
(2008) 10 MAD CK 0147

In the Madras High Court

Case No : A.S. No. 62 of 1994 and C.M.P. No. 317 of 2007

P. Srinivasan and Santhakumari

APPELLANT

Vs

P. Gopal and P. Balaji

RESPONDENT

Date of Decision : 31-10-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27, Order 6 Rule 17, Order 6 Rule 4, Order 8 Rule 9, 11
Trusts Act, 1882 — Section 88, 90

Citation : (2009) 1 LW 177

Hon'ble Judges : K. Kannan, J

Bench : Single Bench

Advocate : T.R. Mani, for Mr. T.M. Hariharan, for the Appellant; P.T. Asha, for the Respondent

Judgement

K. Kannan, J.—Subject matter of litigation

The appeal has been filed by defendants 1 and 2 in O.S. No. 776 of 1985 on the file of Sub Court, Coimbatore. The suit has been filed by the respondents in the appeal to declare that Ex.B-27 - purchase of suit property standing in the name of the second defendant on 14.9.1985 was done by the first defendant in his wife's name, benami for the benefit of plaintiffs 1 & 2 and the first defendant as joint owners and for partition of the plaintiff's 2/3rd share and for the relief of injunction to restrain the defendants from interfering with their joint possession.

II. Disposition at the trial court

The trial court found the transaction to be not benami, but held that the document of purchase was fraudulent in the sense that the first defendant had instead of purchasing the property in the name of the family members, namely, the plaintiffs and the first defendant, had purchased the property in the name of his wife, the second defendant. The plaintiffs, according to the trial Court, was therefore entitled to a 2/3rd share and granted the relief of partition as prayed for. The trial Court also found that the earlier partition decree which had been

passed with reference to a panchayat arrangement for division of the house property and the business run at the suit property has to be decreed in terms of the panchayat arrangement. The Court however said that the decree passed by the Sub Court had not become final in the sense final decree had not been passed and therefore the suit was deemed to be still pending.

III. The main grounds of challenge in appeal

2. The Trial Court's Judgment is being assailed by the defendants 1 & 2 on the ground that the suit had been filed on the basis that the document of purchase was benami for the benefit of the family but in the name of the second defendant and when that had been found against by the trial court, the decree granted was clearly erroneous. The plea of fraud attributed to the first defendant had no foundation in the pleadings, especially with no definite particulars as required to be given under O.6 r.4 C.P.C, and the decree of the trial Court suffers from a vice of granting the relief which had no basis. In other words, if the benami theory goes out of reckoning, the appellants have no case of the plaintiffs to answer.

IV. Consideration of additional evidence in appeal

3. At the appellate Court, the appellants have filed CMP. No. 317 of 2007 for reception of some documents as additional evidence under Order 41 Rule 27 CPC. These documents have been originally received subject to proof and relevance and it is essential to dispose of the application before considering the appeal on its merits. These documents have been filed to prove that pursuant to a decree for partition which was passed before the in O.S. No. 480/85 on the file of Sub Court, Coimbatore, the mother had originally entered into a deed of partition with her two sons and subsequently there has also been a sale of the property. In both these documents, the fact that the family house has been divided in a particular fashion pursuant to a decree in O.S. No. 480/85 was specifically recited. The attempt of the appellant is to point out that the finding of the trial court that the decree in O.S. No. 480 of 1985 had not been given effect or in any event the decree had not become final, cannot be true, especially in view of the conduct of the parties namely the plaintiffs themselves enjoying the property along with their mother and treating the earlier partition that had been effected as final and acting upon such a transaction. These documents although already available at the time of the trial, perhaps the defendants did not file because they did not think it could advance the case one way or the other, but having regard to the specific finding given by the Court below that the partition that had been brought about with reference to the family business and the house, had not become final, the defendants seek to file to point out that the trial court's finding was clearly erroneous and it was against even the conduct of the parties. For the cause of advancing justice, I deem these documents as essential for the case. In any event, no prejudice could be occasioned by the reception of the documents, in view of the fact that the respondents are parties to the transaction and the documents are admitted. Consequently, I allow the application and ordered the reception of these documents. These documents will

be received and marked at the appellate Court as Exs.B48 and 49. The petition is therefore ordered accordingly.

