

(2011) 07 MAD CK 0396

In the Madras High Court

Case No : A.S. No. 716 of 2008 and M.P. No's. 1 of 2008 and 1 of 2009

K. Indirani and Others

APPELLANT

Vs

K. Manjula, K.S. Sumathi, D. Malathi and K. Jayalakshmi

RESPONDENT

Date of Decision : 22-07-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 16
Hindu Succession Act, 1956 — Section 30
Registration Act, 1908 — Section 16
Specific Relief Act, 1963 — Section 39
Transfer of Property Act, 1882 — Section 6, 6
Trusts Act, 1882 — Section 3, 90

Citation : (2011) 07 MAD CK 0396

Hon'ble Judges : T. Mathivanan, J

Bench : Single Bench

Advocate : S. Ramanarayanan, for Sampath Kumar Associates, for the Appellant; R. Subramanian, for Hemalatha, for R1 to R3, for the Respondent

Final Decision : Dismissed

Judgement

T. Mathivanan, J.—The Appellants are the Defendants 1 to 4, 6 and 7 in the suit in O.S. No. 9491 of 2006, on the file of the learned VII Additional Judge, City Civil Court, Chennai.

2. Impugning the judgment and Decree dated 30.06.2008, granting preliminary decree that the Plaintiffs are entitled to 3/9th share in the plaint schedule property, the Appellants have preferred this appeal before this Court.

3. The facts, which absolutely necessary for the disposal of this appeal are as under:

The legal character of the parties to the suit need not be changed and let them be referred as it is in the suit.

3.1. The first Defendant is the mother of the Plaintiffs, whereas the Defendants 2

to 4 are their brothers and the 5th Defendant is their sister. The Defendants 6 and 7 are the legal heirs of their deceased brother Jeeva rathinam. Their father Late.K. Rangaswamy was employed in the State Bank of India as Branch Manager. He got allotment of property in Plot No. 21, Door No. 42 (Old Door No. 20), State Bank of India Officer's Colony, 2nd Street, Perambur High Road, Chennai-600 012 by the State Bank of India, Madras Circle Supervising Staff Co-operative Building Society Ltd., Chennai-600 001 (hereinafter may be referred to as the Society) and was in possession and enjoyment of the same. He died intestate on 06.09.1981 and left the property in land and building in the a forestated plot to be succeeded by his legal heirs.

3.2. Since the first Defendant is the nominee of their father Late.K. Rangaswamy, the Society had issued a Sale Deed dated 14.07.1982 in the name of the first Defendant and however the property is for the benefit of the entire family members viz. the legal heirs of Late.K. Rangaswamy. The Plaintiffs and the Defendants as the legal heirs of Late.K. Rangaswamy are entitled to the suit property and as such they are entitled to get their respective shares viz. each 1/9th share (Plaintiffs 1 to 3 and the Defendants 1 to 5 each entitled to get 1/9th share, whereas the Defendants 6 and 7 are jointly entitled to get 1/9th share) since their respective shares are governed and ascertained as per the Hindu Succession Act, 1956.

3.3. The third Plaintiff is in possession of the part of the suit property and is permanently residing there in exercise of her right to her share in the suit property. The Plaintiffs as Class-I legal heirs and as daughters of the deceased Late.K. Rangaswamy are entitled to 1/9th share in the suit schedule property.

4. The fifth Defendant had not chosen to contest the suit as she remained *ex parte* before the Trial Court. The Defendants 1 to 4, 6 and 7 have alone filed their written statement and contended that the plaint is liable to be rejected under Order VII Rule 11 of the CPC as there is No. cause of action for filing the suit and apart from this they have also contended that the suit is barred by limitation. The pleadings are to be struck down under Order VI Rule 16 of the CPC especially under Order VI Rule 16(a) and Order VI Rule 16(c).

4.1. Mr. K. Rangaswamy had passed away on 06.09.1981. At the time of his death, he had No. title in the suit schedule property. He had only a right to get the property from the Society by virtue of allotment. Even during his life time, he could not have transferred the property to anyone u/s 6(e) of the Transfer of Property Act. Before his death, he had nominated his wife Smt. K. Indirani, who is the first Defendant, and by virtue of her nomination she became the shareholder of the Society. The sale deed was registered by the Society only on 14.07.1982 in the name of the first Defendant. The suit was filed on 02.12.2006. Hence, it is thus clear that the suit schedule property never intended for the benefit of the family.

4.2. The nomination is only in respect of share so as to enable the first

Defendant to become a member of the Society. The question of co-ownership does not arise in this case as the first Defendant became the sole and absolute owner of the suit schedule property from 14.07.1982.

4.3. The 3rd Plaintiff was never in possession as co-owner of the suit schedule property. The facts remain is that she came to be a tenant in respect of the portion of the suit schedule property for a paltry sum of Rs. 300/- as rent. The first Defendant was forced to file a petition in R.C.O.P. No. 1142 of 2006 against her on the ground of willful default. In fact, the first Defendant had executed a settlement deed dated 22.05.2006 in favour of the Defendants 2 to 4 and 7 in respect of the suit schedule property and hence they can deal with the property in any fashion, they like.

4.4. Even the sale deed was executed by the Society only after the first Defendant had remitted a sum of Rs. 2,852/-. Barring the first Defendant, nobody had paid any amount to any Government Department. In any event, the first Defendant had perfected her title by adverse possession with regard to the suit schedule property.

5. Based on the pleadings of the parties to the suit, the Trial Court had formulated two issues as detailed here under:

1. Whether the Plaintiffs are entitled to get their separate share as prayed for in the suit?

2. To what relief are they entitled?

In order to substantiate their respective cases both the Plaintiffs and the Defendants 1 to 4, 6 and 7 were put on trial. The first and third Plaintiffs had examined them selves as P.W.1 and P.W.2 respectively. During the course of their examination Exs.A1 to A16 were marked. On the other hand, the second Defendant was examined as D.W.1 and during the course of his examination Exs.B1 to B17 were marked.

6. On appraising the evidences both oral and documentary the Trial Court had proceeded to pass a preliminary decree on 30.06.2008 with a finding that the Plaintiffs are entitled to get their 3/9th share in the suit schedule property.

7. Now the preliminary decree has been challenged by the Defendants 1 to 4, 6 and 7 in this appeal.

8. Heard Mr. S. Ramanarayanan, Learned Counsel for Appellants/Defendants 1 to 4, 6 and 7 and Mrs. S. Hemalatha, Learned Counsel for Mr. R. Subramanian, Learned Counsel on record for the Respondents 1 to 3.

