

(1987) 08 KL CK 0021

In the High Court Of Kerala

Case No : A.S. No"s. 356, 357, 358 and 359 of 1985

Narayanan and Others

APPELLANT

Vs

Gangadharan

RESPONDENT

Date of Decision : 27-08-1987

Acts Referred:

Trusts Act, 1882 — Section 82

Citation : AIR 1988 Ker 324 : (1989) 180 ITR 491

Hon'ble Judges : P.K. Shamsuddin, J;P.C. Balakrishna Menon, J

Bench : Division Bench

Advocate : P.N.K. Achan, K. Vijayan and P.N. Ravindra, for the Appellant; C.P. Damodaran Nair and D. Krishna Prasad, for the Respondent

Final Decision : Dismissed

Judgement

Shamsuddin, J.—These appeals are directed against the judgments in O.S. Nos. 347, 349, 351 and 353 of 1983 on the file of the Court of Subordinate Judge of Palghat. Defendants in the respective suits are the appellants in these cases. Plaintiff in all the suits is the same person and is the brother of the defendants in the suits.

2. The relief sought for in all the suits is recovery of possession from the defendants on the strength of title. The facts leading to ,these appeals may be summarised as follows:

The plaintiff and the defendants are sons of one Chippukutty. The defendant in O. S. No. 349 of 1983 is the eldest. According to the plaintiff from his early youth onwards, the plaintiff had been working in various places and ultimately he was employed in Saudi Arabia and had saved considerable, income from his employment. The eldest brother Narayanan who is the defendant in O.S.No. 349 of 1983 is a teacher working in his native place. The plaintiff had been sending all the money saved by him to Narayanan by cheque and money orders and also had paid cash when he came to the native place occasionally. The plaintiff

requested him to accumulate the money sent by him and to invest in landed properties in his name. Narayanan agreed to do it and a sum of Rs. 85,000/- was entrusted to Narayanan for the purpose of acquiring landed properties. Narayanan had deposited the money in the Koduvayoor Service Cooperative Bank. Thereafter Narayanan entered into an agreement with the widow and children of one Gopala Iyer for purchasing the suit properties. Pursuant to this Narayanan purchased the properties by separate documents in his name and in the names of his brothers including the plaintiff. Narayanan had paid the amounts of consideration out of the funds sent by the plaintiff for the purpose of acquiring landed property in his name. Expenses for execution of the documents and registration were also met out of the funds sent by the plaintiff. However, Narayanan and other brothers did not inform him about the acquisition made in the name of his brothers, and he came to know of the fact only when he came on leave, to his native place in the year 1981. The plaintiff's case is that when he complained to Narayanan and the other brothers of having taken the assignment deeds in their names, all of them agreed that when the plaintiff returns to India, they would give all the properties back to him executing necessary documents; They also agreed to account the profits derived from the properties. In Feb. 1982 the plaintiff resigned his job in Saudi Arabia and came back to his native place. He demanded his brothers to give back his properties as had been promised by them. Pursuant to this, Anandan, one of the brothers of the plaintiff, conveyed the properties purchased in his name to the plaintiff, but the other brothers including Narayanan did not convey the properties to the plaintiff or account for the profits. Therefore, on 18-2- 1983 the plaintiff demanded his brothers including Narayanan by registered lawyer notice to execute documents conveying the properties purchased in their names with his funds to him. To this Narayanan sent a reply denying the liability to convey the property to the plaintiff. The plaintiff averred that the money entrusted by the plaintiff with Narayanan for the purpose of acquiring landed properties is a trust property. The amounts were entrusted with the defendant Narayanan on the strength of his faith in Narayanan for specific purpose of acquiring landed properties in the name of the plaintiff and therefore Narayanan had a fiduciary capacity. Misusing the fiduciary capacity and utilising the trust money, Narayanan has purchased the properties in his name and in the names of the other brothers as well with a view to deceiving the plaintiff. The other brothers are also constructive trustees in respect of the properties purchased in their names and they are all bound to account for the profits and to surrender possession of the properties purchased in their names to the plaintiff.

