

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 31.08.2015

CORAM

THE HONOURABLE MR. JUSTICE P.R.SHIVAKUMAR

S.A.No.1393 of 2000

P.V.Radhakrishnan ...Appellant/Respondent/Plaintiff

-Vs-

1. P.V.Easwaran (Died)

2. Janaki (a) Baby ...Respondents/Appellant/1st Defendant

(R2 brought on record as LR of the deceased sole respondent vide order of Court dated 27.09.2013 made in C.M.P Nos. 412 to 414 of 2012 in S.A.No.1393 of 2000)

Second Appeal filed under section 100 of C.P.C to against the judgment and decree dated 21.01.2000 passed in A.S.No.70 of 1999 and Cross Objection in A.S.No.70 of 1999 on the file of Principal District Judge, Chingleput thereby setting aside the judgment and decree dated 15.12.1998 passed in O.S.No.99 of 1991 on the file of Subordinate Court, Tiruvallur.

For Appellant : Mr.N.R.Gopalan
for Mr.Aantharamakrishnan

For Respondents : Ms.P.Jayalakshmi
for M/s.Paul & Paul

JUDGMENT

The plaintiff in the original suit, who emerged successful before the trial Court, but suffered a set back before the lower appellate Court as the appeal filed by the defendant was allowed by the lower appellate Court, has come forward with the present second appeal against the decree of

the lower appellate Court. For the sake of convenience, the parties are referred to in accordance with their ranks in the suit and at appropriate places, their ranks in the second appeal will also be referred to.

2. The plaintiff P.V.Radhakrishnan, is none other than the younger brother of the sole defendant P.V. Easwaran. The suit property was purchased under a sale deed dated 10.04.1974 in the name of the defendant P.V.Easwaran from S.Ramamurthi and Others. A certified copy of the sale deed has been produced as Ex.A1. The plaintiff P.V.Radhakrishnan contended that the funds for the purchase of the suit property under the original of Ex.A1 was made up of the contributions made by the plaintiff and the defendant equally and the same was made available with the defendant. It is the further contention of the plaintiff that by mutual understanding that the purchase to be made in the name of the defendant would be accepted as the joint purchase of the defendant and the plaintiff. The suit property consisting of a old titled house and vacant site came to be purchased under the original of Ex.A1. It is the further contention of the plaintiff that they jointly borrowed from the co-operative Housing Society and then put up a building in the vacant portion of the property thus purchased. On the basis of the above said contentions the plaintiff claimed that he was entitled to an undivided half share in the suit property which consists of land and the building and pleaded for a decree for partition and separate possession. Besides seeking partition and separate possession, the plaintiff also sought for the following reliefs:

1. A direction for payment of past mesne profits for three years at the rate of Rs.170/- per month;
2. A direction for payment of future mesne profits at the same rate from the date of plaint till the date of delivery of possession of his share;
3. A direction to the defendant to pay a sum of Rs.15,000/- being half of the amount allegedly paid by the plaintiff to the Co-operative Housing Society towards the discharge of the loan; and
4. For a direction to the defendant to pay Rs.196.50 towards the Property Tax allegedly paid by the plaintiff.

3. The suit was resisted by the defendant denying the above said allegations made by the plaintiff and contending that his own funds were used for the purchase of the vacant site as well as for the construction of the building.

4. The learned trial Judge, after framing necessary issues, conducted a trial in which three witnesses were

examined as PWs 1 to 3 and 36 documents were marked as Exs.A1 to A36 on the side of the plaintiff. Two witnesses were examined as Dws 1 and 2 and 5 documents were marked as Exs.B1 to B5 on the side of the defendants.

5. The learned trial Judge, who considered the pleadings and evidence in the light of the points urged by the respective counsel in their arguments, accepted the case of the plaintiff and granted a preliminary decree declaring the plaintiff's $\frac{1}{2}$ share and directing division of the suit property into two equal shares and allotment of one such share to the plaintiff. The learned trial Judge, who chose to sustain the plea for partition and separate possession, disallowed all other claims. Thus, the suit was partly decreed resulting in the grant of preliminary decree for partition as indicated supra and dismissal of the suit in respect of all other reliefs.