V. Withdrawal of plea of benami as found in original pleadings cannot be sustained; averments in reply statement is to be discarded

4. The appellants contend that earlier the plaintiffs filed application I.A. No. 235 of 1990 under Order 6 Rule 17 CPC to amend the plaint by withdrawing the averment as benami and the application had been originally dismissed. This was thought necessary perhaps by the fact that at that time the decision of the Supreme Court in *Mithilesh Kumar and Another Vs. Prem Behari Khare*, held the field and the Benami Transactions Prohibition Act had a retrospective effect. Against the judgment of the trial Court in the interim application, the plaintiff/petitioner had filed CRP. No. 2682/90 which was also dismissed by the High Court. The plaintiff/petitioner went to Supreme Court in SLP. 1067/91 and the Supreme Court also dismissed the petition with the following observation:

"The learned counsel for the petitioner however contend that in lieu of the observation in the impugned judgment, the petitioner may be seriously prejudiced at the time of final disposal of the suit. The Court while deciding the suit at the final hearing is not bound by any observation made in the order disposing of an interlocutory application, the apprehension expressed on behalf of the petitioner is not well founded."

5. After this application was dismissed and the SLP was also disposed of, the plaintiff again purported to file an application for reception of a reply statement under Order 8 Rule 9 CPC. In the reply statement, the petitioner sought to introduce the very same contention which had been taken in the application for amendment whereby they sought to withdraw the averment relating to benami and when they sought to contend the transaction was not benami, but it has been fraudulently made by the first defendant in the name of the second defendant. The counsel for the appellant seriously contended that the reply statement ought not have been allowed and it amounted to introducing the very same contention which had been earlier decided against by the court below in the application for amendment of the plaint. The senior counsel relied on three decisions, two by the Supreme Court and one by the decision of this Court.

6. In *Aayyappally Mohd. Haji and others v M.M. Abdulsalam and others* (2001) 2 SCC 28, the Supreme Court had, while disposing of a civil appeal, held that where an application for amendment of plaint had been filed along with the appeal after the dismissal of the suit was ultimately dismissed by the Supreme Court and the appeal was directed to be heard on the basis of pleadings that already existed, the High Court would not be justified on relying on evidence sought to be introduced which was the basis for amendment. The Court held that the direction of the Supreme Court with regard to the proceeding had to be scrupulously adhered to.

7. Yet another decision the Supreme Court in *Gurdial Singh and Others Vs. Raj*

Kumar Aneja and Others, where the Court held in Rent Control proceedings, that vague and general application for amendment of written statement accompanied by a new reply statement was not proper and should not be allowed by High Court in revision. A more apposite judgment was the decision of this Court in Simon and another v Thankammal and another 1999 2 CTC 706 where the Court dealt with the issue of applicability of Section 11 C.P.C. on the principle of res judicata. The Court was referring to a case of a defendant filing a petition for additional written statement and when the amendment sought for had been denied, subsequently a petition was filed for amending the written statement. The Court said that the order passed in the course of suit operated as res judicata in the subsequent stage of the same proceedings. The contention of the appellant counsel is therefore that when in an earlier round, the plaintiff sought for amendment of the plaint for an attempt to withdraw the averment relating to benami, and when it had been also disallowed in proceedings that went up to Supreme Court, the plaintiff could not have been permitted to file the same pleadings by means of written statement under Order 8 Rule 9 CPC. The learned counsel also pointed out that there was no provision anywhere in the CPC for reception of reply statement under Order 8 Rule 9 CPC. The last portion of the contention that there is no scope for filing a reply statement is, in my view, meaningless. The additional pleadings referred to under Order 8 Rule 9 is in the nature of addition to the pleadings in any way either to the written statement or by additional pleadings to the plaint by way of a reply statement. This position has been considered in several decisions earlier and I do not feel compelled to be detained on this technical objection.