9. The present appeal seems to have been based on the following grounds:

i. The first Defendant being the wife of Late.K. Rangaswamy is the member of the Society.

ii. Her nomination is only in respect of membership and not in respect of the

property.

iii. On the date of death of Mr. K.Rangaswamy, he was not the owner of the suit schedule property and as such he cannot bequeath his right to sue for specific performance in favour of any one.

iv. The Plaintiffs ought to have filed necessary suit for setting aside the sale deed 14.07.1982 if it is found to be illegal.

v. No partition suit could be filed by the Plaintiffs without setting aside the said sale deed.

vi. Suit for partition could be filed only on the following two circumstances:

a. When a property is inherited by heirs, who became co-owners,

b. When the property has been purchased jointly by two or more persons,

vi. To adjudge the disputes between the parties, the principles envisaged u/s 6(e) of the Transfer of Property Act is necessarily to be considered.

vii. The sale deed was executed on 14.07.1982. The Plaintiffs have filed the suit on 02.12.2006 i.e. after 24 years and 5 months. Hence, the suit is hopelessly barred by limitation.

viii. The suit could not be filed to set aside the settlement executed by the first Defendant in favour of the Defendants 2 to 4 and 7.

10. Ex.A1 is the sale deed dated 14.07.1982 in respect of the suit schedule property executed by the Society, represented by its Vice-President R. Rajabather in favour of Smt.K. Indirani, wife of Late.K. Rangaswamy, who is the first Defendant. It appears from the document that Late.K. Rangaswamy was the member of the Society from 06.12.1962 and his membership number is 26. It also appears that the first Defendant K. Indirani is the nominee and legal heir of Late .K. Rangaswamy. It is seen from his document that Late K. Rangaswamy had availed a loan of Rs. 25,000/- from the Society for the purpose of putting up construction in the Plot No. 21, which is in dispute in this suit.

11. In accordance with the terms and conditions of the articles of the agreement dated 12.02.1967 executed by him in favour of the Society Late K. Rangaswamy had repaid the said amount in full to the Society and therefore the Society had conveyed and assigned the schedule mentioned property under the above said sale deed.

12. Ex.A2 is the certificate of death in respect of Late. K. Rangaswamy. It reveals that the date of death of Late. K. Rangaswamy is 06.09.1981. It is apparent that since K. Rangaswamy had passed away on 06.09.1981, the Society happened to execute the sale deed under Ex.A1 in favour of the first Defendant K. Indirani, who is none other than the wife and nominee of Late K. Rangaswamy.

13. The expression "Nominee", in Black's Law Dictionary, 6th Edition, at Page

No. 1050, has been defined as under:

One who has been nominated or proposed for an office. One designated to act for another to his or her place.

14. In this backdrop, Mr. S. Ramanarayanan, Learned Counsel for the Defendants has contended that the all ottee viz. Late K. Ramaswamy had died on 06.09.1981 even prior to the registration of the sale deed under Ex.A1 (Ex.B4). He has also submitted that after his demise, the sale deed was registered on 14.07.1982 by the Society in favour of the first Defendant as she only had paid a sum of Rs. 2,852/-towards the members loan account. Ex.B3 is the receipt issued by the Society to that effect. In this receipt, it has been worded as "Received from Mrs. K. Indirani a sum of Rs. 2,852 (Rupees Two thousand eight hundred and fifty twoonly) in respect of the following Members Loan Account forfull settlement." The details given in the receipt hasbeen shown in the tabular column given below:

S. No.

Name of the member/Scheme

Principal

Interest

Other Charges

Total

Rs.

P.

Rs.

P.

1.

O/A.K.RangaswamyPerambur, SB/BW 283532

2780

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12

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InsuranceRs.

Rs

P.

Rs

P.

Rs.

P

60/-

2852

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From Ex.B3 it is crystal clear that a sum of Rs. 2,852/-wascollected from the first Defendant K. Indirani in respect of the members loan account of Late K. Rangaswamy, Perambur, SB/BW 283532. In this connection, the Learned Counsel for the Plaintiffs has raised a question as to whether the deceased K. Rangaswamy was the owner of the property at the time of his death?

15. In Paragraph No. 6 of the plaint, the Plaintiffs have stated that after the death of their father Late K. Rangaswamy, the Society had issued a sale deed dated 14.07.1982 in the name of the first Defendant as she was the nominee and however the property is for the benefit of the entire family members viz. the legal heirs of Late K. Ragaswamy.

16. In fact, the Learned Counsel for the Defendants has given different dimension to the expression "nominee" and submitted that the first Defendant was nominated for the membership of her husband Late K. Rangaswamy to receive the sale deed in her favour from the Society. He has also added that since she being the nominee of her husband and received the sale deed in her favour in respect of the suits chedule property from the Society, she had become the absolute owner of the property and therefore the Plaintiffs are not entitled to get any share much less 3/9th share

collectively.

17. The Learned Counsel for the Defendants has also maintained that Ex.B3 receipt would go long way to establish the fact that the first Defendant had paid a sum of Rs. 2,852/-towards the membership fee. He has also adverted to that she was recognised by the Society as its member and only under this circumstance the sale deed under Ex.A1(B4) was executed by the Society in favour of the first Defendant.

18. The Learned Counsel for the Defendants would further submit that it is not possible to discern that the Plaintiffs' respective share has been ascertained as per the Hindu Succession Act, 1956. He has also maintained that the question of inheritance would come into operation only if the deceased viz. Late K. Rangaswamy had title to the property or not otherwise.

19. During the course of his arguments, the Learned Counsel has also made

reference to Section 6(e) of the Transfer of Property Act, 1882, which enacts as follows:

6. What may be transferred.-Property of any kind may be transferred, except as otherwise provided by this Act or by any other law for the time being in force,-

(e) A mere right to sue cannot be transferred;

20. The Learned Counsel has also adverted to that since the first Defendant being the absolute owner of the property had executed a settlement deed (Ex.B13) in favour of the Defendants 2 to 4 and 7 on 22.05.2006 and therefore the suit filed by the Plaintiffs, without seeking for cancellation or setting aside the above settlement, is not maintainable.

21. In so far as this portion of argument is concerned, it has become imperative on this Court to refer the evidence of P.W.1 in her chief-examination. In Paragraph No. 11 of her proof affidavit, she would state that the first Defendant is not the absolute owner of the suit schedule property and as one of the Class-I legal heir of Late K. Rangaswamy, the first Defendant is having only 1/9th share in the suit schedule property and as such the execution of settlement deed dated 22.05.2006 (Ex.B13) registered as document No. 2073 of 2006, at the office of the Sub-Registrar of Purasawalkam by the first Defendant in favour of the Defendants 2 to 4 and 7 is invalid and not binding on the Plaintiffs and it will not take away the right of the Plaintiffs for claiming partition of the suit schedule property. She has also deposed that the first Defendant is having only 1/9th share in the suit schedule property and she therefore can deal only with her 1/9th share in the suit schedule property and hence the settlement deed dated 22.05.2006 is invalid and not binding on the Plaintiffs.

