(1986) 03 MAD CK 0005

In the Madras High Court

Case No : L.P.A. No. 29 of 1980

N. Jayalakshmi Ammal and another — APPELLANT

Vs

Lakshmi Ammal and others — RESPONDENT

Date of Decision : 25-03-1986

Acts Referred:
Trusts Act, 1882 — Section 82

Citation : (1986) 03 MAD CK 0005

Hon'ble Judges : Sengottuvelan, J;Mohan, J

Bench : Division Bench

Advocate : M.R. Narayanaswami, for the Appellant; K. Sarvabhauman, for the Respondent

Final Decision : Dismissed

Judgement

Mohan, J.—The plaintiffs, who were successful in part in their suit in O. S. 595 of 1973, in so far as they obtained a decree for declaration,

and possession only with respect of item 2 and not with reference to item 1, and who were also unsuccessful in appeal No. 56 of 1976, have come

up by way of this Letters Patent appeal. The facts lie in a short campass. There was one Govinda Konar, who had two wives Marimuthammal and

Lakshmi Ammal. The plaintiffs 1 and 2 are the daughters of Govinda Konar through Marimuthammal, the first wife. Defendants 2 and 3 are the

sons of Govinda Konar through his second wife, lakshmi Ammal, the 1st defendant in the suit. Govinda Konar died on 25th August, 1965. Shortly

thereafter, i.e., some time in September, 1965 Marimuthammal also died. Lakshmi Ammal, the 1st defendant, was married to Govinda Konar in

1944. Two properties were purchased by Govinda Konar in the name of Marimuthammal, his first wife, under Ex. B2, dated 15th October, 1943 and under Ex. B3, dated 20th June, 1947. We may also at this stage state that Govinda Konar had attested Ex. B2 sale deed. In March, 1963

Govinda Konar executed a Will. Ex. B48 appears to be a draft, though it is called an unregistered Will, and later under Ex. A49, dated 16th April,

1983. In that registered wilt, be made a statement to the effect that not only these two properties, viz., the properties purchased under Exs. B2 and

B3, but also another property purchased in the name of Lakshmi Ammal, the first defendant (second wife of Govinda Konar), were purchased

benami and the persons, in whose names the sale deeds stand, were mere name lenders, and thereafter he proceeds to bequeathed the properties

in a manner he considered best in the said Will, Ex. B49. Consequent to this, a(sic) dispute had come to be caused and therefore, O.S. 595 of

1973 was filed for a declaration, possession and past profits, etc., by the plaintiffs, viz., the daughters through his first wife, Marimuthammal stating

that these two properties were purchased by Govinda Konar when he wanted to take a second wife and when plaintiffs'' mother, Marimuthammal

insisted that some provision should be made for her maintenance. According to her request, both these properties were purchased. Inasmuch as

the ostensible title stands in the name of their mother, Marimuthammal, they alone will be entitled to the said properties to the exclusion of the

defendants.

2. In defence, inter alia, it was contended that the properties are those of Govinda Konar, himself. Marimuthammal was only a benamidar.

Govinda Konar purchased the properties in his first wife''s name with ulterior motives without intending her to be benefited in any way. Therefore,

the main plank of attack by the defendants is benami.

3. The learned trial Judge, on a consideration of the entire case, came to the conclusion that the statement made by Govinda Konar himself under

Ex. B49 gave a direct (sic) lie that they were benami purchases, that in so far as item 2 of the suit properties is concerned it having been

bequeathed in favour of the plaintiffs, they will be entitled to a decree for declaration, and possession as well as mesne profits.

4. Against this, an appeal was preferred to this Court in A.S. No. 56 of 1976; it came up before a learned single Judge, Sethuraman. J. The

learned Judge also concurred with the findings of the trial court and dismissed the appeal. Hence, the present Letters Patent appeal.

5. It is strenuously argued by Mr. M.R. Narayanaswami, learned counsel for the appellants, that both the trial court and the learned single Judge of

this Court had attached undue importance to the statement made in Ex. B49 registered Will. The statement is not admissible at all. If, however, it is

admissible, it could be against the maker and not in his favour, as laid down in Thakur Bhim Singh (Dead) by Lrs and Another Vs. Thakur Kan

Singh, and in Pattabhiram v. Narayanamurthi 15 L.W. 404 : AIR 1922 P.C. 102. From the above ruling, it follows that a statement made in the

year 1963 with reference to transactions that had taken place in the year 1943 and 1947 cannot conclude the issue. Therefore, the courts below

are wrong in holding as if this will clinch the issue.