8. More substantially, the issue whether the plaintiff could have filed a reply statement bringing an averment which had been earlier sought to be done by withdrawal of the plea of benami could be permitted to be done again by means of a written statement could be answered by reference to the decisions of the Supreme Court. The plaintiff cannot be permitted to bring by way of additional pleadings any contention which the plaintiff had earlier sought to do by means of an amendment of pleadings. That decision in the suit at the stage of amendment will doubtless constitute res judicata in the subsequent proceeding. I hold that the reception of the additional pleadings by means of reply statement under Order 8 Rule 9 by the trial Court, was erroneous.

VI. Relationship between parties ? setting the stage for discussion on the crucial issue of trust

9. It is now necessary to set out the relationship between the parties with reference to the averments in the plaint and the written statement and how the issue had been dealt with by the trial Court. The father of the plaintiffs 1 and 2, and of their elder brother viz., the first defendant, was Pandurangam Chettiar. Panduranga Chettiar's wife was Sakuntala. The father was a self-made man and he started a Jewellery business in 1950. They ran the business called Panduaranga Jewellery in the suit premises in Door 250, Big Bazasar Stree,

Coimbatore a shop measuring 7' 7" and 20". It had been rented by the original owner Durairaj in the year 1957 and after the life time of the owner, his wife Ranganayaki renewed the lease in favour of the family under a Document dated 28.2.1975 in Ex.A9. The father Pandurangan was able to save up enough money from the income from the business which was carried with the assistance of his sons, especially the 1st defendant. He purchased a property that was to become their residential house in Door No. 146, Coimbatore. The family had been residing in the said property, while renting out the rear portion to 4 to 6 tenants. The first defendant had married the second defendant of his own choice. While the father consented, the mother did not and according to the first defendant, there was a little misunderstanding between the mother-in-law and the daughter-in-law on that account. The father Panduranga Chettiar passed away leaving the house and the Jewellery business to be succeeded by the wife and the three sons viz. first defendant and the plaintiffs 1 and 2. They had also three daughters. But they have been married and living elsewhere. The three sons alone continued the business after the life time of the father in partnership. The first defendant took a leading part because of his experience in the trade and the plaintiffs, who were juniors in age to the first defendant, were led at all times in the conduct of the business and the family affairs only by the first defendant. Disputes arose between the members of the family when they sought for solution by convening a panchayat. The panchayat suggested a mode of division of the business as well as the residential house. The intervention of panchayatars yielded to a mode of division which was acceptable to all the parties. A larger share in the residential house of an extent of 3087 sq.ft. had been given to the first defendant, while the plaintiffs 1 and 2 had been awarded with 1418 sq.ft. of plinth each. The mother had got 336 sq.ft. of property and some deposits in the Indian Overseas Bank. The jewellery business with the bank account, assets and liability were given to the plaintiff in lieu of the larger share that the first defendant had been given in the house. The first defendant had no objection to the plaintiffs 1 and 2 in carrying on the business as partners and the first defendant had contemplated setting up his own business.

VII. The conduct of the 1st defendant at the negotiation stage for purchase of suit property ? Reasoning of the trial court

10. The point of dispute comes only subsequently to the negotiation for purchase of the suit property which is the shop where the family business was being run. The contention of the plaintiffs was that the original owner Ranganayaki was prepared to sell the property to the family of the plaintiffs and the first defendant and she had herself come to the house in June 1985. The first defendant negotiated for purchase and had contracted to the purchase for the property for a lakh of rupees and on that date namely 18.6.1985, an agreement had been written when Rs. 10,000/- was paid as advance and the balance of Rs. 90,000/- was payable in three instalments. According to the plaintiffs, they were under the impression that the agreement to purchase will yield ultimately to a purchase of the property in the names of the plaintiffs and the first defendant jointly. They