6. As against the preliminary decree for partition, the defendant filed an appeal in A.S.No.70 of 1999 on the file of the Principal District Judge, Chengalpattu. As against the disallowed portions of the plaint claim, the plaintiff preferred a cross-objection. The lower appellate Court, after hearing the appeal and the cross-objection, dismissed the cross-objection and allowed the appeal with the result that the suit was dismissed in its entirety. As against the said decree of the lower appellate Court dated 12.01.2000, the present second appeal has been filed.

7. The second appeal was admitted on 15.09.2000 identifying following to be the substantial questions of law that have arisen for consideration in the second appeal;

1. Is not an admission best evidence of the fact admitted?
2. Does not law envisage that an admitted fact need not be proved?
3. Can a joint purchase by two brothers, but sale deed standing in the name of the elder be termed a Benami transaction?
4. When a transaction which does not confirm with the established six tests or conditions for a benami transaction can still be termed as a Benami Transaction?
5. Can an Appellate Court base its decision on grounds outside the plea of parties?
6. In any event, will not a transaction of joint purchase by brothers where sale deed stands in the name of one of them come under the exceptions in the Benami Transactions Prohibition Act?

8. The arguments advanced by Mr.N.R.Gopalan, arguing on behalf of Mr.N.R.Anantharamakrishnan, the learned counsel on record for the appellant and by Ms.P.Jayalakshmi, learned counsel for the respondent are heard. The judgments of the courts below and other materials available on record are perused and taken into consideration.

9. The case of the plaintiff is that the suit property comprised in S.No.427/1 and measuring 92 feet east to west on the north, 87 feet in the south, 44 feet north to south in the east and 38 feet in the west with a old tiled structure, was purchased jointly by the plaintiff and the defendant in the name of the defendant under the original of Ex.A1; that after the purchase, in the vacant portion, a new building was constructed with the funds jointly raised by them by mortgaging the property to the Co-Operative Housing Society and that thus the purchase was made and the building was constructed with the joint funds of the plaintiff and the defendant. Based on such a contention, the plaintiff claims that he is entitled to an undivided half share in the suit property. Of course, the defendant contended before the trial Court that the plaintiff did not make any contribution either for the purchase of the property or for the additional construction that was made in the vacant portion of the property purchased and that the entire fund was provided by the defendant himself. In short, the plea of joint purchase was sought to be resisted by the defendant contending that it was his separate property purchased by himself with his own funds. Perhaps the same was the reason why the defendant suffered a preliminary decree for partition in the suit in the hands of the trial Court. When an appeal was preferred by the defendant and a cross-objection was taken by the plaintiff, the defendant was advised to contend that the suit itself was not be maintainable in view of Section 4 of Benami Transaction (Prohibition) Act, 1988. The plaintiff also took cross-objection regarding the disallowed portion of the plaintiff claim. Learned counsel for the plaintiff (appellant in the second appeal) very much relies on the alleged admission made by the defendant that the plaintiff also contributed the funds for the purchase of the property under Ex.A1 and that the same was clearly admitted by the defendant in his letter addressed to the plaintiff and marked as Ex.A27. The learned counsel for the appellant also relies on Ex.A36, a certified copy of the registered mortgage deed dated 19.02.1975, in support of his contention that the property was purchased by himself and his brother jointly and was treated as joint property. The learned counsel for the plaintiff (appellant in the second appeal) also relies on Ex.A34 as an agreement between the

parties in which the joint purchase was admitted by the defendant.