6. Having regard to the relationship between Govinda Konar and Marimuthammal, that they being husband and wife, the question of possession of

the property or the manner of enjoyment, is irrelevant. Then again, at best the statement in the Will could amount to an assertion. Therefore, it has

to be treated with reference to the other indicia, which are prescribed in the various decisions, like Kistappa Naicker v. Elumalai Naicker 1976 2

M.L.J. 470 : 89 L.W. 471 Nagappa Gounder Vs. Kasi Gounder and Others, ., and Jaydayal Poddar (Deceased) through L.Rs. and Another Vs.

Mst. Bibi Hazra and Others, If therefore that statement made by Govinda Konar in Ex. B19 is eschewed from consideration, then there is nothing

else to prove that it is a case of benami and ostensible title being in the name of Marimuthammal, that title must prevail. In matters like this, as laid

down in Kistappa Naicker v. Elumalai Naicker 1976 2 M.L.J. 470 : 89 L.W. 471, the intention is material, as is evident from S. 82 of the Trusts

Act.

7. One other point that requires to be mentioned in passing is that Ex. B2 had come to be attested by Govinda Konar. This contemporaneous

conduct is a relevant piece of evidence though the case has been over stated by the appellant before the learned single Judge as though it would

constitute estoppel. In so far as item 2 is concerned the plaintiffs, as daughters of Marimuthammal, are entitled to the same and hence they pray for

a decree as claimed in the plaint.

8. Mr. K. Sarvabhauman, learned counsel for the respondents, supporting the

concurrent judgments of the courts below, would contend that it is

not correct to say that both the courts below had held that the statement made by Govinda Konar in Ex. B49 alone would conclude the issue. First

and fore most, in the plaint, there is not a single allegation that consideration ever proceeded from Marimuthammal. Secondly in para 4 of the

plaint, it is stated that at the time of second marriage, Marimuthammal insisted that she should be provided with some security for her maintenance

and consequently, the impugned purchases under Ex. B2 and B3 came to be executed. This statement ignores the fact that even before the second

marriage with Lakshmi Ammal in 1944, Ex. B2 purchase came to be made on 15th October, 1943 itself. Therefore, that gives a direct (sic) lie to

the statement made in the plaint. That apart, the municipal registry stands in the name of the husband and he alone had been dealing with the

property. No doubt, not one of these indicia is conclusive. However, the cumulative effect of all these, coupled with the statement made under Ex.

B49 would undoubtedly lead to the inescapable conclusion that it is benami. The cases cited by the learned counsel for the appellants, with regard

to the statement made in the Will, cannot be relied on, viz., Thakur Bhim Singh (Dead) by Lrs and Another Vs. Thakur Kan Singh, and Patta-

bhiram''s case AIR 1922 P.O. 102:15 L.W. 404. which are clearly distinguishable on facts.

9. No doubt, intention is one of the important tests. Where such an intention is gatherable, from a statement made anti litem mortam by Govinda

Konar, that is an available piece of evidence and it is nobody''s case that it concludes the issue. Both the courts below have analysed the case of

benami with reference to the various cases and here one such case would be enough for the purpose of this appeal, viz. Controller of Estate Duty,

Lucknow Vs. Aloke Mitra, wherein the entire case law on the subject has been set out In Kishtappa Naicker''s case 1976 2 M.L.J. 470 : 89

L.W. 471., the learned Judge on evidence found that there was intention on the part of the husband to benefit the wife. But here, the direct answer

is afforded by the statement made by the husband under Ex. B49. In this case, it is admitted by P.W. 3, that it was her father, Govinda Konar,

who provided the consideration for the purchase. This coupled with the other tests, which determine the case of benami, clearly points out the case of benami.

10. No doubt, Govinda Konar had attested Ex. B2, but by that, nothing turns upon, that it is entirely a matter for evidence where the case of

benami has been proved. The courts below are therefore correct and no case has been made out for interference.

11. As regards benami, as to what are the tests to be applied, it has repeatedly been laid down in a series of cases and they are too well settled

and it is not necessary for us to refer to those cases in detail excepting to give the citation, viz., Kishtsppa Naicker''s case4, Nagappa Gounder Vs.