22. On coming to her cross-examination, a suggestion was put to P.W.1 when she was in the witness box stating that her mother first Defendant did not execute settlement deed in favour of the Defendants 2 to 4 and 7 for which P.W.1 had replied that she did not know about the details of the settlement. In this regard, it is pertinent to note here that the Defendants alone had contended in their written statement that on 22.05.2006 the first Defendant had executed a settlement deed in favour of the Defendants 2 to 4 and 7 and without seeking the relief of setting aside the document or cancelling the said settlement deed, the suit is not maintainable, but entirely contrary to the own pleadings.

23. During the course of cross-examination of P.W.1, the Learned Counsel for the Defendants before the Trial Court had put a suggestion that the first Defendant had not executed the settlement deed. This kind of suggestion would go to expose that the Learned Counsel has not properly understood the intrinsic value of the case of the Defendants.

24. Ex.B13, the alleged settlement deed is the registered document. It is the settled principle of law that a person, who does not have either any interest or title over a particular property, cannot transfer it in favour of another person. It

is also important to note here that Sub-clause (a) to Section 6 of the Transfer of Property Act, 1882 contemplates that the chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature, cannot be transferred. In Sub-clause (d) also it is contemplated that all interest in property restricted in its enjoyment to the owner personally cannot be transferred by him.

25. With regard to the arguments advanced on behalf of the Defendants, a core question has been arisen as to whether the first Defendant having obtained a document much less a sale deed in respect of the suit property in her favour can be construed as the real owner of the property? If there is any legal evidence to show that she is the absolute owner of the suit property, there will not be any impediment to transfer the property by way of Ex.B13, settlement deed, in favour of the Defendants 2 to 4 and 7.

26. When she is not the absolute owner of the suit schedule property, what will be the value and effect of Ex.B13 settlement deed? Will it be construed as void ab initio document as contemplated u/s 31 of the Specific Relief Act, 1963? In this connection, this Court would like to place reliance upon a decision reported in Prem Singh and Others Vs. Birbal and Others, . In this case, while writing the judgment on behalf of the Division Bench, His Lordship the Hon'ble Mr. JUSTICES.B. SINHA at Paragraph Nos. 14 to 16 has held as under:

14. A suit for cancellation of instrument is based on the provisions of Section 31 of the Specific Relief Act, which reads as under:

31. When cancellation may be ordered.-(1) Any person against whom a written instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it adjudged void or voidable and the court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.

(2) If the instrument has been registered under the Indian Registration Act, 1908 (16 of 1908), the court shall also send a copy of its decree to the officer in whose office the instrument has been so registered; and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation.

15. Section 31 of the Specific Relief Act, 1963 thus, refers to both void and voidable documents. It provides for a discretionary relief.

16. When a document is valid, No. question arises of its cancellation. When a document is void ab initio, a decree for setting aside the same would not be necessary as the same is non est in the eye of the law, as it would be a nullity.

27. Ex.A5 is the legal notice dated 01.02.2006 issued on behalf of the Plaintiffs to the Defendants and there by they were called upon to effect a partition of the suit schedule property and allot 3/9th share in favour of the Plaintiffs. Ex.A7 is the reply sent by the Defendants repudiating the claim of the Plaintiffs. Ex.A8 is there joinder issued on behalf of the Plaintiffs to the Defendants and thereby the

Plaintiffs had reiterated their claim of partition. Ex.A16 is the certified copy of the petition in R.C.O.P. No. 1142 of 2006. From this document, it appears that this petition was filed by the first Defendant against the third Plaintiff D. Malathi u/s 10(2)(i) of Tamil Nadu Buildings (Lease and Rent)Control Act seeking for eviction from the petition property on the ground of wilful default.

28. In this connection, D.W.1 in his cross-examination has admitted that in the year 2006, the Plaintiffs had issued a legal notice through their counsel claiming partition. Pertaining to this answer, two suggestions were made to him by the Learned Counsel for the Plaintiffs in the Trial Court, for which D.W.1 had answered (i) it is not correct to state that the first Defendant had initiated R.C.O.P. proceedings against the third Plaintiff only after the receipt of the notice from the Plaintiffs claiming partition and (ii) it is not correct to state that Ex.B13, settlement deed, was executed only after the receipt of the notice in the year 2006. Another two suggestions were also put to D.W.1 during the course of his cross-examination, for which, he had answered as follows:

- i. It is not correct to state that Ex.B13 settlement deed was not valid and it would not curtail the rights of the Plaintiffs over the suit schedule property, and
- ii. It is not correct to state that Ex.B13 was fabricated only to defeat the rights of the Plaintiffs.

29. During the course of his arguments, the Learned Counsel for the Defendants has drawn the attention of this Court to Ex.B16. It is seen from this document that it is the form of return for small estates where a grant of representation is not required and exemption from Estate Duty is claimed by reason of the smallness of the estate. In this document, in the Annexure column, it is stated as Late Shri K. Rangaswamy's Estate Duty Assessment, date of death is 06.09.1981. It further reads as follows:

Shri K. Rangaswamy was the Branch Manager of the State Bank of India, Hospet Branch. He had a sudden end by Heart-attack. He was 57 years old. He was a permanent resident of Madras and had a short posting at Hospet. (say about one month orso.) He died intestate. He had No. ancestral properties. All his estates were self acquired.He left the following members of his family who are his legal heirs:

Wife :

Mrs.K.Indirani, aged 54 years

Sons :

1.

Jeevarathnam. K

Assistant ? S.B.I., Mount Rd. Madras. (36)

2.

Umasankar.K

Assistant ? BOBL., Mount Rd. Madras. (33)

3.

Udayakumar.K

Assistant ? S.B.I. Madras Main Br. Mds. (29)

4.

Venkatakrishnan.K

Not yet employed. (20 years)

Daughters:

1.

K.Jayalakshmi

Age 34-married to Sh.Koteswaran, Head-Cashier, S.B.I.Chingleput,

2.

K.Manjula

Age 31-married to Sh.Mahesh- Mahendra-income tax department, Poona,

3.

K.Sumathi

Age 25 years, unmarried,

4.

