

(2010) 12 MAD CK 0266
In the Madras High Court
Case No : A.S. No. 505 of 1994

K. Sahadevan

APPELLANT

Vs

K. Allagammal (Decd.), Kannapa Naicker (Decd.), K.
Jayaraman and K. Loganathan

RESPONDENT

Date of Decision : 23-12-2010

Acts Referred:

Benami Transactions (Prohibition) Act, 1988 — Section 4

Citation : (2010) 12 MAD CK 0266

Hon'ble Judges : S. Palanivelu, J

Bench : Single Bench

Advocate : J.R.K. Bhavanantham, for the Appellant; S. Subbiah, for the Respondent

Final Decision : Allowed

Judgement

S. Palanivelu, J.—This appeal is filed against the judgment and decree dated 24.09.1991 passed in O.S. No. 5848 of 1987 on the file of VIII Asst. Judge, City Civil Court, Madras.

2. The following are the allegations contained in the plaint

2 [a] The Plaintiff states that the Defendants are his parents, that he and the 1st Defendant are joint owners of the house, ground and premises bearing Old Door No. 4, New Door No. 10, Mandappam Road, 3rd Lane, Madras - 10, that the said house was constructed fully out of his own funds and thereafter for further improvements to that property he and his mother jointly mortgaged the said premises in the year 1976 with the Egmore Benefit Society Limited and obtained a sum of Rs. 30,000/-from the Egmore Benefit Society by way of loan on the security of the above mentioned premises at No. 10, Mandappam Road, 3rd Lane, Madras - 10.

2 [b] As the Plaintiff was formerly employed at Coonoor, he has allowed his mother and 1st Defendant herein to collect the rent from the tenants and pay the

amounts to the Egmore Benefit Society Limited and cleared the mortgage. Another sum of Rs. 5,000/- was jointly borrowed by Plaintiff and the 1st Defendant from the above said Society and executed a mortgage deed and that the Plaintiff has been transferred to Madras and he is residing in a portion of the suit premises and after his arrival to Madras, the 1st Defendant is still collecting the rents without paying any amount to the Plaintiff; that inspite of repeated requests, the 1st Defendant has not produced rental accounts; that the 2nd Defendant is colluding with the property and for that a reply was given by the Defendant containing false allegations and as such the Plaintiff has no other way except to file a suit for partition.

2 [c] The Plaintiff states that in all of his earlier notices he has categorically stated that the suit premises was constructed fully out of his funds and the improvement was made from the loan amount and as the Defendants are his parents and as the title deeds of the said property stand in the name of the Plaintiff and the 1st Defendant, he is resisting his claim only to half of the suit property in No. 10, Mandapam Road, 3rd Lane, Madras - 10 and that he reserves his right to claim for his share in respect of other property in Old No. 4/2, Mandappam Road, Kilpauk, Madras - 10 and without prejudice to his right for his share in the family property, he has filed this suit with regard to property at No. 10, Mandapam Road, 3rd Lane, Kilpauk, Madras - 10 for which he and 1st Defendant are joint owners and others have no right over the said property.

2 [d] The Plaintiff states that the 1st Defendant is collecting more than Rs. 2,000/- per month by way of rent and she is liable to pay to the Plaintiff's share from 1977 onwards, that the 2nd Defendant has been impleaded as a party in the suit by way of abundant caution, for effective adjudication and that no amount is due to Egmore Benefit Society Limited, that the suit property is free from encumbrances and entire mortgage has been cleared, that the Plaintiff is entitled to mense profits from the schedule property from the year 1977 and that the cause of action for the suit arose at Madras when the suit property was constructed from and out of his funds and also with the help of the amount borrowed from Egmore Benefit Society Limited and when the Plaintiff returned to Madras and when the 1st Defendant failed to hand over the possession and to show the accounts and when the Defendants refused to give share and subsequently.