3. The defendants resisted the claim of the plaintiff. The entrustment of money to Narayanan for acquiring landed property in the name of the plaintiff was denied. According to them the suit was barred by limitation. They also contended that the properties were purchased out of the funds of the defendants themselves. Narayanan, the eldest brother and the defendant in O.S. No. 349 of 1983 further contended that he spent a sum of Rs. 9051/- for purchasing the

property in his name. In his written statement he admitted that an amount of Rs. 58,000/- was received by him from the plaintiff. He also stated in his written statement that the plaintiff came to India for his marriage in April, 1979 and an amount of Rs. 22,000/- was spent by him for his marriage. He purchased a property for the plaintiff by registered assignment deed No. 950 of 1979 for a sum of Rs. 12,000/-. According to him, the plaintiff is liable to pay to him a sum of Rs. 9,000/- and he reserved his right to institute appropriate proceedings for recovery of the said amount. The defendants also contended that there was no trust or constructive trust created as averred in the plaint.

4. The bone of the contention raised by the plaintiff in all the suits was that he entrusted money to Narayanan, the defendant in O.S No. 349 of 1983 and 1st defendant in the other suits, for the specific purpose of purchasing landed property in the name of the plaintiff but his brother Narayanan betrayed the trust reposed in him and purchased properties in the names of himself and his other brothers who are the defendants in O.S. Nos. 347 of 1983, 351 of 1983 and 353 of 1983 and another brother Anandan and that thereafter Anandan surrendered the property in his name to the plaintiff, but the other defendants in the suits refused to surrender possession of the properties and that therefore he was entitled to recover possession of the plaint schedule properties. There was also an alternative prayer for recovery of the market value of the plaint schedule properties in case the Court for any reason holds that he is not entitled to recovery of possession. On the other hand, the defendants would contend that the properties were purchased out of their own funds and that therefore the plaintiff was not entitled to recovery of possession. The common issue raised in all these cases is whether money was entrusted with Narayanan for purchase of lands in the name of the plaintiff and whether he committed any breach of trust reposed in him and purchased the lands in the name of himself and other defendants with the funds made available by the plaintiff. Because of this common issue, those cases were tried together by the lower Court and a common judgment was pronounced holding that the plaintiff entrusted money with Narayanan, the defendant in O.S. No. 349 of 1983 for purchase of landed property in his name and utilising those funds the defendant Narayanan purchased landed property in the name of himself and other defendants in the suits and that therefore the plaintiff was entitled to recovery of possession with mesne profits for three years. It was also held that the plaintiff is entitled to future mesne profits from the date of suit till recovery of possession, and, was further ordered that the quantum of profits will be decided in execution proceedings.

5. In these appeals also the learned counsel for the appellants argued that the properties were purchased by the defendants out of their own funds. The learned counsel conceded that the amounts entrusted by the plaintiff might, have been used to pay part of the consideration for the lands purchased but according to him that would not entitle the plaintiff to recover the properties from the defendants. It was also argued by the learned counsel that the entrustment of

funds was only to Narayanan the defendant in O.S. No. 349 of 1983 and in the circumstances the plaintiff could not have sought for any relief against the 2nd defendant in other suits. The learned counsel also contended that there is no evidence to show that money was entrusted to Narayanan for the specific purpose of purchasing landed property in the name of the plaintiff and that therefore there cannot be any inference of trust constructive or otherwise. As indicated earlier O.S. No. 349 of 1983 is filed against Narayanan, the elder brother of the plaintiff who is the first defendant in all the suits. The 2nd defendant in O.S. No. 353 of 1983 did not contest the matter and was set ex parte, and the document of purchase in his favour was not produced before Court. However appeal has been filed against the judgment and decree in O.S. No. 353 also.

