



S.A(MD)No.559 of 20

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 25.09.2024

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THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

S.A(MD)No.559 of 2006

Dharmaraj,
S/o.Subburaja,
Residing at Kottaikaranpatty (via),
T.Edayapatty Post,
Palakuruchi, Manapparai Taluk,
Trichy District. ... Appellant/1st Respondent/1st Defendant

Vs.

1.Asirvatham (died),
S/o.Jebamalai Pillai,
Residing at Lorong Mangga Sentul – 51200,
Kualalumpur, Malaysia,
Represented by his power agent J.Francis,
S/o.Sri Jebamalai Pillai,
Residing at No.F.110, Marina Square,
No.27, Santhome High Road,
Santhome,
Chennai. ... 1st Respondent/Appellant/Plaintiff

2.Sebastian,
S/o.Jebamalai Pillai,
Residing at P.Mettupatty,
Palakkuruchi Post,
Manapparai Taluk, Trichy District.

3.Varadharaju,
S/o.Adakka Gounder,
Residing at Vellayakonapatty,
Manapparai Taluk,
Trichy District. ... Respondents 2 & 3/Respondents 2 & 3/
Defendants 2 & 3



4.Bernaline Francis
5.Arulnathan
6.Thomas
7.Pappathi

... Respondents 4 to 7/
Lrs of the deceased first respondent

(Respondents 4 to 7 are brought on record as Lrs of the deceased first respondent vide order dated 20.07.2023 made in M.P(MD)Nos.1 to 3 of 2013 in S.A(MD)No.539 of 2006 by KRJ).

Prayer: Second Appeal filed under Section 100 of the Code of Civil Procedure against the judgment and decree, dated 31.01.2006 passed in A.S.No.345 of 2004, on the file of the Principal District Court, Trichy, reversing the judgment and decree dated 22.12.1998 passed in O.S.No.71 of 1996, on the file of the Sub Court, Kulithalai.

For Appellant	: Mr.R.Subramanian
For R – 4	: Mr.F.X.Eugene for Mr.D.Gurusamy

JUDGMENT

This Second Appeal has been directed against the Judgment and decree, dated 31.01.2006 passed in A.S.No.345 of 2004, on the file of the Principal District Court, Trichy, wherein, the Judgment and decree, dated 22.12.1998 passed in O.S.No.71 of 1996, on the file of the Sub Court, Kulithalai, are reversed.



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2.Originally, the first respondent herein as plaintiff has instituted a suit in O.S.No.71 of 1996 on the file of the trial Court for the relief of declaration, recovery of possession and mense profits, wherein the appellant and the respondents 2 and 3 have been shown as the defendants 1 to 3.

3.Pending the suit, the first respondent died and the respondents 4 to 7 were brought on record as Legal representatives of the deceased first respondent.

4.For the sake of convenience, the parties are referred to as, as described before the trial Court.

5.The plaintiff's case is that the plaintiff, Savarimuthu, Francis and the second defendant-Sebastian are brothers and from and out of the money earned by him in Malaysia, as the plaintiff was employed in Malaysian Railways, he purchased a property in his own village, through his brother-the second defendant. The second defendant received the money periodically and purchased the suit



properties, shockingly not in the name of the plaintiff but in his own name. When the plaintiff came to India, later on found that the property had been purchased in his brother's name and it was all a fraudulent sale deed and had a discussion with the second defendant and questioned the act. The second defendant regretted for his action and executed a registered document in favour of the plaintiff on 24.11.1971, which is called as 'Oppadaippu deed'. In the said document, it has been admitted by the second defendant that the money spent for purchasing the lands were paid by the plaintiff. The plaintiff was in possession and enjoyment of the suit properties and paying kist through the second defendant and also through his brother Savarimuthu. The documents were in the possession of the brothers and there was a family arrangement made between the plaintiff and his brothers on 27.10.1993 and they agreed to produce all the relevant documents to the plaintiff. Taking advantage of the absence of the plaintiff, the second defendant had created encumbrance over the suit properties. The plaintiff had issued an advertisement in Dinamalar daily making it clear that the encumbrance would not bind on him and the second defendant created a mortgage to a sum of Rs.10,000/- in favour of the third defendant on 19.04.1993. Later on, the second defendant had created a registered lease deed for 6 years in favour of



the first defendant. Immediately, on 24.05.1995, he also created a sale deed in favour of the first defendant. The said document would not bind on the right of the plaintiff. As the second defendant had already executed 'oppadaippu pathiram', is estopped from denying the title of the plaintiff and the defendants 1 and 3 have purchased the property at their own risk. The plaintiff issued a notice to the defendants 1 and 2. A reply was received with false averments. The plaintiff is a non-citizen of Malaysia and being a citizen of India, there is no violation of the Foreign Exchange Regulation Act and he had no prohibition to purchase the suit property under the Citizenship Act and Foreigners Act. The defendants 1 and 2 having enjoyed the usufructs of the suit properties are liable to pay the mense profits. Hence, the plaintiff has filed the said suit for the abovestated relief.