felt betrayed by the fact that ultimately the first defendant purchased the property on 14.9.1985 under Ex.B.27 in the name of the second defendant. This, according to the plaintiffs was a benami purchase and they were entitled to treat the property as the property belonging to the plaintiffs 1 and 2 as well as the first defendant in which they had 2/3rd share. They issued a notice after the purchase on 22.10.1985 calling upon the defendants to concede that the purchase was for the benefit of all the persons viz. the plaintiffs and the first defendant and asking the second defendant to sell 2/3 share to plaintiffs 1 and 2. A reply had been given on 5.11.1985 under Ex.B.45 by defendants 1 and 2 refuting the contention of the plaintiffs that there had been originally an agreement in respect of the property for purchase of the property by the plaintiffs and the first defendant on 18.6.1985 as contended by the plaintiffs and said that the attempt of the plaintiffs was really to bolster their claims by fraudulent and deceitful means. The defendant has set forth in the reply that even after the panchayat was concluded, the panchayat wanted the document relating to suit property to be also made in favour of the plaintiffs 1 and 2 to which the first defendant was not willing. They vowed that they would do everything to ensure that the property was ultimately given to the plaintiffs also. The reply notice conjectured that it was at their instance that the suit notice had been given.

11. The plaintiffs filed the suit under such circumstances reiterating the claim that the document of purchase had been made by the first defendant in the name of the second defendant was really made for the benefit of the family of all the three persons viz. the plaintiff and the first defendant and therefore the document in the name of the second defendant ought to be found to secure the benefit for all the parties viz. Plaintiffs and the first defendant. The relevant portion that the contentions relating to the plea of benemi has been set forth in paragraphs 10 to 14 of the plaint.

12. In the trial Court, the plaintiff examined himself and also a witness who was said to be a witness for the so called agreement. On the side of the defendants, the first defendant examined himself, DW2 was the counsel who filed Vakalathnama and brought about compromise decree in O.S. No. 480 of 1985. DW3 was one of the vendors Chandrasekaran under Ex.B.27. Adverting to all the evidence tendered before it, the trial Court found that the vendor Ranganayaki and her two sons had came to the house of the plaintiffs and the first defendant on 18.6.1985, there had been a talk for selling the property for Rs. 1 lakh, and an advance of Rs. 10,000/- had been paid and balance of Rs. 90,000/- was agreed to be paid within three instalments. The Court found that the plaintiffs had also been there at the time when the negotiation took place and when the first defendant made the payment of Rs. 10,000/-. The trial Court found also that the document Ex.B.26 which had been filed on the defendants' side, as an instrument of receipt by the vendors had been brought up for the purpose of the case to support the case of the second defendant and it was not a true document. On the question as to why the panchayat had not made any specific

reference to the right to purchase the suit property in the name of the plaintiffs, where essentially the business which had been run at the property had been allotted to the plaintiffs, the Court found that the earlier plaint had been filed by the first defendant securing the signature of the plaintiffs 1 and 2 also and they had not really known what the recitals were. It said that the decree will not decide finally the rights of parties, for the said suit itself had not become final and the general stamps which had been directed to be deposited was reported to have been deposited but lost or misplaced at the Court registry and hence, the final decree had also not been passed. The court reasoned that the earlier suit was still deemed to be pending and therefore the plaintiffs could not be estopped from contending that the suit item was also intended to be taken for all their benefit. The trial court found that the entire sale consideration of Rs. 1 lakh has been paid by the first defendant only out of the funds of the family and therefore the plaintiffs were entitled to secure that the declaration that the suit property had been purchased only for the benefit of the plaintiffs and the first defendant and accordingly went on to decree the suit as prayed for. While granting the decree it found that the plea of benami professed by the plaintiffs was not true but since the first defendant had brought about the purchase acting only on behalf of all the family members when they were all living together, it was bound to be treated as belonging to the family and second defendant was not true owner of the property.