6. The plaintiff has given evidence as PW 1. He deposed that before he left for Saudi Arabia to take employment his cousins PWs. 2 and 3 also came to his house to see him and they had occasion to discuss his prospects of earning money in the presence of his brother Narayanan, and he suggested that his brother Narayanan would accumulate money sent by him for the purpose of purchasing landed property in his name, and this proposal was agreed to by Narayanan. This evidence is corroborated by the evidence of PWs. 2 and 3, who are cousins of plaintiff and defendants who deposed that in the month of July they had been to the house of the plaintiff and the defendants at Kakkayoor and that during the course of conversation it was proposed by the plaintiff that he would send money in the name of Narayanan and that the money would be invested in landed properties in the name of the plaintiff by Narayanan and that Narayanan had agreed to do so. Though these witnesses were cross-examined at length nothing has been elicited to cast doubt on the veracity of the testimony of these witnesses. PWs. 2 and 3 are closely related to the plaintiff as well as the defendant and it is not shown that they have got any axe to grind against the defendants. However, in his evidence as DW. 1, Narayanan stated that on 10-7-1977, the date on which the alleged conversation took place, the plaintiff left for Delhi in response to a telegram received on that they directing him to appear in Delhi by 10 a.m. on 11-7-1977. The youngest brother has also sworn as DW 2 that the plaintiff left for Delhi on 10-7-1977. DW 9 was also examined to give evidence to this effect. The testimony of DWs. 1 and 2 is highly interested. The lower Court has discussed the evidence of DW. 9 and held that his evidence is totally unreliable. The subsequent conduct of the plaintiff in sending money to Narayanan would also strengthen the version given by the plaintiff as well as PWs. 2 and 3. DW. 1 stated that while sending the money by draft the plaintiff had not sent any covering letters and he was not told by the plaintiff in what manner the money was to be utilised or deposited. Ext. A 23 is admittedly a statement of account relating to money paid by the plaintiff to Narayanan during the period from 21-9-1977 to 14-5-1979, prepared by Narayanan and given to the plaintiff. It would clearly indicate that a total amount of Rs. 81,100/- was received by him during the period. In the statement of

accounts Narayanan has given a statement of expenditure to the tune of Rs. 28,100/-. But there is no acceptable evidence to show that these amounts were really spent by Narayanan for the plaintiff. Further, the fact that as per Ext. A 22, Anandan surrendered the property purchased in his name to the plaintiff would also support the evidence of PW. 1 that the properties were purchased by the defendants with the amounts sent by the plaintiff to Narayanan. Ext. A 22 clearly recites that the consideration was provided from the amounts sent by plaintiff to Narayanan. It is also significant to note that the 2nd defendant in O.S. No. 353 of 1983 has remained absent and was set ex parte. One would expect him to contest the matter if really he had paid Rs. 12,000/-towards the purchased property. The 2nd defendant in O.S. No. 347 of 1983 had not gone to the witness box to prove that it was he who paid the consideration for the purchase made by him. The evidence of DW. 2 would show that he had no money for purchase and his case that he had borrowed the money from others cannot be believed. The 2nd defendant in O.S. No. 347 of 1983 stated in his written statement that he borrowed Rs. 10,000/- from his brother-in-law Madhavan and that was utilised for the purpose of purchasing the property. But DW. 1 deposed that Rs. 5,000/- was with Chandran and the balance was obtained from his brother-in-law. But, according to the written statement of the 2nd defendant in O.S. No. 347 of 1983 he paid only Rs. 12,000/-. The evidence of D.W. 3 is to the effect that he paid Rs. 10,000/- to his brother-in-law but this version was disbelieved by the lower Court. It can also be noticed that the sale deed in favour of the 2nd defendant itself would show that he was a student who had no means of income on 29-4-1979. D.W. 4 was examined to show that he had given a loan of Rs. 5,000/- to the 2nd defendant in O.S. No. 351 of 1983, It is difficult to believe that he advanced such a large amount without any security to the 2nd defendant who had no ostensible means of income of the date of purchase of the property. The testimony of D.W. 8 to the effect that he had advanced Rs. 10,000/- to D.W. 2 who was only a student without taking any security, is totally unbelievable. This witness is none other than the brother-in-law of D.W. 1 Narayanan. In these circumstances the finding of the lower Court that the evidence adduced on behalf of the defendants that they had sufficient means to make the purchase cannot be true, is quite justified.

7. Ext. A24 is part of the letter admittedly sent by DW. 1 to PW. 1. This letter is seen written on 15-9-1980. The following recital in Ext.A 24 is significant:

(Matter in vernacular hence omitted--Ed)

It is stated in Ext. A 24 :

(Matter in vernacular hence omitted-- Ed.)

These statements would clearly indicate that the properties were purchased in the name of his brothers not with the funds supplied by them and that DW. 1 had not purchased the property in the name of the plaintiff for the entire money he sent. The above recitals would also indicate that considerable extent of landed

properties sufficient for the plaintiff and his family to lead a comfortable life was purchased with the funds entrusted by the plaintiff and what was required was that the documents relating to these properties had to be written in the name of the persons who are entitled to it. DW. 1 has no clear explanation to offer in regard to these statements.