3. In the written statement filed by the Defendants, the following averments are stated

3 [a] The 1st Defendant emphatically denies all the allegations contained in the plaint except those that are specifically admitted herein and puts the Plaintiff to strict proof thereof, that herself and her late husband are parents of the Plaintiff but denies the allegation that they are joint owners of the suit property. The allegations made in paragraphs 3 and 4 of the plaint are denied and it is stated that the suit property was purchased by this Defendant's husband, i.e. 2nd Defendant, late Kannapa Naicker out of his own earning and savings as a

worker in B & C Mills, Madras and that the 2nd Defendant purchased the land for a sum of Rs. 600/- in the joint names of this Defendant and of Plaintiff who was just then born and was 15 days old, from Namberumal Naidu by way of a registered deed of sale dated 01.11.1940.

3 [b] This Defendant further states that subsequently her husband late Kanappa Naicker got provident fund amount of Rs. 11,000/- and he had a savings of Rs. 9,000/- and he invested both the sums with Vellala Co-operative Bank Ltd. in fixed deposit account and that with the said accumulation as well as by borrowing Rs. 15,000/- from the said Co-operative Bank by mortgaging his own self-acquired house and ground bearing Old No. 4/2, New No. 4, Mandapam Road, Kilpauk, Madras 10 and by sale of 30 sovereigns of jewels, this 1st Defendant and Kanappa Naicker has put up the construction which later came to be assigned Door No. 4/4 and Present Door No. 10, Mandapam Road, 3rd Lane, Kilpauk, Madras 10 and that Kannappa Naicker alone obtained sanctioned plan from the Corporation of Madras in his name in B.A. No. 4351 of 1974 dated 07.10.1984 and put up construction.

3 [c] Kannappa Naicker alongwith this Defendant with a view to effect improvement to the suit property, raised a mortgage loan of Rs. 30,000/- from the Egmore Benefit Socy. Ltd. in or about December 1976, that since the sale deed stood in the names of both the 1st Defendant and the Plaintiff, the mortgage deed in favour of the Egmore Benefit Socy. was executed by both of them without the least suspicion that later on the Plaintiff would assert his right, that it is only her husband who has put up the superstructure as well as purchased the land, that the Plaintiff did not contribute anything towards either the cost of purchase of land or for the putting up the construction since he was infant child of 15 days old and that at the time of construction during 1960 - 61, the plaintiff was only 21 yrs. old studying in I.I.T course and that he was depending upon his father, 2nd Defendant for his maintenance and sustenance and that the ownership of the property in the municipal register of the Corporation of Madras is only in the name of T. Kannappa Naicker and this Defendant alone was paying the Corporation tax and other public charges, that the Defendant borrowed a further sum of Rs. 5,000/- for further improvement in the suit property and that the name of the Plaintiff was formally included as a co-mortgagor since the sale deed stood in his name as well and that after the completion of the building, the Defendant and her husband let out portions in the premises to various tenants and have been collecting the rents and cleared the debt due to the Benefit society.

3 [d] This Defendant and her husband alone are the absolute owners and the Plaintiff cannot take advantage of his ostensible right and that the Plaintiff's name was inserted only out of sentimental attachment. The Plaintiff soon after his marriage went to Coonoor to earn his bread and that since he had children of tender age and they should not suffer at Madras, this Defendant and her husband permitted the Plaintiff to stay in a portion of the premises which had

just then fallen vacant and that the Plaintiff annexed other portions in tenant's occupation by criminal intimidation and that the initial MES deposit was provided by this Defendant and collected the rents from various tenants through her husband and that the mortgage deed in favour of Egmore Benefit Society, the Plaintiff's name was inserted as a eo-nominee party only for the reason that he was conferred ostensible ownership rights and that the Defendant is entitled to possession of suit property as well as for return of title deeds from Egmore Benefit Society Ltd.

3 [e] The Defendant emphatically denies the allegations made in paragraphs 4 & 5 of the plaint and states that the Defendant alongwith her husband are the owners of the suit property, that there is no question of any liability to furnish any account of rental yield or for payment of any sum on such rendition of account, that there is no question of 2nd Defendant colluding with this Defendant except for bringing the Plaintiff to this world and that both of them are owners of the property herself having contributed her jewellery of 30 sovereigns weight and of the deceased 2nd Defendant having provided his PF amounts, savings and raising loans to put construction and that they could not foresee that the Plaintiff will prove to be an unworthy son.

