

(1994) 02 MAD CK 0070

In the Madras High Court

Case No : Appeal No. 411 of 1983 and C.M.P. No. 16959 of 1992

M.K.P. Vellain Chettiar (died) and 4 others

APPELLANT

Vs

Sri Andavar and Co.

RESPONDENT

Date of Decision : 09-02-1994

Acts Referred:

Trusts Act, 1882 — Section 4(3)(h), 88

Citation : (1994) 02 MAD CK 0070

Hon'ble Judges : Srinivasan, J;Abdul Hadi, J

Bench : Division Bench

Advocate : G. Ethirajulu, for the Appellant; S.P. Subramaniam, for the Respondent

Judgement

Srinivasan, J.—This appeal is by the defendant, who has suffered a decree for Rs.40,348.43 with subsequent interest in the Court of the Subordinate Judge, Periyakulam. The parties are hereafter referred as per their rank in the suit, as "plaintiff and "defendant". The plaintiff's case, as set out in the plaint, is as follows:- The plaintiff is a coupe contractor in respect of Government forests. When the forest department of Tamil Nadu announced the auctioning of the right to cut, collect and removes the debarked wattle wood in a plantation in Dindigul Taluk, the plaintiff desired to get the same by participating in the auction. But, at that time he did not have the adequate solvency certificate in accordance with the rules of the forest department. He requested the defendant to participate in the auction and get the coupe contract in his name and leave it to the plaintiff for the execution of the work. The defendant agreed to do so. An agreement was entered into between the plaintiff and the defendant on 24-7-1948. It was duly Signed by them. The original agreement is produced along with the plaint. The terms and conditions of the agreement are set out in the plaint. According to the agreement, the defendant obtained the right to cut, collect and remove the wattle wood for and on behalf of the plaintiff. After confirmation of the auction, the plaintiff alone did the actual cutting work and the defendant did not have any interest, whatever, in the contract. The security deposit of Rs.38,750/- was to be

paid in connection with the said work. The amount paid by the plaintiff was from out of his own funds. It was deposited in the name of the defendant in the Madurai District Central Cooperative Bank Limited at Pannaikadu. He did not pay any amount towards the same. The defendant has acknowledged that the entire security deposit amount belongs to the plaintiff exclusively and that he had no interest therein. The defendant undertook to withdraw the security deposit amount after the completion of the contract work and return it to the plaintiff. The letter of undertaking is filed along with the plaint. After the completion of the contract work the fixed deposit receipt got returned from the Forest Officer, pursuant to the release order. The plaintiff's agent, who was in custody and possession of the said receipt, by name Chellappa Iyer, proceeded along with the defendant to the bank to withdraw the amount. The bank stated that it would take some time for the actual withdrawal of the amount. The defendant took the receipt from the plaintiff's agent representing that he would expedite the despatch of the amount from the bank. Trusting him, the receipt was handed over by the plaintiff's agent to him. But the defendant chose to keep it with him and encase the amount. The amount belongs to the plaintiff and the defendant is bound to return the same to him. In spite of demands, the defendant has not chosen to return the money. In reply to the plaintiff's notice, the defendant has sent a lawyer's notice, containing false and unsustainable allegations. Hence, the plaintiff is obliged to file the suit for recovery of the amount.

2. In the written statement, the contentions of the defendant are as follows:- In the auction conducted by the forest department, the defendant was the highest bidder, The total amount of auction was Rs.2,58,230/-. The plaintiff never requested the defendant to bid in the auction and there was no necessity for the same. There was no agreement between the plaintiff and the defendant as alleged in the plaint. The agreement produced in Court is a forged and concocted one. The defendant has not signed the same. After the successful bid in the auction, the defendant had paid one half of the sale amount on 3-4-1978 and as per the request of the Forest Department, he has deposited an amount of Rs.38,750/- in the bank at Pannaidadu. The amount belongs to the defendant. Subsequently the defendant paid the remaining half of the amount to the Forest Department in July, 1978. After full payment was made, the defendant was permitted to cut and remove the debarked wattle wood. Thereafter the plaintiff approached the defendant and agreed to be a partner of the coupe and he has agreed to pay half of the amount to the defendant and share the profits equally. Incorporating the said terms, the defendant requested the plaintiff to prepare an agreement. But the plaintiff prepared an agreement contrary to the said terms, signed in it and gave it to the defendant for his signature. When the defendant found that the terms were not as agreed, he did not sign the agreement, prepared by the plaintiff. The plaintiff did not press for the same. But, subsequently, the plaintiff agreed to be a partner with the defendant for the said coupe and he was making payments on the understanding that both the parties would have to share the profits equally. The plaintiff and the defendant were

carrying on the coupe contract smoothly. As per the account copy dated 23-10-1978, given by the plaintiff to the defendant, there is a profit of Rs.45,000/- due to the share of the defendant and there was an excess amount of Rs.6,349/- due to the defendant from the plaintiff. The plaintiff agreed to pay the abovesaid amount of Rs.51,349/- to the defendant within a short period, but he never did so. The allegations in the plaint are not true. The plaintiff has forged the documents and filed the suit with mala fide intentions. The plaintiff has no right to question the withdrawal of the security deposit amount from the bank. The plaintiff is not entitled to any relief. On the other hand, the plaintiff is bound to pay a sum of Rs.51,349/- to the defendant, for which a counter claim is made and Court fee is paid.