6.The first defendant denied the averments that the plaintiff sent money from abroad and that the properties were purchased by the second defendant and submitted that the sale deed stands in the name of the second defendant and he alone is the title holder and not a name lender.



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7.The second defendant denied the averment that he executed 'oppadaippu pathiram' on 24.11.1971 and submitted that the said document would not convey title to the plaintiff. Unless the second defendant transfers his interest by any means known to law, the plaintiff cannot be considered to be the owner of the property and according to him, there is collusion and conspiracy between the plaintiff and the second defendant. The plaintiff was never in possession of the suit property and the kist paid through the second defendant and also through Savarimuthu and the alleged family arrangement dated 27.10.1973 during which the brothers are alleged to have handed over the document are all denied. The alleged family arrangement is a fabricated document. Only as rightful owner, he executed a mortgage deed in favour of the third defendant and a lease deed in favour of the first defendant. Only in the capacity of the true owner, he executed a sale deed in favour of the first defendant. The first defendant is a bona fide purchaser for value without notice. The second defendant had been in open, exclusive and continuous possession of the suit property from 17.10.1967 and therefore, he has prescribed title by adverse possession. From 17.10.1967, the possession of the property was not with the plaintiff, but only with the first defendant and his predecessor-



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in-title viz., the second defendant. Therefore, the defendants 1 and 2 have got prescriptive title by adverse possession. Recognizing the title and possession, the Government of Tamil Nadu granted patta in favour of the first defendant. The first defendant has deepened the well and got an electricity service connection. After knowing that the property value has been considerably increased, the plaintiff has chosen to file the suit in collusion with the second defendant and the plaintiff has no title and the suit is also barred by limitation. The plaintiff Asirvatham is a citizen of Malaysia and he is not a citizen of India. Therefore, the plaintiff has no right to acquire property without the sanction of the Indian Government. The plaintiff also cannot send money except through legal channels to the second defendant and the plaintiff cannot send any money illegally violating the provisions of the Foreign Exchange Regulation Act. Under the Citizenship Act as well as the Foreign Exchange Regulation Act, the plaintiff cannot claim that he has purchased the property. The second defendant alone is the absolute owner of the suit property, who has purchased it in his own name and prayed for the dismissal of the suit.



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8.Before the trial Court, on the side of the plaintiff, P.W.1 to P.W.3 were examined and Exs.A1 to A31 were marked. On the side of the defendants, P.W.1 to P.W.6 were examined and Exs.B.1 to B.15 and on the side of the Court, Exs.X.1 to X.11 were marked.

9.On the basis of the rival pleadings raised on either side, the trial Court has framed necessary issues and after analysing both the oral and documentary evidence, has dismissed the suit on the ground that the plaintiff has not proved the case of benami transaction and the sale made by the second defendant in favour of the first defendant, who had purchased the property in the year 1967.

10.Against the Judgment and decree passed by the trial Court, the plaintiff as appellant has preferred an Appeal Suit in A.S.No.345 of 2004, on the file of the first appellate Court.

11.The first appellate Court, after hearing both sides and upon reappraising the evidence available on record, has allowed the appeal and thereby set aside the Judgment and decree passed by the



trial Court. Against the Judgment and decree passed by the first appellate Court, the present second appeal has been preferred at the instance of the first defendant as appellant.

12.At the time of admitting the present second appeal, this Court had framed the following substantial questions of law for consideration:

'1. Whether in law is not the lower appellate Court in overlooking that the suit claim is barred by provisions of Benami Transaction (Prohibition) Act?

2. Whether in law has not the lower appellate Court erred in overlooking that the title cannot pass by mere admission vide AIR 1966 (SC) 605?