3[f] The Defendant also submits that long prior to the issue of notice to them, this Defendant had issued notice dated 28.2.1986 for which there has been no response from Plaintiff and that probably he was thinking what sort of reply he would give and he did send a reply belatedly, after a lapse of six months, on 20.8.1986 and for which this Defendant also sent a rejoinder and again the 2nd Defendant, since deceased also sent an independent notice to Plaintiff and the exchange of correspondence may be referred to for appreciation of that and to assess on which side the truth lies.

3 [g] The Plaintiff is not at all in possession of half of the suit property and he was given leave to remain in one portion out of compassion for him and that taking advantage of his stay there, he began to cause all sorts of troubles to tenants and made the position of the tenants very miserable and indirectly he compelled them to vacate and trespassed into that portions and that he is only a trespasser in respect of the portions vacated by tenants. This Defendant states that since it is the absolute property of her husband as well as of herself, both of them have executed a joint will dated 16.9.1985 and in that will he has dealt with the suit property and also stated at pages 3 of that will that his son is not helping and maintaining both this Defendant and of himself. No doubt in that will he gives the southern portion of the suit property to the Plaintiff and the words of a deadman have to be given more weight.

3 [h] The Defendant denies the allegations made in paragraph 6 of the plaint and states that the Plaintiff had no shadow of right title or interest in premises bearing New No. 4, Mandapam Road, Kilpauk, Madras and that the 2nd Defendant has bequeathed the property to his other sons as per that will and there is no question of any reservation and on that ground also, the suit has to

be dismissed.

3 [i] The Defendant denies the allegations made in paragraph 7 of the plaint and states that she is not getting rent of Rs. 2,000/-and the Plaintiff is in occupation of the entire half portion of building and that she is getting only a rent of Rs. 750/-out of which she has to meet the tax demand in a sum of Rs. 1,800/-each half year besides having to maintain the building in good condition attending to white washing periodically and effecting minor repairs as and when needed and she is alone paying the current consumption charges for the portion under the Plaintiff's occupation and that the claim is fantastic and unreal. The Defendant emphatically denies the allegations made in paragraph 8 of plaint and states that the 2nd Defendant is also a co-owner of the property and that there is no question of his being joined in the suit by way of abundant caution and that the Plaintiff also ought to have impleaded his two brothers i.e Jayaraman and Loganathan as parties in the suit for patron and so the suit is bad for mis joinder and non-joinder of parties and that the suit may be dismissed with her costs.

4. After analysing the evidence on record, the learned VIII Asst. Judge, City Civil Court, Chennai dismissed the suit observing that the property is joint property of the Defendants in the suit, that the suit is bad for partial partition and it is also bad for non-joinder of necessary parties. Hence, the Plaintiff has preferred this appeal.

The following are the points for consideration:

1. Whether the Plaintiff and the 1st Defendant are the joint owners of the suit property ?
2. Whether the suit is bad for non-joinder of necessary parties ?
3. Whether the suit is not maintainable as it is for partial partition ?
4. Whether the appeal suffers from abatement ?
5. To what reliefs are the parties entitled to ?

Point No. 1:

5. The Defendants in the suit by name Alagammal and Kannapa Naicker are the parents of the Plaintiffs. The present Respondents in this appeal are brothers of the Plaintiff. Pending the trial of the suit, the 2nd Defendant, Kannapa Naicker died and the 1st Defendant, his wife and the Plaintiff who are already on record were recorded as legal representatives. After the pronouncement of judgment in the suit and before filing the appeal, 2nd Defendant also died. Hence, his other sons, the present Respondents were brought in appeal.

6. The major portion of the suit property was purchased in the names of the first Defendant and her son, the Plaintiff on 01.11.1940 from one Perumal Naidu under Ex.A1, sale deed. At the time of the sale, the Plaintiff was 15 days old baby. Ex.A2 is dated 10.02.1954 for Rs. 2,000/-purchased in the names of the

Plaintiff who was then 14 years and 1st Defendant with respect to another portion of the suit property. Hence, both the Plaintiff and the 1st Defendant became owners of the suit property by virtue of Exs.A1 and A2, as per the Plaintiff.