VIII. If the plea of benami fails, does the whole edifice of the plaintiffs crumble?

13. Learned Senior counsel Mr. T.R. Mani stoutly contends that if the suit had been filed on the basis that the document of purchase under Ex.B.27 was benami and if that finding relating to benami was against the plaintiffs, the defendant had no need for any other defence and plaintiffs' action ought fail. The decree granted by the trial Court under such circumstances, was clearly erroneous. He would point out to the other important aspect that the plea of fraud itself comes only in the penultimate paragraphs already referred to above that the first defendant had brought about the transaction in his wife's name by practice of fraud. No details of fraud has been made and the Court could not have granted a decree on that such a flimsy averment in the plaint. The plaintiffs' contention regarding the so called fraud which was introduced by means of amendment to the plaint and an attempt to withdraw the case of benami could also not be countenanced by referring to the legal authorities already cited above. Even at the outset, I have no difficulty in accepting the first leg of the arguments of the appellants that the plea of benami cannot succeed at all. It will be one thing to contend that the plaintiffs wanted themselves as beneficiaries but however it was taken in the name of the second defendant (the ostensible owner), but quite another to contend that the first defendant, by virtue of his position that he held in the family had brought about the sale in the name of his wife by deceit and fraud and the transaction was intended to benefit only the plaintiffs and the defendant. The contentions of benami and the so called breach of trust cannot go together and therefore the trial Court's finding that the plea of benami was not

well laid is perfectly justified.

14. If a case could be disposed of on such an elementary issue probably there is nothing else for consideration before me. However, the point is not as it is sought to be made by the senior counsel for the appellant and I am afraid, it would be an over-simplification of the effect of pleadings and to trash the grains of truth underlying the plaintiffs' claim. A thorough attempt to examine the entire pleadings in the suit and evidence that had been let in before the trial court and how the parties went to trial would obtain enormous significance. It is the contention of the plaintiffs that it was the first defendant who had been taking care of interest of all of them and it was he, who was running the business even during the life time of the father. The plaintiffs 1 and 2 did not even pass out of their school final and they had very modest education, one having passed up to 9th standard and another up to 7th standard; the mother herself had studied only up to 2nd standard. On the other hand, it was the contention of the plaintiffs which was not refuted that the first defendant was more adept in business and he was literally running the family business and was taking care of all their interest. The family was not a very affluent one and there are documents to show that even after in the year 1982-83, when the father was alive, the family was borrowing loans on promissory notes for small sums even for Rs. 2500/- and for Rs. 4000/- for the running of business. The desire of the family to purchase a property in which the family business had been running and the modest acquisitions which they were making out of the business cannot be underestimated. The evidence of the plaintiffs was that during all the time when the father was alive, he was contemplating to purchase the property and the vendors had also been saying that if they contemplated to sell the property, they would always consider only to the plaintiffs' family. It is in evidence which is again not disputed that after the life time of the father, not too late after his death, the vendors Ranganayaki and her two sons had come to their family house on 18.6.1985 and there had been negotiation for the purchase of the property. This is a crucial undisputed fact, which cannot conceal the circumstance that the first defendant was negotiating for the purchase of the property, taking up the earnest desire of the father and the rest of the members of the family. While it is the contention of the plaintiffs that the agreement had been made and it was drawn up in two sets, one set was retained by the first defendant and another set retained by the vendor, the first defendant denied the same. The agreement for purchase, in whatever form, as an incident before the document of purchase was made on 14.9.1985 is not anywhere disputed. If this is taken as a fundamental one, then it could be seen that the contention raised in the reply notice in EX.B.45 as well as in the written statement that there had been no agreement at all prior to the document of purchase on 14.9.1985 is not true. If it is so, the contention of the defendants that the document of agreement has not been filed in the court is not of much relevance because the plaintiffs cannot be expected to produce the document in hands of the adversary. The brother himself had turned out as an adversary and the one of the vendors had been