3. Whether in law has not the lower appellate Court misconstrue Ex.A.1, which has resulted in perverse findings?'

13.The learned counsel appearing for the appellant/first defendant contended that the first appellate Court ought to have seen that the first defendant is the bonafide purchaser for value without



notice and that he has been in possession and enjoyment; the lower appellate Court failed to see that the first defendant spent about a lakh of rupees for developing the property with the knowledge of the plaintiff; the lower appellate Court ought to have seen that when the property stands in the name of the second defendant, the onus is on the plaintiff to prove that the second defendant is a name lender and that he purchased the property on behalf of the plaintiff from out of the plaintiff's funds; the lower appellate Court totally misconstrued the alleged 'Oppadaippu Pathiram', which does not confer any title in favour of the plaintiff and there is no documentary evidence to show payment by the plaintiff to the second defendant; the lower appellate Court overlooked that the patta had been transferred in the name of the first defendant, which was marked as Ex.D.5 and the property tax stood transferred in the name of the first defendant, which were marked as Ex.B.10 and Ex.B.11; the lower appellate Court erred in holding that the transaction is hit by Benami Prohibition Act and the lower appellate Court erred in holding that the second defendant has admitted plaintiff's case under Ex.A.1 and hence, plaintiff need not prove anything and prayed for allowing the Second Appeal.



14.Since the plaintiff has taken a plea that he is the owner of the suit property, the sale deed stands in the name of his brother Sebastin-the second defendant which has been executed under Ex.B.2, dated 17.10.1967, the learned counsel appearing for the appellant/first defendant would submit that the claim of the plaintiff is barred under Section 4 of the Benami Transactions (Prohibition) Act, 1988, wherein it is held that 'Prohibition of the right to recover property held benami.- 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.

15.The learned counsel appearing for the fourth respondent would submit that the suit property was handed over to the plaintiff by the second defendant no sooner than 'oppadaippu pathiram', dated 21.11.1971 was registered. Immediately, at the will of the plaintiff, his brother Savarimuthu took possession of the suit property as the caretaker. However, patta of the properties illegally changed in the name of the second defendant only on 16.04.1993 under Ex.B.5, until then the possession of the elder brother of the plaintiff at the will of the plaintiff and then immediately, it was again transferred to the name



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of the first defendant on 19.04.1993 and thus, the suit filed for recovery of possession within 12 years. Only, the electricity connection to the two wells was in the name of the second defendant because it was obtained by the second defendant by showing the original sale deed dated 17.10.1967 inspite of 'oppadaippu pathiram', dated 21.11.1971, transferred the title to the plaintiff's name.

16.Heard the learned counsel appearing for the appellant and the learned counsel appearing for the fourth respondent and perused the materials available on record.

17.According to the plaintiff, he, Savarimuthu, Francis and the second defendant-Sebastian are brothers and from and out of the money earned by him in Malaysia, as the plaintiff was employed in Malaysian Railways, he purchased a property in his own village, through his brother-the second defendant. The second defendant received the money periodically and purchased the suit properties, shockingly not in the name of the plaintiff but in his own name. When the plaintiff came to India, later on found that the property had been purchased in his brother's name and it was all a fraudulent sale deed



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and had a discussion with the second defendant and questioned the act. The second defendant regretted for his action and executed a registered document in favour of the plaintiff on 24.11.1971, which is called as 'Oppadaippu deed'. In the said document, it has been admitted by the second defendant that the money spent for purchasing the lands were paid by the plaintiff. The plaintiff was in possession and enjoyment of the suit properties and paying kist through the second defendant and also through his brother Savarimuthu. The documents were in the possession of the brothers and there was a family arrangement made between the plaintiff and his brothers on 27.10.1993 and they agreed to produce all the relevant documents to the plaintiff. Taking advantage of the absence of the plaintiff, the second defendant had created encumbrance over the suit properties. The plaintiff had issued an advertisement in Dinamalar daily making it clear that the encumbrance would not bind on him and the second defendant created a mortgage to a sum of Rs.10,000/- in favour of the third defendant on 19.04.1993. Later on, the second defendant had created a registered lease deed for 6 years in favour of the first defendant. Immediately, on 24.05.1995, he also created a sale deed in favour of the first defendant. The said document would not bind on the right of the plaintiff. As the second defendant had already executed



'oppadaippu pathiram', is estopped from denying the title of the plaintiff and the defendants 1 and 3 have purchased the property on their own risk. The plaintiff issued a notice to the defendants 1 and 2. A reply was received with false averments. The plaintiff is a non-citizen of Malaysia and being a citizen of India, there is no violation of the Foreign Exchange Regulation Act and he had no prohibition to purchase the suit property under the Citizenship Act and Foreigners Act. The defendants 1 and 2 having enjoyed the usufructs of the suit properties are liable to pay the mense profits.