7. It is contended by the Plaintiff that the house was constructed over the suit property fully out of his own funds and thereafter for further improvements, both himself and his mother jointly mortgaged the property with Egmore Benefit Fund Limited on 09.12.1976 getting a loan of Rs. 30,000/-on execution of registered mortgage deed Ex.A3. Further, by means of Ex.A4, registered mortgage deed, both of them raised further advance of Rs. 5,000/-from the above said Bank for further improvement in the suit property. In both the mortgages, the suit property was subject matter. It is the version of the Plaintiff that whether the loans were obtained by both of them for construction or for improvement, they were discharged by means of the rent collected from the tenants who occupied the suit property and with the funds he sent to his brother Jayaraman while the Plaintiff was working in Coonoor.

8. Per contra, it is stressed by the Defendants that the suit premises was wholly constructed by Kannapa Naicker out of his own amount, that he got his name mutated into the revenue register in the Corporation of Madras, that he has been paying the property tax, that the Plaintiff's name was inserted as eo-nominee party since his name was also found in the sale deeds and that the Defendants alone are owners of the suit property. It is also contended that even though the Plaintiff was a tender child at the time of Ex.A1, out of sentimental attachments, his name was included in the sale deed.

9. It is also contended by the Defendants that Kannapa Naicker was working in B & C Mills in Chennai and was utilising the funds which he got from his terminal benefits for the construction of the building. Even though particulars of the contribution made by the 2nd Defendant were not mentioned in the written statement, DW1, the 1st Defendant would say in her evidence that her husband withdrew Rs. 7,500/-from the Bank by means of Ex.B2 on 03.04.1969 Vellalar Co-operative Bank. On 16.04.1970 a sum of Rs. 17,500/-was withdrawn by him under Ex.B3. Rs. 6,000/-was withdrawn on 19.10.1968 by means of Ex.B1, withdrawal letter. It is her further evidence that Rs. 23,000/-was withdrawn by her husband on 21.04.1972 as evident from Ex.B4. Besides the said amount, as per DW1, she and her husband also mortgaged a family house in Door No. 4, Mandapam Road, Water Tank Road, Kilpauk with Vellalar Co-operative Bank Limited on 18.10.1975 by means of registered mortgage deed, Ex.B5. Ex.B6 is the approval plan for the construction of suit property. Kanappa Naicker has taken initiatives to get this plan sanctioned. Exs.B7 and B8 are the Bank passbooks showing repayment of loan amounts to Egmore Benefit Fund Limited which were utilised for construction of the house. She also says that since the above said amount was not adequate, she also pledged her jewels with the Egmore Benefit Society as evident from Ex.B10. A sum of Rs. 1,850/-was given

as jewel loan as seen from passbook Ex.B10. Ex.B11 is also an identical passbook which shows obtaining of jewel loan by Kannapa Naicker for Rs. 2,000/-, so also Ex.A12 which is for Rs. 1,500/-(jewel loan). Exs.B13 series are the receipts stated to have been paid by 1st Defendant for payment of jewel loan. Exs.B14 is the property tax receipt standing in the name of 2nd Defendant.

10. The Plaintiff pressed into service various letters written and sent by his brother Jayaraman, the present Respondent in the appeal which are Exs.A5, A7 to A12. Ex.A13 is the letter sent by Kannapa Naicker to the Plaintiff. A careful scrutiny of the above said letters would show that the Plaintiff was employed during the relevant period and he was sending the amount then and there to his brother Jayaraman for re-payment of loan, for maintenance of the property and also for the payment of property tax. There are unimpeachable documents showing that the Plaintiff had been sending amount to meet the family necessities and also for maintaining the suit property. It is also learnt that the rent collected from the tenants in the suit property were utilised for re-payment of loan. It also comes to light that the funds were raised for construction of the building by means of the mortgage loan under Exs.A3 to A5 and from jewel loans as well. Even though it is the version of the DW1 that the mortgage loans were discharged by her husband, the fact remains that the Plaintiff has also made material contribution for the discharge of documents.