examined on the side of the defendant as DW3. It cannot therefore be expected that the document could be produced by the plaintiff. The Senior Counsel for the appellant had two objections with reference to the so called agreement dated 18.6.1995. One his contentions is that the plaintiff in their pre-suit notice issued on 22.10.1985 urged that the second defendant executed a sale of 2/3rd share and referred to the agreement dated 14.6.1985. This notice had not even been filed along with the suit because the suit had not been drafted in the manner of the relief as sought in the notice. It was totally an inconsistent case with the averment in the pre-suit notice that the plaintiff recitals had been made and therefore the plaintiff cannot rely on a so called agreement which he has given up and sought for the relief of partition in the suit instead of a direction for sale of the property by the second defendant in the manner originally claimed in the notice. The second objection is that the custody of two sets of documents in the hands of the first defendant and the vendor, had been set forth neither in the pre-suit notice nor in the plaint. Therefore, the agreement could not be relied upon. The fact that the plaintiff had originally referred to the agreement and seeking for its enforcement and later the plaintiff had laid a modification of the relief and had sought for declaration, cannot go so deep as to doubt the veracity of the contention itself. It is more matter of form than content. It is matter of common knowledge that the parties are invariably guided by the advice of their counsel in the matter of how relief's are drafted in plaint, and there is judicial duty to see that given the particular facts and circumstances, particularly the relief that conforms to truth and what accords with evidence ought to be given, provided there is no surprise at the trial and the parties knew how their pleadings led them, no matter how the form of relief was couched in plaint. There have been no deviation anywhere either in the notice or in the averment in the plaint that at all times, the plaintiffs have only contented that the first defendant was taking leading part in the family affairs; he was more well versed than the plaintiffs and the first defendant had been purporting to act for the benefit of the whole family when he was negotiating for the purchase of the property from the vendors Ranganayaki and others. Except in the manner of demand which at the first instance took the shape of execution of sale deed by the 2nd defendants in favour of the plaintiffs and the 1st defendant on the basis that the contemplated sale was to be in their favour only, the averment in the plaint was to the effect that the purchase in the name of the 2nd defendant was really intended to be for the benefit of the plaintiffs as well as the first defendant and therefore the document of purchase in the name of the second defendant itself was to be taken as document of purchase in the name of the plaintiff 1 and 2 and first defendant and therefore sought for declaration of the plaintiff's entitlement of 2/3rd share. The difference is more in form than in content. The content that the property was purchased for the benefit of the family members of the first defendant and the plaintiffs and there has been no variation at all. Again the objection that there had been no details as to the original agreement is irrelevant, so long as it is a matter of admission that the property was agreed to be sold at the negotiation that were held at the plaintiffs' house on 18.6.1985

for a specified price. Therefore, I find that there had been an agreement on 18.6.1985 to purchase the whole of the property; that there had been an advance of Rs. 10,000/- paid and that there had been negotiation for the purchase of property for the benefit of the family members.

IX. Plea of the brothers as beneficiaries under purchase fits with family arrangement of allotment of the business to the plaintiffs.

15. As admitted by both parties, the business of the jewellery shop itself is agreed to be allotted to the plaintiffs and a decree had also been passed on that basis. It is inconceivable that the property in which the business was run was not contemplated by the parties at all for being retained by them. The question which is strongly addressed by the counsel for the appellant is that when the plaint had been filed in O.S. No. 480 of 1985 and the panchayat had given its verdict about the allotment of business to the plaintiffs, they must have also made reference to the equitable right of purchase which had come about by that time and that aspect should have also been referred to in the plaint. As I pointed out that the family was not a very affluent and they have been borrowing monies to the tune of Rs. 2500 or Rs. 4000 even in the years 1982-83. The discharged promissory notes have also filed as exhibits in suit.

16. If it is merely a case of benami, the role of the beneficiary or the motive on the part of the person who had advanced the amount of consideration always plays an important role in the determination of the nature of the transaction. In matters of benami, the Courts have held the purchase price, motive or intention, relationship between parties, possession of property and custody of title deeds are all important criteria. It is difficult for the plaintiffs to contend that they had any particular motive for purchasing the property in the name of the second defendant. The plaintiffs, in my view, have not also been able to show anywhere that they had all the money in the hand and they had advanced the whole sale consideration and took the purchase in the name of the second defendant. The relationship between the parties were cordial and it is also borne out that the possession of the property had been continued to be held in the hands of the plaintiffs. The original title deeds themselves had been produced only by the defendants. Two important aspects viz., the relationship between parties and possession of property alone stand in favour of the plaintiffs and in respect of every other individual parameter of proof which must co-exist to support the case of benami does not exist in the case.