K.Malathi

Age 23 years, un-married,

Under the caption of immovable properties, it is stated as follows:

House No. 20, State Bank Officer's Colony, Perambur High Road, Madras-600 012. Readily built house was allotted to Mr. K. Rangaswamy by State Bank Co-operative Housing Society without transferring the title deeds in his favour. Because, he should have liquidated the housing loan fully. In this connection, please also refer to my previous letters dated 11.02.1983 addressed to you which states that Shri.K. Rangaswamy was not absolutely holding legal title on that immovable property. Because, he was liquidating partly to wards the housing loan when he was alive. At the time of his death, Shri K. Rangaswamy was indebted a sum of Rs. 2,852 towards Housing Society. Hence, the Co-operative Society was not given to transfer deed/sale deed in favour of Shri K. Rangaswamy. On 24.02.1982, Smt. K. Indirani had liquidated the remaining

balance and was holding absolute title deeds only after 6th September, 1981. In other words, Shri K. Rangaswamy was not having any power to transfer or sale or mortgage his house property due to above prevailing circumstances. Hence, legally, you should not compute while assessing his property (House).

30. When D.W.1 has spoken about this document, during the course of his cross-examination, he would depose that Ex. B16 is related to payment of estate duty. In this connection, he would also depose that all the legal heirs of Late. K. Rangaswamy were benefited by his retirement. He has also admitted that his mother viz. D1 was not at all employed. He has also categorically admitted that in Column No. 14 of the above said document the stamp duty, registration on passing immovable property of House 20, S.B.I. Madras-12 was shown as loan outstanding with S.B.I. Madras, Main Branch on the security of LIC policies. In this connection, he would depose that the amount was also paid as the loan amount of his father. He has also admitted that excepting the suit property No. other property was owned by his father.

31. While advancing his arguments, the Learned Counsel has also taken this Court through the testimonies of P.W.1, P.W.2 and D.W.1 as well. He has also taken this Court through the judgment of the Trial Court. At Page No. 9, the Trial Court has referred a decision of the Apex Court in Shri Vishin N. Kanchandani and Another Vs. Vidya Lachmandas Khanchandani and Another, . After going through the above cited decision, the Trial Court has referred the middle portion of Paragraph No. 13, in which the Apex Court has held as follows:

Any amount paid to the nominee after valid deductions becomes the estate of the deceased. Such an estate devolves upon all persons who are entitled to succession under law, custom or testament of the deceased-holder.

32. After referring this decision, the Trial Court has observed in Paragraph No. 9 of its judgment stating that on the footing of the above cited decision though Ex.A1 sale deed has been written in the name of the first Defendant being the nominee of Late K. Rangaswamy, it should be construed that all the heirs of Late K. Rangaswamy are having rights over the suit property. In this regard, the Learned Counsel for the Defendants has contended that the decision in Shri Vishin N. Kanchandani and Another Vs. Vidya Lachmandas Khanchandani and Another, would not be made applicable to the present case on hand. The applicability of the decision to the instant case on hand would be discussed in the latter paragraphs.

33. Ex.B1 is the Bye-Laws of the Society. Clause 5 of the Bye-Laws deals with the membership of the Society Clause (b)(ii) stipulates that wives of the members of the category mentioned in bye-law 5(i)(i)(a) and (b) jointly with their husbands in accordance with these bye-laws; such members shall be called "ordinary members". Clause 5(e) deals with the qualifications of the membership. Clause 9 recites that No. member shall be permitted to transfer any share held by him unless the transferee be a member or some person whom the

Board of Directors is willing to admit as a member and provided in any case that the transfer of a share shall not be operative unless and until it is sanctioned by the Board of Directors. Clause 10(1) says that if a member dies, his membership shall ipso facto cease. Clause 10(2)(a) reads that every member of the society may nominate any person to succeed, in the event of his death, to his share or interest in the society. Such nomination shall, in the event of his death be given effect to by the Board of Directors provided.

(i) The nomination was signed by the deceased in the presence of at least two witnesses attesting the same.

(ii) The nomination has been registered in the books of the society kept for the purpose; and

(iii) The person nominated shall have been admitted by the Board of Directors as a member of the society under bye-law 6.

34. The Learned Counsel has also made reference to Clauses 36 and 37 of the Bye-laws, which reads as follows:

Purchase of Land and Construction of Houses

36. Subject to such resolutions as the general body of members may from time to time pass, the Board of Directors shall have full power to do all things which it deemed necessary expedient for the accomplishment of all the objects specified in bye-law 2, including power to purchase, hold sell, exchange, mortgage, rent, lease, sub-lease, surrender, and accept surrenders of land or houses and to construct houses.

Purchase of land

37. It shall be competent for the Board of Directors:

(i) to buy lands either from or through Government or otherwise;

(ii) to render the lands so purchased fit for habitation;

(iii) to lay down streets, roads and parcel out the lands as house-sites;

(iv) to sell or lease or otherwise deal with the sites, to members or others on such terms as it may determine and

(v) to acquire in the name of the society lands already standing in the name of the members or in the name of their dependents on such terms as it may determine, and

(vi) to provide the facilities for water supply drainage, lighting and similar works of common utility.

35. In this connection, the Learned Counsel for the Defendants has submitted that the first Defendant, after the demise of her husband, had become a member of the Society as she was nominated her husband and obtained the sale deed

under Ex.A1 in her name, and in pursuant there of she had become the absolute owner of the suit schedule property and therefore the Plaintiffs cannot stake claim much less partition over the suit property.

36. In support of his contentions, he has placed reliance upon the following decisions:

1 Ammaponnammal Vs. Shanmugam Pillai (Died) and Others, ,

2 Smt. Kusum Debi Jhinhani Vs. Smt. Pushpa Devi Khurda, ,

3 Kumari Baghyavathi Vs. Smt. Llakshmikanthammal (deceased) and others, ,

4 Kamakshi Ammal v. Rajalakshmi and 6 Ors., 19911 CTC 372,

5. P.R. Hemachandra Babu and Another Vs. P.R. Janardhanam (deceased) and Others, ,

6. Emaresan Vs. Radha, ,

7 Binapani Paul Vs. Pratima Ghosh and Others, ,

37. In Ammaponnammal Vs. Shanmugam Pillai (Died) and Others, , the single Judge of this Court has held that where the husband purchased the property in the name of the wife with the intention to benefit the wife and to make her the owner of that property, subsequent change of intention of the husband would not divest the wife of the title acquired by her under the sale deed.