8. The foregoing discussion would clearly show that though the properties were purchased in the names of the defendants in these suits, really the consideration was paid out of the money sent by the plaintiff to Narayanan, for the specific purpose of purchasing landed property in the name of the plaintiff. It is also clear from the evidence that these defendants had no ostensible means for making the purchase at the time when the purchases were made. No doubt, DW. 1 Narayanan is a teacher. But it is clear from the way in which the documents came into existence and the admissions made by DW. 1 regarding the receipt of amounts that really consideration was paid out of the amounts sent by the plaintiff to D.W. 1 Narayanan for the purpose of purchasing landed property in the name of the plaintiff.

9. The next question to be considered is whether the plaintiff is entitled to recover the properties from the defendants. It has been held in a number of cases that where the property is acquired in the name of one person but the purchase price is paid by another, a presumption arises that the transaction is one for the benefit of the person providing the money. In Harihar Prasad Singh and Another Vs. Maharaja Kesho Prasad Singh, the question of presumption that the transaction is for the benefit of the person who pays consideration came for the consideration of a Full Bench of the Patna High Court. In that case the plaintiff claimed possession of an estate in Burma and a house and a garden in Dumraon together with an account of the income and other subsidiary reliefs. The Court held that where the property is acquired in the name of one person, but purchase price is paid by another, a presumption arises that the transaction is one for the benefit of the person providing the money. However on the facts of that case, the majority of the Judges took the view that the evidence in that case indicated a different intention.

10. In A. Rangaswami Pillai Vs. A. Subramania Pillai and Others, , the scope of Section 82 of the Trusts Act and the burden of proof relating to the intention of the person who provided consideration came for the consideration of a Division Bench of the Madras High Court. In that case the property was purchased by the plaintiff's father in the name of his wife. The Court made the following observation in paragraph 4 of its judgment.

"4. It is next contended by the learned counsel, relying on Section 82 of the Indian Trusts Act, 1882, that Arthanatha intended to provide the consideration for the benefit of his wife and that therefore the property was the absolute property of Nagammal. Section 82 of the Trusts Act provides that where property is transferred to one person for a consideration paid or provided by another person, and it appears that such other person did not intend to pay or provide

such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration. According to the counsel, the payment of consideration alone will not prove a resulting trust, but it must also be proved that the person who provided the consideration did not intend to pay or provide such consideration for the benefit of the transferee and the onus is on the person who asserts that such person did not intend to pay or provide such consideration for the benefit of the transferee and not on the transferee himself, to show that the person did intend to provide the consideration for his or her benefit. He also relied on the provisions of Section 81 in support of the construction placed by him on Section 82. We are unable to agree with this contention of the learned counsel. When once it is proved that the consideration was provided by a person other than the transferee and it is claimed that the person who provided the consideration did not intend to provide such consideration for the benefit of the transferee, the onus is on the transferee to show that the person who provided the consideration did intend to provide the consideration for his or her benefit. The question that will have to be considered after finding that the consideration was provided not by the transferee but by the other person, is as to whether such other person did intend to provide the consideration for the benefit of the transferee and not whether such person did not intend to benefit the transferee. This could be arrived at both from the language of Section 82 itself and from the general principles of evidence and onus of proof. It is now well-settled that in Indian law the English rule as to presumption of advancement has not been adopted. Therefore, once it is found that the consideration has been provided by the husband, there being no presumption of advancement, it will have to be proved by the, person claiming to be the transferee that the consideration was provided for her benefit....."

11. The benami nature of transactions was considered by the Supreme Court in *Controller of Estate Duty, Lucknow Vs. Aloke Mitra*, . The Court said :

"30. 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 Gosain v. Gungapersaud Gosain* (1854) 6 Moo I.A 53 to *Lakshmiah Chetty V. Kohandrama Pillai* and of this Court in *SREE MEENAKSHI MILLS LIMITED Vs. COMMISSIONER OF Income Tax, MADRAS*, . As observed by Knight Bruce, LJ. in *Gopeekrist Gosain* case, 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 *Sura Lakshmiah Chetty* case, 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.