Kasi Gounder and Others, , Jaydayal Poddar (Deceased) through L.Rs. and Another Vs. Mst. Bibi Hazra and Others, ., and Controller of Estate

Duty. Lucknow v. Aloke Mitra. We will do well to refer to a few paragraphs in the last of the cases referred to above:

The law in this matter is not in doubt and is authoritatively stated by a long line of decisions of the Privy Council starting from the well-known case

of Gopeekrist Cossin v. Gungaprasad Gosain 1854-5 M.I.A. 53 , to AIR 1925 181 (Privy Council) and of this Court in Meenakshi Mills,

Madurai Vs. The Commissioner of Income Tax, Madras, . As observed by Knight Bruce, L.J. in Gopeekrist Gosain''s Case 1854-5 M.I.A. 53

the doctrine of advancement is not applicable in India, so as to raise the question of a resulting trust. When a property is purchased by a husband in

the name of his wife, or by a father in the name of his son it must be presumed that they are benamidars, and if they claim it as their own by alleging

that the husband or the father intended to make a gift of the property to them, the onus rests upon them to establish such a gift. In AIR 1925 181

(Privy Council) the law was stated with clarity by Sir John Edge in these words--

There can be no doubt now that a purchase in India by a native of India of property in India in the name of his wife unexplained by other proved or

admitted facts is to be regarded as a benami transaction, by which the beneficial interest in the property is in the husband, although the ostensible

title is in the wife.

It is but axiomatic that a benami transaction does not vest any title in the benamidar but vests it in the real owner. When the benamidar is in

possession of the property standing in his name, he is in a sense the trustee for the real owner; he is only a name lender of an alias for the real owner. In Pethaperumal Chetti v. Muniandi Servai 1908 35 I.A. 98., the Judicial Committee quoted with approval the following passage from

Mayne''s Hindu Law, 7th Edn. para 446:-

Where a transaction is once made out to be a mere benami, it is evident that the benamidar absolutely disappears from the title. His name is simply

an alias for that of the person beneficially interested.

The cardinal distinction between a trustee known to English law and a benamidar lies in the fact that a trustee is the legal owner of the property

standing in his name and cestui que trust is only a beneficial owner, whereas in the case of a benami transaction, the real owner has got the legal

title though the property is in the name of the benamidar. It is well settled that the real owner can deal with the property without reference to the

latter. The law is succinctly stated by Mayne in his Treatise on Hindu Law, 11th Edn. at page 953, in the following terms:-

A benami transaction is one where one buys property in the name of another or gratuitously transfers his property to another, without indicating an

intention to benefit the other. The benamidar therefore has no beneficial interest in the property or business that stands in his name; he represents in

fact the real owner and so far as their relative legal position is concerned, he is a mere trustee for him. In other words, a benami purchase or

conveyance leads to a resulting trust in India just as a purchase or transfer under similar circumstances leads to a resulting trust in England. The

general rule and principle of the Indian Law as to resulting trusts differs but little if at all, from the general rule of English Law upon the same

subject.

12. The question in this case is whether the plea of benami has been made out. As regards the source of purchase money, the plaint states in para

4:

When the said T.N. Govinda Konar wanted to take a second wife plaintiffs'' mother Marimuthammal insisted that some provision should be made

for her maintenance. T.N. Govinda Konar taking into consideration her loyalty and faithful service to the family acceded to her request and

purchased 2 items of properties described in the schedule annexed to the plaint in her name on two different dates.

As rightly contended by Mr. Sarvabhauman, learned counsel for the respondents, the marriage of Govinda Konar with Lakshmi Ammal, took

place in the year 1944 admittedly (Underlining is ours). We find Ex. B2 sale deed, which is one of the sale deeds referred to in para 4, to have

been executed on 15th October, 1943, viz., prior to the marriage of Lakshmi Ammal with Govinda Konar. Therefore, this plea cannot at all be

accepted.

13. Then in para 5 of the plaint, it is stated that both these sale deeds, viz., Ex. B2 dated 15th October, 1943 and Ex. B3 dated 20th June, 1947

are in the name of Marimuthammal, mother of the plaintiffs, and the above two purchases were effected solely to benefit Marimuthammal and after

purchase Marimuthammal was in exclusive possession and enjoyment of the said properties. On a careful reading of the plaint, we find nowhere

even a casual allegation that their mother provided the consideration. On the contrary, P.W. 3, the first plaintiff Jayalakshmi admits in cross

examination that it was only the father, who provided the funds for the purchase of both the properties covered by Exs. B2 and B3, and he

purchased the same in the name of their mother. Therefore, that is the position.

14. Then, with regard to the manner of dealing with the properties, Govinda Konar collected the rent for the suit houses along with his other houses

by issuing printed receipts in his name. The same is spoken to by D.Ws. 2, 3 and 4. Exs. B4 to B20 are the counterfoils of receipts for item 1,

while Ex. B21 to B24 are the counterfoils of the receipts for item 2 of the suit properties.