38. The whole case in Smt. Kusum Debi Jhinhani Vs. Smt. Pushpa Devi Khurda, hinges around the proviso to Sections 69, 70(1) and 141 of West Bengal Co-operative Societies Act (38 of 1973), Section 8 of the Hindu Succession Act (30 of 1956) and Section 5 of the Transfer of Property Act, 1892. In this case, the deceased member had appointed one of his heirs as nominee in respect of his shares, membership and flat. After his demise, the property belonging to the deceased member stands transferred to nominee. Under this circumstance, it is held by the Calcutta High Court that if the membership of the co-operative society and the flat are transferred in favour of the nominee, they cannot by virtue of the Co-operative Societies Act, be transferred in favour of any other person. Even the property cannot be held by a person, who is not a member of the Society. Further-more the Act also provides that the provisions of said Act will supersede any other law. The intention of the Act is clear that the right to transfer in respect of the membership and the flat can be exercised during lifetime of the deceased member. In order to strike a balance between the Insurance Act and the Provident Fund Act, two decisions were placed reliance upon by the Learned Counsel for the Plaintiff while advancing his argument in the above cited case.

1 Smt. Sarbati Devi and Another Vs. Smt. Usha Devi, ,

2 Smt. Usha Majumdar and Others Vs. Smt. Smriti Basu, ,

In the former case viz. Smt. Sarbati Devi and Another Vs. Smt. Usha Devi, , the Apex Court at Page Nos. 349,350 and 352 has held that

We shall now proceed to analyse the provisions of Section 39 of the Act. The said section provides that holder of a policy of life insurance on his own life may when effecting the policy or at any time before the policy matures for payment nominate the person or persons to whom the money secured by the policy shall be paid in the event of his death. If the nominee is a minor, the policy holder may appoint any person to receive the money in the event of his death during the minority of the nominee. That means that if the policy holder is alive when the policy matures for payment he alone will receive payment of the money due under the policy and not the nominee. Any such nomination may at any time before the policy matures for payment, be cancelled or changed, but before such cancellation or change is notified to the insurer if he makes the payment bonafide to the nominee already registered with him, the insurer gets a valid discharge. Such power or cancellation of or effecting a change in the nomination implies that the nominee has No. right to the amount during the life time of the assured. If the policy is transferred or assigned u/s 38 of the Act, the nomination automatically lapses. If the nominee or where there are nominees more than one or the nominees die before the policy matures for payment or the money due under the policy is payable to the heirs or legal representatives or the holder of a succession certificate. It is not necessary to refer Sub-Section 7 of Section 39 of the Act here. But the summary of the relevant provisions of Section 39 given above establishes clearly that the policy holder continues to hold interest in the policy during his life and the nominee acquires No. sort of interest in the policy during the life time of the policy holder. If that is, so on the death of the policy holder, the amount payable under the policy becomes part of his estate which is governed by the law of succession applicable to him. Such succession may be testamentary or intestate. There is No. warrant for the position that Section 39 of the Act operates as a third kind of succession which is styled as a "statutory testament" in paragraph 16 of the decision of the Delhi High Court in Uma Sehgal and Others Vs. Dwarka Dass Sehgal and Others, . If section of the Act is contrasted with Section 38 of the Act which provides for transfer of assignment of the rights under a policy, the tenuous character of the right of a nominee would become more pronounced. It is difficult to hold that Section 39 of the Act was intended to act as a third mode of succession provided by the statute. The provision in Sub-section(6) of the Section 39 which says that the amount shall be payable to nominee or nominees does not mean that the amount shall belong to the nominee or nominees. We have to bear in mind here the special care which law and judicial precedents take in the matter of execution and proof of wills which have the effect of diverting the estate from the ordinary course of intestate succession and that the rig our of the rules governing the testamentary succession is not relaxed even where wills are registered.

39. In the later case viz Smt. Usha Majumdar and Others Vs. Smt. Smriti Basu, , the Division Bench of Calcutta High Court has held that the question that arose

for consideration was as to whether the nominee under the Provident Fund Act, received the amount absolutely to the exclusion of the heirs and legal representatives of the deceased account holder or that the nominee was a mere nominee to receive the money on behalf of the heirs and legal representatives of the deceased account holder as was the case under the Insurance Act. It was held in the said case as hereunder:

Having given our anxious consideration to the various provisions of the Provident Fund Act and the Scheme we are of the opinion that the status of a nominee under the Provident Fund Act is completely different from his counter-part under the Insurance Act. The most and striking difference about the status of the nominee under the two Acts is clearly discernible from Section 10(2) of the Provident Fund Act quoted earlier which expressly provides that the amount standing to the credit of a member of the Fund at the time of his death shall vest in the nominee and it shall be free from any debt or liability incurred by the deceased or the nominee before the death of the member. From Section 10(2) it is abundantly clear that immediately upon the death of the member the Provident Fund money becomes part of the assets of the nominee whereas under the Insurance Act after the death of the assured, the money continues to be his asset and the money which was standing to the credit of the member becomes free even from the debt or liability incurred by the nominee before the death of the member. Only because the money vested in and thereby became the property of the nominee after the death of the member such a provision was required to be incorporated as otherwise, being estate of the nominee, it was liable to be attached for debts or liabilities incurred by him prior to the death of the member. That the nominee under the Provident Fund Act, unlike the nominee under the Insurance Act, gets a right to the money, also has been made clear that by the provisions of paras 61 and 70 of the Scheme quoted earlier.

40. In Kumari Baghyavathi Vs. Smt. Llakshmikanthammal (deceased) and others, , the first Defendant Smt. Lakshmi kanthammal and the second Defendant Smt. Rajalakshmi Ammal are senior and junior widows of one late Srinivasalu Naidu who died intestate on 04.05.1980. The third Defendant Smt. Sarojini is the daughter of the first Defendant Smt. akshmikanthammal, while fourth Defendant Gajalakshmi is the eldest daughter of second Defendant Smt. Rajalakshmi Ammal. Plaintiff Baghyavathi is her youngest daughter. Srinivasalu Naidumarried the second Defendant Smt. Rajalakshmi Ammal as his second wife in the year 1948. While items 1 to 3 in the plaint schedule are the self acquired properties of Srinivasalu Naidu, the shipping and clearing agent businesss carried, on by him as sole proprietor is described as Item 4 in the plaint schedule. The parties herein alone are legal heirs of deceased Srinivasalu Naidu. The Plaintiff is entitled to 1/4th share in the said properties. Hence the suit for partition and separate possession of her one fourth share in the plaint properties and for directing the Defendants to pay her marriage expenses and for directing the Defendants 1 and 2 to render a true and proper account of the mesne profits and pay her due share therein.