10. On the other hand, the learned counsel for the defendant (respondent in the second appeal) drew the attention of the Court to paragraph 12 of the plaint wherein the plaintiff made it clear that he and his wife joined in execution of the mortgage in favour of Karanodai Cooperative Housing Society only as guarantors, because the salary of the defendant was not sufficient as per the opinion of the society for the grant of loan without there being guarantors. Drawing the attention of the Court to the said plea made in the plaint itself, the learned counsel for the defendant (respondent in the second appeal) argues that the reliance sought to be made on Ex.A36 is not tenable for the simple reason that the plaintiff himself has admitted that he joined in execution of the mortgage deed only as guarantor.

11. So far as the document marked as Ex.A34 is concerned, it is the contention of the learned counsel for the respondent in the second appeal (defendant) that the said document being a document purporting to create transfer and extinguished rights in immovable properties, is not admissible as a piece of evidence for want of registration. However, the learned counsel for the appellant in the second appeal (plaintiff) would submit that though Ex.P34 may be inadmissible for want of registration to prove any title or right derived under the same, it can be used for the collateral purpose, viz., for proving the admission that the property was purchased jointly by the plaintiff and the defendant.

12. This Court paid its anxious consideration to the above said submissions made on both sides.

13. No doubt Ex.A34 may contain an admission regarding the source of funds used for the purchase of the property in question and the same is also corroborated by Ex.A27-Inland letter. The question that arises for consideration in this case is though there are such admissions, whether the plea as the one taken by the plaintiff in this case can be sustained in the light of the prohibition found in Section 4 of the Benami Transaction (Prohibition) Act, 1988. The oral and documentary evidence may be in support of the plaintiff to substantiate his contention that there has been admissions made by the defendant in the form of writings under Ex.A27 and Ex.A34. Whether such facts proved by admission will be enough to get over the statutory bar

provided under a law enacted by the Parliament, which came into force subsequent to the transaction? The first and second substantial questions of law lose their importance and they need not be answered if the other questions are answered in favour of the respondent/defendant. Consideration of questions 1 and 2 will arise only if the answer regarding the other questions are in favour of the appellant herein (plaintiff). Therefore, the other four questions, namely questions 3 to 6 are taken up together for consideration at the first instance. Out of questions Nos.3 to 6, the fourth question has been framed on the assumption that the person resisting the claim made by a person on the basis of benami transaction should establish that the transaction was a benami transaction so that the relief sought for by the other party will be negated. In fact, the questions tantamount to an exercise by which the burden of proof is sought to be cast on the person who is sought to be protected by Section 4 of the Benami Transactions (Prohibition) Act, 1998. For better appreciation, Section 4 of the Benami Transactions (Prohibition) Act is reproduced:-

"4.Prohibition of the right to recover property held benami.- (1) No suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property.

(2) No defence based on any right in respect of any property held benami, whether against the person in whose name the property is held or against any other person, shall be allowed in any suit, claim or action by or on behalf of a person claiming to be the real owner of the property.

(3) Nothing in this section shall apply,-

(a) 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

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

14. It provides a total bar for entertainment of a suit or a claim or an 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, by or on behalf the person claiming to be the real owner. Clause (2) also provides that any one claiming to be the real owner cannot take a plea of defence that he is the real owner as against the person in whose name the property is held or against any other person. A consideration of this provision will make it clear that the burden is not cast on the person in whose name the property stands or any other person who is having the property against whom the relief is sought for to prove that he is not a benami and the property is not held by him benami. On the other hand, if a person claims to be the real owner when the property stands in the name of the other person, the onus is cast upon him to prove that it is not based on any benami transaction prohibited by the Act. The very plea made by the plaintiff in the case on hand is nothing but a plea of benami transaction in the name of his brother. Of course, without straightaway pleading that he purchased the property benami in the name of his brother, he has chosen to take a stand that it was a joint purchase by himself and his brother for which purchase both equally contributed.