11. A question was asked in the cross examination of PW1 to the effect that since he purchased two plots in Vysarpadi, he could not have contributed money for the construction of the suit property or for repayment of loan for which he answered in negative. The letters sent by Jayaraman would candidly establish that he had been regularly requesting his brother, the Plaintiff to send money. The house was constructed in or about 1974 or 1975. The deposits and withdrawals made by Kannapa Naicker pertain to the years 1969, 1970 and 1972. There is no material to connect the above said deposits with the construction of the suit property which was after about four years.

12. Earlier to the filing of the suit, there had been exchange of notices between the parties. Ex.B15 is the notice sent by Plaintiff to the Defendants on 24.01.1982. After about 4 1/2 years, a reply was received from the Defendant on 28.10.1986 under Ex.B16 in which the 1st Defendant has clearly admitted the rights of the Plaintiff in the suit property as follows -

However my client out of filial affection to your client as one of his sons, is prepared to give him his half share and it may be divided by metes and bounds at the instance of Mutual Friends and well wishers thereby to give quietus to the family matter.

13. Two more instances are indicated on behalf of the Plaintiff to show that Kannapa Naicker could not have paid money for Ex.A1 and he admitted that the Plaintiff is joint owner in the suit property. They are stated in the following paragraph.

14. In Ex.A3, mortgage deed, Kannapa Naicker has signed as one of the attestors. Hence, it has to be presumed that he had the knowledge that the Plaintiff and the 1st Defendant were joint owners of the suit property and he is estopped from controverting the contents of the document. Nextly, in Ex.A2, one Rathinam Naicker has signed as attestor who is none other than the father of the 1st Defendant. In the cross examination, the Plaintiff would say that Rathinam Naicker, father of his mother purchased the property in his name. There is no denial in the further cross examination of PW1 to the effect that Rathinam Naicker was not father of 1st Defendant and that he did not pay sale price for the Ex.A2 sale. The above said instances are pieces of evidence to infer that the Plaintiff is joint owner of the suit property.

15. There is no plea on behalf of the Defendants that inclusion of Plaintiff's name in Exs.A1 and A2 was benami transaction. Even in the course of oral evidence, this aspect was not stressed. But both the learned Counsel at the time of their arguments would speak about benami transaction. The learned Counsel for the Plaintiff Mr. J.R.K. Bhavanantham would contend that in order to establish that it is a benami transaction, necessary ingredients as settled by law have to be proved and in this case, they are absent. They are

[i] The motive for purchase of suit property in the name of the particular individual.

[ii] Source of money for passing consideration.

[iii] Custody of documents of title.

[iv] The manner in which the property was dealt by the real owner.

16. In a judgment reported in Binapani Paul Vs. Pratima Ghosh and Others, it is held that the onus to prove the transaction as benami lies on the party claiming it to be so and that following are the six circumstances which can be taken as a guide to determine the nature of the transaction.

[a] the source from which the purchase money came;

[b] the nature and possession of the property, after the purchase;

[c] motive, if any, for giving the transaction a benami colour;

[d] the position of the parties and the relationship, if any, between the claimant and the alleged benamidar;

[e] the custody of the title deeds after the sale; and

[f] the conduct of the parties concerned in dealing with the property after the sale. (Jaydayal Poddar v. Bibi Hazra, SCC, 7, para 6)

17. Section 4 of the Benami Transaction (Prohibition) Act 1988 prohibits benami transaction and also defence to be raised in the legal proceedings, which reads thus:

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 such property.

18. The learned Counsel for the Respondent Mr. S. Subbiah would draw attention of this Court to a decision of this Court reported in Khanapuram Gandaiah Vs. Administrative Officer and Others, wherein S. Mala J., after analysing the evidence of the case and following the legal principles, held that father claiming to be real owner of the property has asserted his right in the property as per law by dealing the property as his own.