41. In this case, the suit property was purchased in the name of step mother of Plaintiff by deceased father. While dealing with the scope and application of Section 4 of the Benami Transactions (Prohibition) Act (45 of 1988), this Court held that the Plaintiff cannot lay any claim in view of Section 4 to such house on ground that they stand in the name of step mother benami for her deceased father.

42. On coming to the instant case on hand, an important question has been arisen as to whether the ratio laid down in the above cited decision could be applied in the present case.

43. In Kamakshi Ammal's case 1991 1 CTC 372, while speaking on behalf of the Division Bench of this Court, the Hon'ble Mr. JUSTICE ABDUL HADI has referred the proviso to Section 3 of the Benami Transactions (Prohibition) Act (45 of 1988). Section 3 of the Benami Transactions(Prohibition) Act reads as follows:

3. Prohibition of benami transaction. -(1)No person shall enter into any benami transaction.

(2) Nothing in Sub-section (1) shall apply to the purchase of property by any person in the name of his wife or unmarried daughter and it shall be presumed, unless the contrary is proved, that the said property had been purchased for the benefit of the wife or the unmarried daughter.

(3) Whoever enters into any benami transaction shall be punishable with imprisonment for a term which may extend to three years or with fine or with both.

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, an offence under this section shall be non-Cognizable and bailable.

44. The learned Judge has also referred the decision of the Apex Court in Mithlesh Kumari v. Prem Behari Khare 1989 1 L.W. 430 (S.C.). In this case, it is held that Section 3 has only prospective in operation. The learned Judge has also referred to another decision in Nafeese Nachiar (Died) and 4 others v. Umma Habeeba Nachiar and 14 others (1994 1 L.W. 429 (D.B.)). In this case, it observed that in the light of the aforesaid provisions, the only way in which Sub-section (2) of Section 3 can be construed is that it enables a person to purchase property in the name of his wife or unmarried daughter without being liable to be prosecuted and in such cases, the property will not be liable for acquisition. It is only to protect a person who purchases property in the name of his wife and unmarried daughter for their benefit as against prosecution and compulsory acquisition of property, Section 3(2) has been introduced. Whenever a property is purchased by a person in the name of his wife or unmarried daughter, the Act provides for a mandatory presumption that the said transaction is for the benefit of wife or the unmarried daughter, as the case may be. In such cases, the burden is on the person who claims it to be a benami transaction for the benefit of the purchaser and not for the benefit of his wife or unmarried daughter to

prove the contrary and rebut the presumption. The Section does not mean that whenever a property is purchased in the name of a wife, it is open to the purchaser himself or persons claiming under him to put forward a case of benami.

45. The other decisions viz. P.R. Hemachandra Babu and Another Vs. P.R. Janardhanam (deceased) and Others, , Emaresan Vs. Radha, , Binapani Paul Vs. Pratima Ghosh and Others, are on the same line. Therefore, the ratio laid down in those cases need not be discussed elaborately.

46. The Learned Counsel for the Defendants has also made reference to the cross examination of P.W.1 as well as P.W.2 and urged that the suit be dismissed as not maintainable either in law or on facts.

47. On the other hand, Mr. R. Subramanian, Learned Counsel for Mrs. Hemalatha, Learned Counsel on record for R 1to R3/Plaintiffs would submit that the amount of Rs. 2,852/,as specified in Ex.B3 receipt, was paid from the retirement benefit of Late K. Rangaswamy. With regard to this, the Learned Counsel has also drawn the attention of this Court to Ex.B2 letter dated 22.02.1982 addressed by the first Defendant to the Secretary of the Society. In this letter, she has stated that she had enclosed a cheque for Rs. 2,852/-being the full settlement of her husband's housing loan. She had also requested the Secretary of the Society to release the title deeds in respect of the suit schedule property and transfer the same in her favour at the earliest possible. It is apparent that this letter was addressed to the Secretary of the Society after the death of her husband viz. Late K. Rangaswamy.

48. Ex.B3 is the receipt for having paid the above said amount of Rs. 2,852/-. Ex.B5 is the ratification letter dated 07.06.1988 addressed to the Revenue Officer, Revenue Department, Corporation of Madras, in which all the legal heirs of Late K. Rangaswamy have expressed their no objection to transfer the suit schedule property in the name of their mother K. Indirani.

49. With regard to Ex.B13 settlement deed, the Learned Counsel for the Plaintiffs would submit that the first Defendant, being the mother of the Plaintiffs as well as the other Defendants and being the nominee to receive the property in her name, had No. right to settle the property in favour of the Defendants 2 to 4 and 7. The Learned Counsel would submit further that the third Plaintiff has been residing in the same property and since the Plaintiffs are co-sharers along with the Defendants, the question of limitation would not arise. He has also submitted that neither the plea to ouster nor the plea of adverse possession would arise in this case, as the Plaintiffs are in joint possession along with the Defendants.

50. In order to fortify his contention, he has placed reliance upon the decision in P. Srinivasan and Anr v. P. Gopal and Anr., (2009) 3 MLJ 1120. In this case, the Plaintiffs had filed the suit against their brother, the first Defendant, for partition of the suit property on the plea that the suit property had been purchased by the first Defendant for the brothers benami in the name of the wife of the first Defendant. The Trial Court rejected the case of benami but granted a decree for

partition of the share of the Plaintiffs on the ground that the Defendant had acted in a fiduciary position in the purchase of the suit property and has to hold the property for the benefit of the Plaintiffs also. The Defendant appealed.

51. On hearing both sides, this Court has held that the finding of the Trial Court on the plea of benami has to be sustained but the decree for partition of the share of the Plaintiffs has to be upheld with a modification that the Plaintiffs should contribute their share of the consideration to the Defendant on the principles of Sections 88, 89, 90 of the Trusts Act. In matters of benami, the Courts have held the purchase price, motive or intention, relationship between parties, possession of property, and custody of title deeds are all important criteria.

52. This Court has also held that the Plaintiffs had no particular motive in purchasing the property in the name of the wife of their brother. They had No. money to advance for the purchase for their share the original title deeds were produced by the Defendants. Two important aspects, the relationship between the parties and possession of the property alone stand in favour of the Plaintiffs. But the other factors which must co-exist to support the case of benami do not exist. The finding by the trial Court on the plea of benami has to be upheld.

53. It is also held that even if the plea of benami purchase set up by the Plaintiffs is found against, still on the facts, evidence and circumstances of the case the suit could be sustained and a decree for partition upheld on the application of principles set out in Section 88, 89 and 90 of the Trusts Act. The fiduciary relationship can be spelt out by facts and circumstances of each case. Section 90 Trusts Act refers to a case of person having common vested interest and one person gains an advantage in derogation of the rights of the other person, by a sharp practice. It is based on the principles of constructive trust.

