that D1 and D2 are in possession and enjoyment of the suit property by entering into Ex-D.2 / Ex-D.34 – Partition Deed dated April 28th, 1995 and have put up construction on the suit property. The said act would clearly show the denial of title of the plaintiff. Further submitted that D1 and D2 are enjoying the suit property openly, continuously, and without any interruption for more than 12 years before filing the suit. Hence, the plaintiff's right to sue has been extinguished and D1 and D2 have perfected title by adverse possession.

35.As stated supra, the property was purchased by the plaintiff and G.Saraswathi. They are the title holders. There is no categorical pleading and proof to show that, D1 and D2 are enjoying the suit property for more than the statutory period by prescribing title in themselves adverse to the title of plaintiff and his sister. There is nothing to show that the partition took place with the knowledge of the plaintiff. Though D1 and D2 are in possession since 1968, there is nothing to show when their possession turned adverse to the plaintiff. In the absence of



such pleadings and proof, D1 and D2s' possession however long, would not confer title by adverse possession to them and would not divest the right of the plaintiff.

36.Further, the plea of title and adverse possession cannot go together. It is settled law that there is no bar to take an inconsistent plea of title and adverse possession in the written statement. But the defendants at appropriate time *i.e.*, at the time of trial or even at the time of arguments before the Trial Court, should have elected either one of the pleas.

37.In this case, the defendants did not elect either the plea of title or plea of adverse possession. In the facts and circumstances of this case, payment of house tax, water tax and property tax alone are not sufficient to deny the title of the true owner. Hence, this Court holds that D1 and D2 failed to prove the plea of adverse possession. Point No.(iii) is answered accordingly in favour of the plaintiff and against D1 and D2.



Discussion and Decision for point no.(iv)

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38.Point No.(iv) concerns non-joinder of necessary parties *i.e.*, non-joinder of legal representatives of the plaintiff's sister. The plaintiff and G.Saraswathi purchased the property under Ex-P.2 - Sale Deed. Admittedly, G.Saraswathi died in October 1985; death certificate is marked as Ex-P.4. On the date of execution of Ex-P.2 – Sale Deed she was married. D1 and D2 in their evidence admitted that G.Saraswathi has one daughter and that they do not know the whereabouts of her legal representative(s).

39.It is settled position of law that the relief of declaration is binding on the parties alone. In essence, it is a right in *personam*. As per Section 34 and Section 35 of the Specific Relief Act, 1963, the decree in this case would bind only the parties to the suit or persons claiming through the parties to the suit, and not the legal representatives of G.Saraswathi, who are not arrayed as parties in the suit. As already stated *supra*, on the date of execution of Ex-P.2, G.Saraswathi was alive. Hence, Ex-P.2 – Sale Deed is valid. Law presumes that plaintiff and legal



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representative(s) of G.Saraswathi are co-owners in the suit property; entitled each $\frac{1}{2}$ share. It is settled law that a co-owner can file a suit for recovery of possession without joining other co-owner(s). The presumption is that the action of one co-owner to recover property from third party is for the benefit of other co-owner(s) also. Hence, plaintiff cannot deny title to other co-owner.

40.This Court observes that there is no bar to purchase a property on 'either or survivor' basis. Generally, 'either or survivor' clause is found in cases of joint bank accounts. This clause has been interpreted by this Court in *Parvathi Vs. Valliammal* reported in **2005 2 LW 265 = 2005 SCC Online Mad 71**. It was held that either or survivor account will not make the survivor the beneficiary or owner of the amount, it only enables the survivor to collect the amount as trustee for the other heirs. There being no presumption of 'intended advancement' in favour of either depositors, the survivor has to prove the transfer as per law. In essence, in a contract containing terms of 'either or survivor' is concerned, if one of the contracting parties passes away, the surviving party shall hold the money / property as Trustee of the deceased unless the contrary is established. Applying the same analogy in this case, the legal heir(s) of



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G.Saraswathi is/are entitled to $\frac{1}{2}$ share in the suit property. Defendants are unaware of the whereabouts of the legal representatives of G.Saraswathi.

In these circumstances, the legal representative(s) of G.Saraswathi can claim their share if so desired and if so advised. The Hon'ble Single Judge has rightly observed that it is open to the legal representative(s) of G.Saraswathi to raise the issue if they believe that they have right over the suit property. The relief of declaration granted in favour of the plaintiff will not affect the rights, if any, available to the legal representative(s) of G.Saraswathi under Ex-P.2. Hence, the non-joinder of legal heir(s) / legal representative(s) of G.Saraswathi would not be fatal to the case of the plaintiff. Point No.(iv) is answered accordingly in favour of the plaintiff and against D1 and D2.

41.The Hon'ble Single Judge after considering the evidence and documents concluded that, due to lack of plea and lack of legal evidence, the claim of adverse possession cannot be accepted; that, upon the plaintiff asserting his title through Ex-D.32, the plaintiff's father did not initiate any action which amounts to admission of the plaintiff's title; and that the defendants denied the plaintiff's title under Ex-P.7 dated July 25th, 2011 and hence, the suit is not barred by limitation. This Court finds



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the same justifiable. Hence, there is no warrant to interfere with the judgment and decree.

42.In the result,

(i) OSA No.251 of 2015 and

(ii) OSA No.258 of 2015 and CMP No.6385 of 2022 in OSA

No.258 of 2015 are dismissed.

No costs. Consequently, connected miscellaneous petitions are closed.

[R.SUBRAMANIAN, J.]

[R.SAKTHIVEL, J.]

03 / 04 / 2024

Index : Yes
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R.SAKTHIVEL, J.

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PRE-DELIVERY JUDGMENT MADE IN
OSA NOS.251 AND 258 OF 2015

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