18. According to the first defendant, the plaintiff sent money from abroad and that the properties were purchased by the second defendant and submitted that the sale deed stands in the name of the second defendant and he alone is the title holder and not a name lender.

19. According to the second defendant, he executed 'oppadaippu pathiram' on 24.11.1971 and submitted that the said document would not convey title to the plaintiff. Unless the second defendant transfers his interest by any means known to law, the



plaintiff cannot be considered to be the owner of the property and according to him, there is collusion and conspiracy between the plaintiff and the second defendant. The plaintiff was never in possession of the suit property and the kist paid through the second defendant and also through Savarimuthu and the alleged family arrangement dated 27.10.1973 during which the brothers are alleged to have handed over the document are all denied. The alleged family arrangement is a fabricated document. Only as rightful owner, he executed a mortgage deed in favour of the third defendant and a lease deed in favour of the first defendant. Only in the capacity of the true owner, he executed a sale deed in favour of the first defendant. The first defendant is a bonafide purchaser for value without notice. The second defendant had been in open, exclusive and continuous possession of the suit property from 17.10.1967 and therefore, he has prescribed title by adverse possession. From 17.10.1967, the possession of the property was not with the plaintiff, but only with the first defendant and his predecessor-in-title viz., the second defendant. Therefore, the defendants 1 and 2 have got prescriptive title by adverse possession. Recognizing the title and possession, the Government of Tamil Nadu granted patta in favour of the first defendant. The first defendant has deepened the well and got an electricity service connection. After knowing that the property



value has been considerably increased, the plaintiff has chosen to file the suit in collusion with the second defendant and the plaintiff has no title and the suit is also barred by limitation. The plaintiff Asirvatham is a citizen of Malaysia and he is not a citizen of India. Therefore, the plaintiff has no right to acquire property without the sanction of the Indian Government. The plaintiff also cannot send money except through legal channels to the second defendant and the plaintiff cannot send any money illegally violating the provisions of the Foreign Exchange Regulation Act. Under the Citizenship Act as well as the Foreign Exchange Regulation Act, the plaintiff cannot claim that he has purchased the property. The second defendant alone is the absolute owner of the suit property, who has purchased it in his own name.

20.The contention of the second defendant is that originally he was the owner of the suit property by virtue of Ex.B.2-sale deed, dated 17.10.1967 and he has sold the property to the first defendant under Ex.B.1-sale deed and therefore, the first defendant alone is the owner of the suit property. But the contention of the plaintiff is that the entire money for the purchase of the suit property under Ex.B.2 was paid only by him and he alone is the owner of the suit property and that the second defendant has no right to execute Ex.B.1-sale deed



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and therefore, neither the second defendant nor through him, the first defendant can claim to be the owner of the suit property.

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21. On perusal of the materials available on record, it is seen that there is absolutely no proof of payments made by the plaintiff to the second defendant. The evidence of P.W.1 and P.W.2 is contradictory. On the other hand, the first defendant examined himself and marked the original sale deed and also the parent title deeds. The claim of the plaintiff is barred by Benami Transaction (Prohibition) Act, 1988. The 'Oppadaippu pathiram' has not been proved by examining any of the witnesses. Moreover, under 'Oppadaippu pathiram' title cannot be transferred. After 1971, the second defendant has been in possession and enjoyment of the suit property and patta has been changed in his name under Ex.B.5 and he also sold the property to the first defendant. The plaintiff is a Malaysian citizen, as admitted by him and therefore, he cannot purchase any property without obtaining any permission from the competent authority.



22.The plaintiff has filed the suit for declaration and recovery of possession. As per Article 58 of the Limitation Act, for declaration, the execution of document should be challenged within three years. Under Article 65 of the Limitation Act, for recovery of possession, the limitation is 12 years. Admittedly, the suit was filed on 11.03.1996 and therefore, the suit is barred by limitation. The plaintiff has not proved payments alleged to have been made by him for the purchase of the suit property. In fact, the lower appellate Court has not referred to any documentary proof of payment. On the other hand relying on the recitals in 'Oppadaippu pathiram', payment is accepted. 'Oppadaippu pathiram' is not admitted by the second defendant nor the first defendant in their reply notice. The reply notice sent by him on 03.07.1995 under Ex.A.18, he has denied the 'Oppadaippu pathiram' and also asserted title over the property. Therefore, the plaintiff ought to have examined any one of the witnesses in the 'Oppadaippu pathiram'. Though as per 'Oppadaippu pathiram', the second defendant would hand over documents and possession as contended by the plaintiff, admittedly, the possession continued with the second defendant till he sold the property to the first defendant in the year 1995. But the plaintiff did not take any action questioning the second defendant's action or take steps for re-conveyance and mutation of



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revenue records and no proof that the same was acted upon. This clearly disproves the plaintiff's claim on 'Oppadaippu pathiram'.