31. 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 or an alias for the real owner. In *Petheperumal Chetty v. Muniandy Servai* (1907) 35 I.A 98: 38 Cal 551 the Judicial Committee quoted with approval the following passage from Mayne's Hindu Law, 7th ed. 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 cestuique 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. In *Gur Narayan v. Sheo Lal Singh* (1918) 46 I.A 1 : AIR 1918 PC 140 : 49 Ind Cas 1 the Judicial Committee referred to the judgment of Sir George Farwell in *Bilas Kunwar v. Desraj Ranjit Singh*, where it was observed that a benami transaction had a curious resemblance to the doctrine of English law that the trust of the legal estate results to the man who pays the purchase money, and went on to say :

".....the benamidar 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 *Guran Ditta v. Ram Ditta* (1928) 55 I.A 235 : AIR 1928 PC 172 the Judicial Committee reiterated the principle laid down in *Gopeekrist Gosain* case and observed that in case of a benami transaction, there is a resulting trust in favour of the person providing the purchase-money.

32. A benamidar has no interest at all in the property standing in his name. Where the transaction is once made out to be benami, the Court must give effect to the real and not to the nominal title subject to certain exceptions....."

12. In the above case, the Supreme Court held that the shares were purchased by the deceased in the name of his wife and sons etc., and therefore the real ownership was vested in the deceased who was entitled to deal with the same as if it were his own and benamidars held in trust u/s 82 of the Trusts Act for the benefit of the deceased.

13. A Division Bench of this Court to which one of us (Balakrishna Menon, J.) was

a party, considered the question of constructive trust in *Harihara Iyer v. Bhageerathi Amma*, (A.S. No. 87 of 1979) : (reported in ILR 1986 Ker 184). The Division Bench quoted with approval the following passage from a Division Bench ruling of the Madras High Court in *Kathoom Bi v. Abdul Wahab* AIR 1939 Mad 313

"A trustee is not permitted to make a profit out of his trust and a guardian of a minor is in the position of a trustee when in possession of the minor's property. In (1737) 1 Atk 489 : 26 ER 310 Lord Hardwicke observed that where a person, whether a father or a stranger, enters upon the estate of an infant and continues the possession the Court will consider such person as a guardian of the infant. In (1744) 3 Atk 124 : 26 ER 875 Lord Hardwicke declared that the Court will decree an account from the time the infant's title accrued, "for every person who enters on the estate of an infant enters as a guardian or a bailiff," and in (1797) 7 ITR 386: 101 ER 1034 Lord Kenyon, C.J. said that nothing can be clearer than that an infant may consider whoever enters on his estate as entering for his use. This principle has many times been affirmed and is now embodied in the Indian Trusts Act. Section 88, Trusts Act provides that where a trustee, executor, partner, agent, director of a company, legal adviser or other person bound in 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."

14. There is no evidence in this case to show that the plaintiff wanted to benefit the defendants when he provided funds for purchase of landed properties. On the other hand, the evidence is overwhelming in this case to the effect that the money was sent by the plaintiff to the defendant in O.S. No. 349 of 1983 for the specific purpose of purchasing landed properties in the name of the plaintiff, but instead, he purchased the properties in the name of himself and his other brothers with the fund so provided by the plaintiff. Therefore, it has to be held that the plaintiff is the beneficial owner and he is entitled to recover possession of the plaintiff schedule properties from the defendants in these suits. In our view this is a case where Section 82 of the Trusts Act squarely applies.

15. Though the defendants have a contention that the suit is barred by limitation, it has not been shown how it is barred by limitation. The defendants held the property for the benefit of the person paying consideration and therefore this is a case where Section 10 of the Limitation Act would also apply.

16. The plaintiff has filed a cross-objection in A.S. No. 359 of 1985, claiming future mesne profits. In other cases the Court below has granted future mesne profits from the date of the suit till recovery of possession. In this case also the plaintiff is entitled to future mesne profits from the date of the suit till recovery of possession. The quantum of mesne profits will be decided in proceedings in execution as in the other cases.

17. In the result, the appeals fail and are accordingly dismissed. The cross-objection in A.S. No. 359 of 1985 is allowed to the above extent. In the circumstances of the case, the parties will bear their respective costs.