15. Section 4 subclause (3) contains only two exemptions:-

The first exception is 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 joint family, then the other coparceners in the family and other members of the family can very well claim that though the property was purchased in the name of one of the coparceners it was the purchase made by the Hindu undivided family itself. The second one is that when the person in whose name the property is held is a trustee for the person claiming to be the real purchaser or that the person in whose name the property is held stands in a fiduciary capacity vis-a-vis the person claiming to be the person for the benefit of whom the property was purchased. Relying on the second exception provided under sub-clause (3)(b), learned counsel for the appellant (plaintiff) wanted to contend that the defendant was in a fiduciary capacity vis-a-vis the plaintiff and hence the plaintiff is not barred from taking a plea that the purchase made by his brother was for his benefit also. In support of his contention, learned counsel for the appellant / defendant cited the judgment of a learned single Judge of this Court in Patur Venkateseshayya V. Dubagunta Subrahmanyam and others reported in AIR (38) 1951 Madras 547 [C.N.158.]. In the said case it was held as follows:

"Where two persons jointly purchase a property in the name of one of them, and the person in whose name the property is purchased sells the property and keeps the sale proceeds with himself, he is a trustee for the share of the proceeds belonging to the other. There is an equitable obligation traceable to the resulting trust."

Relying on the said observation, the learned counsel for the appellant wants to submit that having placed his funds with his brother, namely the defendant with the intention that the purchase of the property will be made for the common benefit of the plaintiff and the defendant, he could very well contend that the defendant was a trustee of the plaintiff so far as the fund provided by him. As a corollary to the said contention, the learned counsel contends further that the purchase made by the defendant in his own name should be construed to be a purchase made by a person who was in the possession of a trustee of the plaintiff and hence the plaintiff is a person falling under exception (b) under sub-clause (3) of Section 4 of the Benami Transactions (Prohibition) Act, 1988.

16. This Court is unable to accept the above said contention raised by the learned counsel for the appellant/plaintiff. The reason is that judgment cited by the learned counsel for the appellant came to be pronounced more than three decades prior to the passing of the Benami Transactions (Prohibition) Act, 1988 and when the benami transactions were recognized as legal transactions. The said judgment shall have no application to the case on hand in the light of the fact that the present case is to be decided on the basis of the provisions of the Benami Transactions (Prohibition) Act, 1988. The Act itself came to be enacted with the object of preventing purchases by one person in the name of another person. It is also intended to do away with the problem of third parties dealing with the persons holding the property in their own names. The Act is intended to prohibit all kinds of benami transactions subject to certain exceptions, making it a punishable offence, besides making the property acquired under benami transactions to be confiscated by the State without compensation as Section 5 of the Act provides that the Government can acquire the property without making any payment of compensation. While attempting to prohibit the benami transactions, the legislature was also alive to the prevailing social conditions and the same was the reason why two exceptions have been provided under Section 4 sub-clause (3). A joint family acquiring a property in the

name of one of the coparceners is one of the exceptions. It is not the case of the appellant herein/plaintiff that he and the defendant constituted a joint family of which both of them were the coparceners; that the purchase made in the name of the defendant shall be a purchase made in the name of one of the coparceners and that thus, Section 4 sub-clause 3(a) provides an exception for his claiming a share in it.

17. On the other hand, the learned counsel for the appellant (plaintiff) has made an attempt to convince the Court that the transaction squarely falls under sub-clause (b) of Section 4(3) of Benami Transactions (Prohibition) Act, 1988. The said contention, according to the considered view of this Court, is also not tenable. How the defendant could be considered to be in a position of a trustee or otherwise in a fiduciary capacity vis-a-vis the plaintiff?— has not been clearly explained by the plaintiff/appellant to the satisfaction of the Court. The learned counsel for the plaintiff/appellant would simply submit that both of them, due to their employment resided at one and the same place under a same roof and in those circumstances, the defendant being the plaintiff's own brother, who is elder by just three years, was given the management of the affairs of the family and that under the said circumstances, he should be construed to be a person standing as a trustee for the plaintiff. It is not the case of the plaintiff that the plaintiff suffered from any incapacity from acting on his own behalf in the matters of purchasing properties and disposing of his funds. It is also not the case of the appellant/plaintiff that both of them constituted a partnership in which the principle of mutual agency may be invoked. Admittedly, there are other brothers of the plaintiff and the defendant. Hence, there shall be no question of constitution of a joint family by act of parties. The hindu undivided family concept and the concept of coparcenary is a legal consequence which is not depending upon the Will of the parties. It is a creation of law and such a relationship cannot be created by agreement as it could be done under the Dayabhaga school of thought. Suppose the plaintiff, being a non-resident, was not in a position to purchase the property in his own name, and he sends the amount to his brother with the instruction and authorization to purchase the property in the name of the plaintiff as his power of attorney holder and the defendant purchases the property in his own name, the plaintiff can come with a plea that there was relationship of trustee and beneficiary and that such trust was violated and hence, he can come under the exception (b) of Section 4(3). Similar is the case when the plaintiff is a minor and the purchase is made by the guardian