15. Property tax has been paid by Govinda Konar, in his own name. Then remains only the motive. As the Privy Council has often held, benami

transactions are so frequent and so common in India that the motive pales into insignificance. Coupled with this, we propose to examine the

statement made by Govinda Konar, himself under Ex. B491, the registered will. In no uncertain terms he has stated in Ex. B49 in para 4 that the

two properties forming part of the A schedule have been purchased with his funds and they stand in the name of Marimuthammal as benami and

that she is the name lender. Though it be so, they have been in his possession and that he alone has the right, title and interest. After stating so he

bequeathed the property consisting of two items covered by Exs. B2 and B3 sale deeds, conferring life estate on Marimuthammal without any power of alienation and after her demise, the properties to devolve on the two plaintiffs, in equal moieties as far as item 1 of A schedule is

concerned (i.e., item 2 of plaint schedule.) As regards item 2 is concerned (i.e., item 1 of plaint schedule), he states that having regard to the fact

that the second wife Lakshmi Ammal''s son, Sekar (3rd defendant) had been brought up by Marimuthammal, his elder wife as her foster son, after

her life time and after performing the obsequies of Marimuthammal, he shall enjoy the said item of property for his life and after his life time, it shall

devolve on his heirs, absolutely. The matter does not stop there. Even with regard to house property covered by the B Schedule to B49, which

was admittedly purchased by Govinda Konar in the name of his second wife, Lakshmi Ammal, he makes an equally categorical assertion that the

same was purchased benami by him in the name of Lakshmi Ammal and she was only a name lender and he alone was entitled to the same and

after making that assertion, he bequeathed the same in favour of Lakshmi Ammal conferring life estate on her and after her lifetime, the same to

devolve upon her four daughters Ramanibhai, Jalaja, Indirani and Susila, each taking an equal share. Therefore, normally speaking, this is not a

case of mere assertion, but over and above that, the manner of treatment of the property. In other words, at no point of time, from the date of

purchase, Govinda Konar ever intended to benefit either his first wife or the second wife, though of course, we are concerned in this case only with

the nature of benami transaction attendant on Ex. B2 and B3. If that be so, the question of intention, which has been held as an important test, as

laid down by Ismail, J. (as he then was), in Kistappa Naicker v. Elumalai Naicker 1976 2 M.L.J. 470 : 89 L.W. 471 is necessary by statement.

The argument of Mr. M. R. Narayanaswami that this alone will not clinch the issue may be all right. But as we have stated already, there are other

circumstances as well, which we have just now pointed out. Looked at from this point of view, we do not think the decision in Thakur Bhim Singh

(Dead) by Lrs and Another Vs. Thakur Kan Singh, could advance the case of the appellants, wherein at page 86 in para 24, is stated thus :--

It was, however, contended on behalf of the defendant that the statement made by Bharat Singh in the year 1956 could not be accepted as

evidence in proof of the nature of the transactions which had taken place in the year 1940. It was contended that the question whether a transaction was of a benami nature or not should be decided on the basis of evidence about facts which had taken place at or about the time of the

transaction and not by statements made several years after the date of the transaction.

But in this case, as we have pointed out, the statement is one of the pieces of evidence which certainly could be taken into consideration in order to

determine the intention, which is one of the vital tests. Viewed in this perspective, the decision in Pattabiram''s case AIR 1922 P.C. 102 : 15 L.W.

404 wherein the head note reads thus :--

A statement in a Will suggesting an inference as to a fact in issue, cannot be provided by or on behalf of the person who made it or this

representative-in-interest. Even where two executors, who were members of the family, acted upon the Will, still the statements cannot be treated

as an admission by the members of the family that the statement in the Will is true.

again does not assist the appellants.

16. Normally, the principle is that in the absence of benami, the person, who had been entitled to the property, is the ostensible title holder. In this

case, it is conceded as the evidence of P.W. 3 itself would disclose that Govinda Konar provided the funds. Therefore, the intention talked of

under S. 82 of the Trusts Act, is clearly brought out by the above statement in the Will coupled with this evidence.

17. The fact that Govinda Konar attested Ex. B2 does not in any manner be determinative of the question of benami and the learned counsel for

the appellants fairly conceded that there is no question of estoppel by reason of such attestation. For all these reasons, we conclude that there is no

warrant for interference. Accordingly the appeal will stand dismissed. However, having regard to the close relationship between the parties, we do

not think the appellants should be mulcted with costs. The parties will therefore bear their own costs in this appeal.