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23.The suit is hit under Section 4(2) of the Benami Transactions (Prohibition) Act, 1988. The Hon'ble Apex Court in ***R.Rajagopal Reddy (dead) by Lrs and anothers Vs. Padmini Chandrasekharan (dead) by Lrs*** reported in ***(1995) 2 Supreme Court Cases 630***, has held that the provisions of the Act are retroactive and after the act, the claim or defence under Benami Transaction is barred. In fact, the lower Appellate Court has also accepted this but holds that the plaintiff is not claiming any Benami purchase. On the other hand, the plaintiff's claim is a sham and nominal transaction. There is no such plea by the plaintiff that the transaction is sham and nominal. The difference between a benami transaction and a sham transaction is that in a benami transaction, the passing of consideration is admitted. On the other hand, in a sham transaction, no consideration is admitted. In the instant case, the plaintiff's specific case is that from out of his funds, the second defendant purchased the property in his name. In fact, in 'Oppadaippu pathiram', the recital is 'இரவல் கிரைய பத்திரம்' ie., benami purchase.



24.The trial Court was of the view that the money had not been transferred by the plaintiff, as he has not proved it beyond doubt by producing an appropriate document to show that in what mode he has sent the money. Regarding the document viz., 'oppadaipu pathiram', the same was issued in the year 1971 but till in the year 1993, the plaintiff did not take any steps to file an appropriate case. No other document has been filed by the plaintiff to show that any permission has been granted by the plaintiff to the second defendant to take care of the property. Even in the year 1971 itself the said 'oppadaipu pathiram' was executed, till 1995, there is no reason stated why the plaintiff has not taken any steps to mutate the revenue records in his name and the said property stood in the name of the original owner Palaniyandi and the tax receipts filed by the first defendant would show that the first defendant was in possession. No patta has been issued in favour of the plaintiff and from the year 1971, the plaintiff was in possession of the suit property has not been proved. Accordingly, in the year 1995 the suit property was transferred in favour of the first defendant and in the year 1975, the electricity bill was also issued in the name of the second defendant-Sebastian. It is also seen that the plaintiff claimed that he is an Indian citizen and he was not a Malaysian citizen, but he has not produced any document to



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show that he is an Indian citizen. From the year 1971, till the date of filing the suit, even though family arrangements have been made, there is no material available that the said property has been purchased by the plaintiff by spending his money and the second defendant clandestinely purchased the suit property in his name has not been proved by the plaintiff and accordingly, the trial Court has rightly held in favour of the first defendant.

25.The Limitation point has not been discussed by the courts below, when 'oppadaipu pathiram' is of the year 24.11.1971 and later on, family arrangement was on 27.10.1993, but the suit has been filed only in the year 1996, after three years and there is no reason stated why he has not taken steps immediately against the second defendant after 'oppadaipu pathiram' and not mutated the records in his name is also not known to this Court. In view of the above stated claim, the lower Appellate Court is overlooking that the suit claim is barred by provisions of the benami transaction. The title has to be transferred only by way of valid document and that has not been done in this case. Hence, the plaintiff has not proved his title. Ex.A.1 is a 'oppadaippu pathiram', through which the plaintiff has claimed right over the property is not acceptable. The substantial questions of law



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are ordered accordingly in favour of the defendants and against the plaintiff.

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26.In fine, this second appeal is allowed without costs and the Judgment and decree, dated 31.01.2006 passed in A.S.No.345 of 2004, on the file of the Principal District Court, Trichy is set aside and the Judgment and decree, dated 22.12.1998 passed in O.S.No.71 of 1996, on the file of the Sub Court, Kulithalai, is confirmed.

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To

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1.The Principal District Court,
Trichy.

2.The Sub Court,
Kulithalai.

3.The Record Keeper,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai.



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V.BHAVANI SUBBAROYAN, J.

ps

Judgment made in

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