3. A reply statement was filed by the plaintiff, denying the allegations contained in the written statement. The plaintiff has stated that the defendant paid only a portion of the auction amount due to the Forest Department and did not pay the entire amount claimed by him. The security deposit belongs to the plaintiff and he is not aware of the alleged account copy said to have been sent to the defendant by the plaintiff's agent. The said agent left the service of the plaintiff long back and he had no authority to act on behalf of the plaintiff. The correctness of the account is not admitted. At the time when the coupe was taken on contract, the plaintiff requested the defendant to put up some sheds in the work spot. He did so and claimed a sum of Rs.6,349/- as the amount due to him towards cost of construction. The said amount was paid by the plaintiff to the defendant by a cheque on 5-2-1979. After that no amount was due to the defendant. In September, 1978 when the other amounts due to the defendant were paid by the plaintiff, the plaintiff wanted to deduct the security deposit. The defendant told the plaintiff that the security amount need not be deducted and that this plaintiff may take it from the bank after the contract work was over. He passed a letter on 10-9-1978 to the said effect. After that the defendant was paid the other amounts due to him. The letter dated 10-9-1978 has been attested by the then District Agricultural Officer, Manaparai. The allegation in the written statement that a sum of Rs.45,000/- is due to the defendant as profits, is false. The plaintiff is entitled to get the decree for the entire amount claimed by him.

4. The trial Court framed as many as five issues and two additional issues. The trial Court found that the coupe auction was taken by the defendant initially for himself and also on behalf of the plaintiff and that the agreement dated 24-7-1978 is true, valid and binding on the defendant. It also held that the plaintiff has deposited a sum of Rs. 38,750/- towards security deposit in the bank at Pannaikadu and the letter dated 10-9-1978 is true, valid and binding upon the defendant. The trial Court also found that the defendant is not entitled to the amount claimed by him in the written statement by way of counter claim. The trial Court also held that the suit, as framed, is maintainable. Consequently the trial Court passed a decree as prayed for by the plaintiff.

5. In this appeal, learned Counsel for the appellant contends that the findings given by the trial Court are erroneous and the trial Court has not appreciated the evidence on record properly and it ought to have disbelieved the evidence adduced on behalf of the plaintiff. Learned Counsel contends that Ex. A.3 is a forged one and it ought not to have been given any credence by the trial Court.

6. We have gone through the entire evidence. We find that the depositions of P.Ws.1 and 2 are substantiated by the documentary evidence as well as the circumstances of the case. We have no hesitation to hold that the appreciation and discussion of the evidence by the trial Court do not suffer from any infirmity whatever. We are entirely in agreement with the finding arrived at by the trial Court. We do not think that it is necessary to repeat in this judgment once again the evidence given by the parties and discuss the same in detail. Suffice it to hold that the findings arrived by the trial Court are on a proper appreciation of the oral and documentary evidence. We do not accept the contentions urged by the learned Counsel for the defendant. If the defendant was keen to establish his plea that Ex.A.3 was a forged one, he ought to have examined a hand-writing expert to prove the same. Though the defendant filed an application to call for a report from the expert and got the expert's report, he did not pursue the matter and left it at that. The report also was not marked in evidence. But, the evidence on record shows that the signature found in Ex.A.3 is that of the defendant and it cannot be a forgery. A comparison of that signature with the admitted signature of the defendant shows that it is a genuine one. We, therefore, hold that Ex.A.3 is a genuine document.

7. Learned Counsel for the appellant, however, raises a new plea based on the Benami Transactions (Prohibition) Act, 1986, (hereinafter referred to as "the Act"). The appellant has filed C.M.P.No.16959 of 1992 for permission to raise additional grounds on the basis of the said Act. As it is a question of law, we permit the appellant to raise the same and C.M.P.No.16959 of 1992 is ordered.

8. The contention of the learned Counsel is that the plea of the plaintiff as set out in the plaint is one of benami. According to him, the plaintiff has come to Court with a case that the defendant has taken the contract benami for the benefit of the plaintiff and the amount was deposited by the plaintiff in the bank as security deposit only for his own benefit, but in the name of the defendant. According to learned Counsel, the entire transaction is only a benami transaction as defined by the Act and the plaintiff is not entitled to maintain the suit.