with the funds of the minor. In such a case, it can be said that he is in a fiduciary capacity vis-a-vis the minor. By no stretch of imagination such a relationship can be construed to be present between the defendant and the plaintiff. Hence, the contention of the plaintiff that his brother, namely the defendant stood in a fiduciary capacity vis-a-vis the plaintiff cannot be countenanced.

18. The learned lower appellate Judge, on a clear understanding of the principle of law and proper application of the same, came to a correct conclusion that the plea raised by the plaintiff is nothing but a plea which is barred under Section 4 of the Benami Transactions (Prohibition) Act, 1988 and that his case did not fall under either of the exceptions provided therein. Hence, all the substantial questions of law ranked as 3 to 6 are bound to be answered accordingly in favour of the defendant/respondent in the second appeal and against the plaintiff / appellant in the second appeal. In view of the answer given to substantial questions of law 3 to 6, substantial questions of law 1 and 2 need not be answered. The decree of the lower appellate Court setting aside the preliminary decree passed by the trial Court directing division of the suit property into two equal shares and allotment of one such share to her cannot be said to be erroneous or infirm liable to be interfered with by this Court in the second appeal.

19. So far as the reliefs of past and future mesne profits is concerned, both the Courts concurrently and rightly held that the appellant/plaintiff was not entitled to the said reliefs. The reason assigned by the trial Court is to the effect that since he was in possession of a portion of the property, he was not entitled to mesne profits. However, the lower appellate Court turned down the said plea also on the ground that the plaintiff was not entitled to claim to be in joint owner of the suit property. When a plea of title to half of the suit property is negatived, there shall be no question of sustaining his plea of mesne profits past, pendente lite or future. Hence, the rejection of the plea for mesne profit shall follow the dismissal of the plea for partition.

20. However, the plaintiff has chosen to pray for a decree directing the defendant to pay a sum of Rs.15,000/- being the share of the defendant for the discharge of the loan availed from the Karanodai Cooperative Housing Society and a sum of Rs.196.50 being the property tax paid by the plaintiff in respect of the suit property. Admittedly, Ex.A36-Mortgage

deed came to be jointly executed by the defendant, plaintiff and the plaintiff's wife. Though a plea in the plaint has been taken to the effect that the plaintiff and his wife joined in execution of the mortgage as guarantors, the plaintiff has taken a clear plea that it was he who paid the balance amount due to the above said society and such payments made by him under Exs.A29 to A32 account for Rs.30,000/-. When his plea for partition on the basis that he is entitled to $\frac{1}{2}$ share in the property is negatived, he shall be entitled to recover the entire money paid by him towards the discharge of the mortgage. Such a claim was also made within the period of limitation from the date of payment of the amount by the plaintiff towards the discharge of the mortgage debt. A claim in respect of the entire amount paid by the plaintiff can be sustained in full. But, since the plaintiff has restricted his claim to only Rs.15,000/-, this Court cannot grant the relief for recovery of money more than the said amount. So far as the payment of property tax is concerned, there is no concrete evidence to show that the plaintiff paid the same on the request of the defendant or in order to protect his own interest in respect of the suit property. Hence, the rejection of the prayer for a direction to make payment of Rs. 196.50 towards the amount allegedly paid by the plaintiff as property tax in respect of the suit property cannot be found fault with. Even though the plaintiff has not claimed any interest, under equity, this Court can award interest from the date of plaint till the date of payment at the rate of 6% per annum as per Section 34 of the Code of Civil Procedure.