19. But in the present case, the facts are entirely different. Nobody claims that the property was purchased benami in the names of the Plaintiff and 1st Defendant. From 1940 till 1976, when the property was mortgaged, the Plaintiff and the 1st Defendant treated the property as their joint property and there had been no objection on the part of Kannapa Naicker. Further, the aspect of benami transaction has not been pleaded and not spoken in oral evidence.

Hence, no question of benami transaction arises in this case. Even though certain documents stand in the name of 2nd Defendant, they do not cloth him with any right. In view of the above said observations, I am of the considered view that the suit property is joint property of Plaintiff and 1st Defendant and it does not belong to the Defendants in the suit. I answer Point No. 1 in the affirmative.

Point No. 2:

20. Much was said about the non-joinder of necessary parties the suit. It is argued that since the 2nd Defendant (father) is also a joint owner of the property, the other family members should have been impleaded. After the death of 1st Defendant (mother), before filing this appeal, the brothers of the Plaintiff have been impleaded as Respondents. As far the nature of the suit property is concerned, it is made clear that it is joint property of the Plaintiff and the 1st Defendant and it is not joint family property of all the family members. Hence, either at the time of filing of the suit or after the death of 2nd Defendant, there had been no necessity to implead the other family members in the suit. Since the family members do not exercise any joint interest over the property at the time of filing of the suit and in view of the fact that only the Plaintiff and the 1st Defendant were joint owners, the plea that the suit is bad for non-joinder of necessary party is untenable. I answer this point in negative.

Point No. 3

21. It is also contended on behalf of the Respondents that the suit is bad for

partial partition. Only if the suit property is a joint family property, the question of non-inclusion of other family properties would arise. But the suit property exclusively belongs to the Plaintiff and the 1st Defendant. Another property in Door No. 4/2 , Mandapam Road, Water Tank Road, Kilpauk, Chennai is admittedly a family property but there is no claim with regard to said property in the suit. Since the suit property is not a joint family property, no question of partial partition would arise in this case. I answer this point in negative.

Point No. 4

22. As adverted to supra, after filing of the suit, the 2nd Defendant died. There was no necessity to implead his legal representatives because suit property is joint property of the Plaintiff and the 1st Defendant. Before filing the appeal, the 1st Defendant also died. Hence, the other brothers of Plaintiff have been impleaded as Respondents in the appeal. It is argued that 2nd Defendant was a formal party. In *Mangal Singh v. Rattno* AIR 1967 SC 1786; identical for Appellant the Counsel learned by Court this before cited been have decisions following The appeal. of abatement no was there hence and Defendants other rights affect not does representatives legal implead to part on failure a where Court, Supreme appeal pendency during Respondent party unnecessary death that held is it> [a] *S. Amarjit Singh Kalra (dead) by Lrs. and Others and Smt. Ram Piari (dead) by L.Rs. and Others Vs. Smt. Pramod Gupta (dead) by Lrs. and Others,*

[b] *Mohd. Hussain (dead) by LR's and Others Vs. Occhavlal and Others,*

[c] *Custodian of Branches of Banco National Ultramarino Vs. Nalini Bai Naique,*

[d] *Mahabir Prasad v. Jage Ram and Ors.* 1971 SCJ 534

[e] *Smt. Rani and Another Vs. Smt. Santa Bala Debnath and Others,*

[f] *Venugopal, M. v. Marappa* 1996 (11) CTC 275

23. As it is inferred that the appeal does not suffer from abatement, there is no need to elaborately furnish the principles laid down in the decisions. I answer this point in negative.

Point No. 5:

24. It has been found under Point No. 1 that the Plaintiff and 1st Defendant are the joint owners with respect to the suit property and the construction was made in the suit property by joint exertion and hence the Plaintiff is entitled for half share in the suit property. However, the rendition of accounts would arise only from the date of impleadment of the Respondents in the appeal. The appeal has to be allowed in part. The judgment and the decree of the Court below are liable to be set aside and they are accordingly set aside.

25. In fine, the appeal is allowed without costs. The preliminary decree is passed in the suit as prayed for. The Plaintiff is entitled to get rendition of accounts from

the Respondents from the date of their impleadment in the appeal.