54. On coming to the instant case on hand, the Learned Counsel for the Respondents 1 to 3/Plaintiffs would submit that No. arguments could be based on the plea of benami setup. The plea of benami set up could not be made applicable to the instant case on hand. He would again reiterate his submissions that the first Defendant had taken the sale deed in the fiduciary capacity on behalf of other legal heirs and that the first Defendant therefore could not claim exclusive right over the suit schedule property.

55. With regard to this portion of arguments, it maybe relevant to refer the proviso to Sections 88 and 90 of the Indian Trusts Act. Sections 88 and 90 of the Indian Trusts Act reads as follows:

88. Advantage gained by fiduciary.-Where a trustee, executor, partner, agent, director of a company, legal adviser, or other person bound in a fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage, or where any person so bound enters in to any dealings under circumstance in which his own interest are, or may be, adverse to those of such other person and thereby gains for

himself a pecuniary advantage, he must hold for the benefit of such other person the advantage so gained.

90. Advantage gained by qualified owner-Where a tenant for life, co-owner, mortgagee or other qualified owner of any property, by availing himself of his position as such, gains an advantage in derogation of the rights of the other persons interested in the property, or where any such owner, as representing all persons interested in such property, gains any advantage, he must hold, for the benefit of all persons so interested, the advantage so gained, but subject to repayment of such persons of their due share of the expenses properly incurred, and to an indemnity by the same persons against liability properly contracted, in gaining such advantage.

56. The Learned Counsel for the Plaintiffs has also laid emphasis on Shri Vishin N. Kanchandani and Another Vs. Vidya Lachmandas Khanchandani and Another, . In this case, an important question was arisen before the Division Bench of the Apex Court as to whether the nominee specified in the National Savings Certificate, on the death of its holder does not become entitled to the sum due under the certificate to the exclusion of all other persons? or where the amount of the certificate can be retained by him for the benefit of the legal heirs of the deceased. For this question, the Division Bench of the Apex Court in Paragraph No. 13 has answered as follows:

13. In the light of what has been noticed hereinabove, it is apparent that though language and phraseology of Section 6 of the Act is different than the one used in Section 39 of the Insurance Act, yet, the effect of both the provisions is the same. The Act only makes the provisions regarding avoiding delay and expense in making the payment of the amount of the national savings certificate, to the nominee of holder, which has been considered to be beneficial both for the holder as also for the post office. Any amount paid to the nominee after valid deductions becomes the estate of the deceased. Such an estate devolves upon all persons who are entitled to succession under law, custom or testament of the deceased-holder. In other words, the law laid down by this Court in Smt. Sarbati Devi and Another Vs. Smt. Usha Devi, , holds field and is equally applicable to the nominee becoming entitled to the payment of the amount on account of national savings certificates received by him u/s 6 read with Section 7 of the Act, who in turn is liable to return the amount to those, in whose favour law creates beneficial interest, subject to the provisions of Sub-section (2) of Section 8 of the Act.

57. It is to be remembered that as discussed in the earlier paragraphs, two important pleas have been taken by the Defendants stating that:

(a) the suit is hopelessly barred by limitation, and

(b) the question of co-ownership does not arise in this case as the first Defendant became the sole and absolute owner of the suit schedule property from 14.07.1982.

As adumbrated supra the suit sale deed Ex.A1(B4) was executed on 14.07.1982 in the name of the first Defendant. The present suit was filed on 02.12.2006 ie. After 24 years 4 months and 18 days. Since the suit has been filed more than after 24 years, does it mean that the suit is barred by limitation? The relationship of parties to the suit are not in dispute. It is established that the third Plaintiff has been residing in a portion of the suit house.

58. In this connection, the Learned Counsel for the Defendants would contend that since the suit is filedal most after 24 years, the Trial Court ought to have dismissed the suit as barred by limitation. After giving careful consideration to this portion of arguments advanced by the Learned Counsel, this Court finds that it does not sound much.

59. No. doubt, the sale deed was executed in favour of the first Defendant on 14.07.1982. The contention of the Plaintiffs is that the sale was taken in the name of the first Defendant only for the benefit of the entire family members viz. the legal heirs of Late K. Rangaswamy. For the first time, the Plaintiffs had issued a legal notice dated 01.02.2006, under Ex.A5, calling upon the Defendants for effecting partition of the suit property and allot their 3/9th share. It followed the exchange of several notices between the Plaintiffs and the first Defendant viz. Ex.A7 reply notice by the Defendants dated 13.02.2006, rejoinder by the Plaintiffs under Ex.A8 dated 28.02.2006, another notice by the first Defendant dated 16.02.2006 and there ply given by the Plaintiffs under Ex.A11 on 13.03.2006. This suit seems to have been filed only after Ex.A11 reply notice dated 13.02.2006 by the Plaintiffs.

60. In order to repudiate the contention of the Defendants that the suit is hopelessly barred by limitation, the Learned Counsel for the Plaintiffs would submit that the suit is not barred by limitation and that the plea of adverse possession and ouster taken by the Defendants are not sustainable under law as the third Defendant has been residing in the suit premises.

61. In support of his contention, he has placed reliance upon the decision reported in Govindammal Vs. R. Perumal Chettiar and Others, . In this case, two civil appeals viz. 4357 and 4358 of 2000 have been filed before the Apex Court challenging the judgment and Decree of this Court and made in Second Appeal Nos. 145 and 146 of 1988. In this case, the Apex Court has laid down the guideline as to when the period of limitation, adverse possession and ouster of co-sharer by another co-sharer can be inferred. At the time of admission of second appeal in S.A. No. 2253 of 1986, this Court had formulated the following substantial questions of law:

1. Whether the Plaintiff's claim was not barred by limitation by exclusion and ouster and the Defendants 1 and 2 in the suit had not acquired title to the suit properties by adverse possession?

2. Whether the Lower Appellate Court was right in omitting to note the suit instituted 12 years after the issue of notice under Ex.B3 dated

02.11.1955 admitting ouster and dispossession is barred by limitation and the relief of partition would not be available?