21. In the result, the second appeal is allowed in part. The decree of the lower appellate Court is modified as follows:- the suit shall stand dismissed in respect of the prayers for partition, mesne profits, both past and future and in respect of the prayer for recovery of a sum of Rs.196.50 allegedly paid towards property tax. The suit shall stand partly decreed and there shall be a decree in respect of Prayer No.(d) alone directing the second respondent herein to pay a sum of Rs.15,000/- with an interest at the rate of 6% per annum from the date of plaint till the date of payment from the properties that came to her hands from her husband. No costs.

Sd/-

Assistant Registrar (CS-V)

//True Copy//

Sub Assistant Registrar

gpa

To

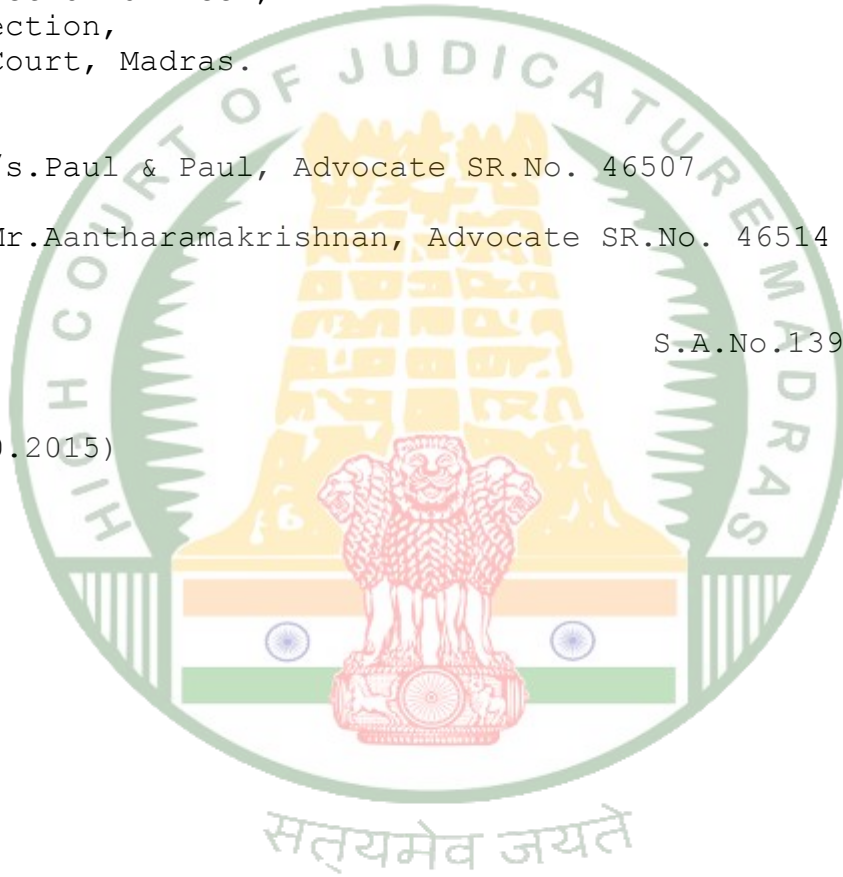
1. The Principal District Judge,
Chingleput.
2. The Subordinate Court,
Tiruvallur.
3. The Section Officer,
V.R.Section,
High Court, Madras.

1 CC to M/s.Paul & Paul, Advocate SR.No. 46507

2 CCs to Mr.Aantharamakrishnan, Advocate SR.No. 46514

S.A.No.1393 of 2000

PUR (CO)
PSI (28.10.2015)



WEB COPY