17. As already pointed out that the trial court had come to the correct conclusion that there had been no benami purchase and the contention made by the plaintiffs was not worthy of acceptance as affirmed view of the trial court, but as I pointed out already that the case is bound to be taken up for consideration in the context of all the pleadings that are not mutually destructive but how all particulars available in the plaint go to make up a case of trust and the fiduciary relationship that the 1st defendant held in the negotiation for purchase of the suit property. The parties have not been misled anywhere at the trial about what

they were really contending for. Not could it be said that the first defendant or the second defendant had no clue what the plaintiffs had been referring to. The whole trial could be seen from the narration of facts by the plaintiff that they had depended on the first defendant for all the transactions relating to the family as its head and at the time when the Panchayat was held the plaintiffs were barely aged of 22 and 20, they were young in age; they had lost their father only a couple of years earlier and both of them had been unmarried. On the other hand, the first defendant had been all along associated with the father in the conduct of the business, he had been married and he was the literally the person who was handling all the affairs of the family. The filial relationship that the parties held between themselves and the position of trust which the 1st defendant held should not be missed. If the first defendant had been in charge of the family affairs and he was really negotiating for purchase, after the father's death, not in respect of the property which is totally unconnected with the family, but in respect of the property which had been held on a leasehold not merely in his favour or in the favour of his wife but in favour of the plaintiffs as well as the first defendant, the contention of the plaintiffs that the first defendant was acting on their behalf also cannot be wrong. The major incidence of this situation could be seen as occurring by reference to Sections 88 and 90 of the Indian Trust Act. Sections 88 and 90 of the said Act read as follows:-

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

90. Advantage gained by qualified owner -Where a tenant for life, co-owner, mortgagee or other qualified owner of any property, by availing himself of his position as such, gains an advantage in derogation of the rights of the other persons interested in the property, or where any such owner, as representing all persons interested in such property, gains any advantage, he must hold, for the benefit of all persons so interested, the advantage so gained, but subject to repayment of such persons of their due share of the expenses properly incurred, and to an indemnity by the same persons against liability properly contracted, in gaining such advantage" Section 88 refers to the advantage gained by a fiduciary, as available to the benefit of all the beneficiaries. In fact if I am making a reference to Section 88, it would be really a case where the transactions do not fall within the category of benami transaction at all.

18. In *Khatoon Bibi v Abdul Wahab* AIR 1939 Madras 313 a Division Bench of this court held that fiduciary relationship can be spelt out by facts and circumstances of each case and in the case of brothers of the deceased who had taken over

charge of the trade and assets and also acted as a guardian for the daughter of the deceased person, an inference of such fulfillment fiduciary relationship could be made. If we read Section 90 also, it would be seen that it refers to a case of person having common vested interest and one person gains an advantage in derogation of the right of the other person. I had pointed out that the right of lease in respect of the suit property was available not only to the first defendant but it ensured to the interest of the plaintiffs as well as the first defendant. The second defendant herself had no right in the property prior to the document of the purchase. Section 90 brings out that in such case when a person has a common vested interest and one person gained the advantage it shall be for the benefit of all persons. Section 90 shall be attracted not in all cases where there is a common vested interest but in a case where there is a sharp practice and the benefit is shored up by one of the co-owners. It is based on the principles of constructive trust and the law has been dealt with in great detail explaining the latitude of its application in *Panchapagesa v Kalyanasundaram* reported in AIR 1957 Madras 472. Further, the principle underlying section 90 is that no person who is in fiduciary capacity or position can make a profit to the detriment of those interested. He must not utilise his position to obtain an advantage. It is in cases where it is established on facts that the co-owner by his dealings derived a benefit or advantage that section 90 would apply (*D. Dhakshinamurthi v K. Krishnamurti* 1957 An. Pra. 337).