62. In the above cited case, a co-sharer viz the Plaintiff, who is the second wife of Raju Naidu had issued notice to the Defendants viz. sons and daughter of the first wife of Raju Naidu claiming partition of suit properties and possession. After taking into consideration of various facts and circumstances, the Apex Court has held that the co-sharer has given notice claiming partition of the suit properties and possession and it was not pursued further. Under this circumstance, it was held that it will not be sufficient to show that the co-sharer has lost their right by adverse possession. It is also held that once it is established that she was the legally married wife of Raju Naidu she automatically she claims her share in the property from the estate of Raju Naidu by way of survivorship. Just because a notice was issued and she did not pursue the same that does not extinguish the claim of the Plaintiff there by giving a handle in the hands of the step sons by way of adverse possession. In order to prove adverse possession something more is required. Once it is accepted that she was the legally married wife of Raju Naidu then her right to claim partition and share in the property stands out and that cannot be defeated by the plea of ouster or adverse possession.

63. The Learned Counsel for the Plaintiffs has also brought to the notice of this Court on Ex.B13 settlement deed dated 22.05.2006. In this connection, he would submit that the right to sue accrues for the Plaintiffs to claim their share by way of partition on and from the date of 22.03.2006 on which date the settlement deed under Ex.B13 was registered for which the first Defendant did not have exclusive right or interest over the suit property to deal with it in accordance with her whims. Since the suit was filed on 02.12.2006 by the Plaintiffs for claiming theirs hares, it is not barred by limitation as claimed by the Defendants. The Trial Court has also rightly found that having the sale deed been executed in the name of the first Defendant, it did not mean that she could ipso facto claim exclusive right over the suit property.

64. This Court has carefully considered the submissions made on behalf of both sides. The Learned Counsel for the Defendants has placed reliance upon the decisions in Baghyavathi v. Lakshmi kanthammal, AIR 1993 Mad 346; Kamakshi Ammal v. Rajalakshmi and 6 Ors., 1991 CTC 372; P.R. Hemachandra Babu and Another Vs. P.R. Janardhanam (deceased) and Others, ; Emaresan Vs. Radha, and Binapani Paul Vs. Pratima Ghosh and Others, with regard to the benami transactions.

65. It is pertinent to note here that it is not the case of the Defendants that the deceased K. Rangaswamy had purchased the property in the name of the first Defendant for her benefit. It is established that Late K. Rangaswamy was the member of the Society and the plot bearing No. 21, Door No. 42 (Old Door No. 20), State Bank of India Officer's Colony, 2nd Street, Perambur High Road, Chennai-600 012 was allotted in his favour. It is also established that he had availed a loan amount of Rs. 25,000/- for putting up a construction and that

amount was also fully repaid by him even during his life time. As seen from Ex.B2 and Ex.B3 receipt, a sum of Rs. 2,852/- was paid by the first Defendant K. Indirani by way of full settlement towards the members loan account of Late. K. Rangaswamy from his retirement benefit.

66. It is also established that the first Defendant is the nominee of her husband Late K. Rangaswamy and the father of the Plaintiffs and other Defendants. In such a character, she had obtained the sale deed with the capacity of nominee for her and on behalf of other legal heirs of Late K. Rangaswamy viz. the Plaintiffs and the Defendants. Hence, it is to be construed that she is holding the property on behalf of the heirs of the deceased K. Rangaswamy and as such she cannot claim exclusive right over the property.

67. The phrase "Trust" has been interpreted u/s 3 of the Indian Trusts Act, 1882 as follows:

Trust: A "trust" is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner.

68. Since the sale deed under Ex.A1 was executed in the name of the first Defendant, after the demise of her husband, she became the trustee of the property and she along with other heirs viz. the Plaintiffs and the Defendants would be called as beneficiary of the subject matter called the suit property.

69. The phrase "Fiduciary" has been unambiguously explained in Black's Law Dictionary, 6th Edition, at Page No. 625 as follows:

Fiduciary: The term is derived from the Roman law, and means (as a noun) a person holding the character of a trustee, or a character analogous to that of a trustee, in respect to the trust and confidence involved in it and the scrupulous good faith and candor which it requires. A person having duty, created by his undertaking, to act primarily for another's benefit in matters connected with such undertaking. As an adjective it means of the nature of a trust; having the characteristics of a trust; analogous to a trust; relating to or founded upon a trust or confidence. It has been further defined as follows: A term to refer to a person having duties involving good faith, trust, special confidence, and candor towards another. A fiduciary "includes such relationships as executor, administrator, trustee, and guardian.

70. The phrase "Fiduciary capacity" has been explained in the same page as follows:

Fiduciary capacity: One is said to act in a "fiduciary capacity" or to receive money or contract a debt in a "fiduciary capacity," when the business which he transacts, or the money or property which he handles, is not his own or for his own benefit, but for the benefit of another person, as to whom he stands in a relation implying and necessitating great confidence and trust on the one part and a high degree of good faith on the other part. The term is not restricted to

technical or express trusts, but includes also such offices or relations as those of an attorney at law, a guardian, executor, or broker, a director of a corporation, and a public officer.

71. To add an additional strength to this view, this Court finds it necessary to refer the proviso to Section 88 of the Indian Trusts Act, 1882. It reads as follows:

88. Advantage gained by fiduciary.-Where a trustee, executor, partner, agent, director of a company, legal adviser, or other person bound in a fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage, or where any person so bound enters into any dealings under circumstances in which his own interests are, or may be, adverse to those of such other person and thereby gains for himself a pecuniary advantage, he must hold for the benefit of such other person the advantage so gained.

72. From the above context, it is thus manifest that the first Defendant is holding the property for the benefit of herself as well as the benefit of all the heirs in the fiduciary capacity. Further, the phrase "Nominee", in Black's Law Dictionary, 6th Edition, at Page No. 1050, has been defined as under:

One who has been nominated or proposed for an office. One designated to act for another to his or her place.

73. The Learned Counsel appearing for the Defendants has raised another contention that right from 14.07.1982 (the date on which the sale was executed) the first Defendant has been owning, possessing and enjoying the same without any interruption from any quarter including Plaintiffs or any other Defendants.

74. This Court has also considered the above said contentions raised on behalf of the Defendants and is of view that this contention is not able to be countenanced. As discussed in the earlier paragraphs, the character of the first Defendant, in so far as the suit property is concerned, is only a nominee and she had taken the sale deed in her name only for the benefit of all the heirs of the deceased K. Rangaswamy. Therefore, she is a trustee of the property and holding the same for the benefits of the Plaintiffs as well as the Defendants.

75. Keeping in view of the above findings, this Court is of considered view that the judgment of the Trial Court does not require any interference and hence the appeal is liable to be dismissed.

76. In the result, this appeal is dismissed and the Judgment and Decree dated 30.06.2008 and made in O.S. No. 9491 of 2006, on the file of the learned VII Additional Judge, City Civil Court, Chennai is confirmed. Consequently, connected miscellaneous petitions are closed. No costs.