9. The Act defines "benami transaction" in S.2(a) as any transaction in which property is transferred to one person for a consideration paid or provided by another person. S.2(b) defines "property" as property of any kind, whether movable or immovable, tangible or intangible, inclusive of any right or interest in such property. Learned Counsel for the appellant submits that in this case it is a deposit of money with a bank, given as security deposit in a transaction. Hence, according to him, the amount claimed in the suit is a property as defined in S.2(c), and the transaction being a benami transaction, is barred by the

provisions of S.4.

10. It. We are unable to accept this contention. We have already pointed out the definition of benami transaction. There must be a transfer to one person for a consideration paid or provided by another person to bring the case within the definition. In this case, there is no question of any transfer to one person by another persons for consideration paid or provided by another person. It is a case of deposit of money as security for a transaction entered into between the two parties and a third party. On the findings on facts, there was a partnership between the plaintiff and the defendant. It was the firm which took coupe contract from the Forest Department. In pursuance of that contract, a security deposit was made. On a later date, one of the partners, viz., the defendant went out of the partnership by taking his share of the money and thus relinquished his interest in the partnership. Therefore, whatever remains with the partnership will belong only to the other partner and there is no question of benami transaction being involved in this case.

11. Ex.A.2 is the document dated 3-4-1978. It is an agreement between the plaintiff and defendant. According to the said document, the coups contract was taken in the name of the defendant for a total sum of Rs.2,58,230/-. The document recites that the contract will be performed jointly by both of them and one half of auction amount to be paid viz., Rs.1,29,115/- was paid by equal contribution from both. It is also recited therein that after the contract is over, both will look into the accounts and share the profit and loss. Ex.A.3 is a document dated 24-7-1978. As per this document, the contract was taken in the name of the defendant originally for the plaintiff and entire amount was paid by the plaintiff. The security deposit is also said to have been paid by the plaintiff. The defendant has acknowledged the exclusive right of the plaintiff to the entire amounts of the partnership as well as the security deposit, and categorically declared that the plaintiff will be entitled to take them. Ex.A.1 is a document dated 10-9-1978. It is a letter written by the defendant to the plaintiff. In that he has acknowledged the right of the plaintiff to the security deposit amount of Rs.38,750/-. He has stated that he has no objection, whatever, to the plaintiff taking back the amount from the hank after the contract is over

12. Ex.B.3 is the copy of accounts produced by the defendant. According to the defendant, it was sent by the plaintiff's agent to him. As per that account, the defendant had paid a sum of Rs.1,57,000/- initially and the plaintiff paid Rs.1,53,806.50 Ex.B.3 further shows that the defendant has received Rs.2,00,000/- and that what remained to be paid to the defendant was only Rs.6349/-. The defendant, giving evidence as D.W.1, has admitted that the account found in Ex.B.3 is correct. That means, the defendant has already received Rs.2,00,000/- and he is entitled only to Rs.6,349/- after the date of Ex.B,3. The case put forward by the defendant that he received Rs.80,000/- by cheque from the plaintiff and the balance of Rs. 1,20,000/- was payable to him, is false. He did not raise such a plea in the reply affidavit or in the written

statement filed by him. In fact, in the counter claim, he made a claim only for Rs.51,349/-. If really, a sum of Rs.1,20,000/- was due to him, there is no explanation as to why he did not make any claim therefore in the notice or in the written statement. Hence, it is clear that the defendant has been putting forward false claim at different stages,

13. As regards Rs.6,349/- which is shown to be due under Ex.B.3 to the defendant, it is proved to have been paid by the plaintiff to the defendant by Ex.A.10. The said document is a certificate is sued by the Manager of the Indian Overseas Bank, Pudupatti, to the plaintiff. It shows that a sum of Rs.6,349/- was paid under the current account cheque No.571731 dated 5-2-1979 issued by the plaintiff in favour of the defendant. The cheque was encashed through the Pudukkottai Central Co-operative Bank Limited, Ponnamaravathy Branch. Thus, the amount due to the defendant as per Ex.B.3 was also paid as per Ex.A.10. The claim for Rs.45,000/- made by the defendant is also not sustainable in view of the account contained in Ex.B.3. Therefore, it is clear that no amount is due to the defendant under the partnership account. What all remains in the partnership account belongs to the plaintiff. There is no question of benami claim by the plaintiff in this case.

14. Further S.4(3)(h) of the Act excludes from the operation of the Section any property which is held by a person as a trustee or in a fiduciary capacity for the benefit of another person, for whom he is a trustee. S.88 of the Indian Trusts Act provides that, "Where a trustee, executor, partner, agent, director of company, legal advisor, 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... he must hold for the benefit of such other person the advantage so gained." In this case the amount, which stood in the name of the defendant in the bank was collected by him. The amount belonged to the partnership. In view of the fact that it stood in his name. The defendant collected the amount. This amount was held by him as trustee u/s 88 of the Trusts Act for the benefit of the plaintiff. Therefore, it is excluded from the operation of S.4 of the Benami Act. Viewing the matter from any angle, the contention of the appellant is wholly unsustainable. Hence there is no merit in this appeal and it is dismissed with costs.