

(1989) 11 MAD CK 0020
In the Madras High Court
Case No : O.S.A. No. 27 of 1980

R. Rajagopal Reddy and others

APPELLANT

Vs

Padmini Chandrasekaran and others

RESPONDENT

Date of Decision : 07-11-1989

Acts Referred:

Benami Transactions (Prohibition) Act, 1988 — Section 2, 4(2)
Trusts Act, 1882 — Section 90

Citation : AIR 1990 Mad 353 : (1990) 1 LW 355 : (1995) 2 MLJ 603

Hon'ble Judges : Nainar Sundaram, J; Bellie, J

Bench : Division Bench

Judgement

Nainar Sundaram. J.

1. This Original Side Appeal is directed against the judgment and decree of the learned single Judge sitting in the Original Side in C.S. No. 110 of

1971. The First defendant in the Suit Originally preferred the Original Side Appeal. The First-Defendant died pending the Original Side Appeal

and his legal representatives have been brought on record. The plaintiff was the first-respondent. The second-defendant died pending the suit and

his legal representatives were brought on record as defendants 4 to 8 and they are respondents 3 to 7 herein. The third-defendant is the second

respondent. We propose to refer to the Parties as per their array in the suit, because it would be convenient for dealing with the questions.

2. The pleas of the plaintiff in support of her prayer for a declaration of title and for a permanent injunction could be broadly stated as follows; In

1950, the second-defendant entered into a hire-purchase agreement with the predecessor in interest of the third-defendant under which the second

defendant agreed to purchase a building to be designed and built in the suit plot.

In 1952, the plaintiff became a tenant of the suit property under the second defendant. But, subsequently the second-defendant orally agreed to sell the suit-property to the plaintiff. Acting on the said oral agreement, the plaintiff from time to time effected valuable improvements to the suit-property. Ultimately, there was a written agreement between the plaintiff and the second defendant and the second-defendant agreed to nominate the plaintiff authorising her to get the sale deed from the third-defendant. This agreement was fulfilled and the third-defendant executed a registered sale deed in respect of the suit-property in favour of the plaintiff on 25-8-1967. Pursuant to the sale deed, the plaintiff is in exclusive possession of the suit-property as an absolute owner thereof. The first-defendant denied the title and ownership of the plaintiff and would put forth a title in himself projecting a partition amongst himself, the second-defendant, one Srinivasalu Reddy, examined as D.W. 2 and other parties: and the first-defendant claimed title to the suit-property on the basis of the said partition, saying that the suit-property was allotted to his branch.

3. The first-defendant alone contested the title claimed by the plaintiff. The substance of the contest by the first-defendant is : Srinivasalu Reddy

D.W. 2, the second-defendant and the first-defendant and their respective branches constituted, what is known is the Hindu Law as a composite

family recognised as valid among the Reddy Community. Though the Membership with the third-defendant stood in the name of the second-

defendant, it was only the composite family that was entitled to a right over the suit-property and not the second-defendant in his individual

capacity. On 29-9-1955. a registered partition was entered into amongst the members of the composite family and in the said partition the suit-

property was allotted to the branch of Srinivasalu Reddy D.W. 2 and the first-defendant. Subsequently, there was a partition in the branch of the

first-defendant and Srinivasalu Reddy D.W. 2 and in that partition the suit-property was allotted to the share of the first-defendant's branch on 16-

5-1966. The rights under the hire-purchase agreement were held by the family as such and as per the partitions, they had come to the first-

defendant. The second-defendant was only a trustee for the other members of the family who are allotted the suit-property in the family partition.

Even if the second-defendant had obtained a sale deed from the third-defendant

in his own name, he will have to hold it for the benefit of the first-defendant, who had been allotted the property in the family partition to which the second-defendant was a party. Similarly, the nominee of the second defendant, namely, the plaintiff should also hold it only in trust for the first-defendant. The plaintiff could not claim any title on the strength of the sale deed and she is not a bona fide purchaser for value.

4. The third-defendant had no contest with regard to the title claimed by the plaintiff and the third-defendant would state that it acted in accordance with the rules and regulations and executed the sale deed in favour of the plaintiff after satisfying the due formalities and that the third defendant is not a necessary party to the suit.

5. Reflecting the controversy that has come out on the basis of the pleadings, put forth by the parties, the following issues were framed and taken

up for trial :

(1) Whether the first-defendant, second defendant, Srinivasalu Reddy and others are members of a composite Hindu Family; whether the suit-

property belongs to such a composite Hindu Family and whether the hire-purchase agreement has been taken in the name of the second-defendant

benami for the benefit of the composite Hindu Family?

(2) Whether the partition deeds are true or void and sham and nominal?

(3) Whether the plaintiff was a tenant of the suit-property under the composite Hindu Family?

(4) Whether Srinivasalu Reddy was collecting the rents from the plaintiff for himself and on behalf of the second-defendant?

(5) Whether the plaintiff had not accepted Srinivasalu Reddy as the Landlord?

(6) Whether the attornment of tenancy with respect to suit-property to the first-defendant was under a mistake of fact as alleged by the plaintiff?

(7) Whether the plaintiff had by conduct accepted title in favour of the first-defendant? Is she estopped from denying title of the first-defendant?

(8) Whether the alleged agreement of sale between the plaintiff and the second-defendant is true?

(9) Whether the sale of suit-property by the third-defendant to the plaintiff is true and supported by consideration?

(10) Whether the sale of suit-property by the third-defendant to the plaintiff was

with notice of partition in the composite family and whether the plaintiff is not a bona fide purchaser for value with notice?

(11) Whether the plaintiff is entitled to the injunction prayed for?

(12) Whether the plaintiff is entitled to the declaration of title to the suit-property?

(13) Whether the third-defendant is a necessary or proper party to the suit?

(14) To what reliefs are the parties entitled?

6. The learned single Judge in the Original Side rendered findings as follows on the issues set down for trial : On issue No. 1, it was held that the

second-defendant became the member in his own individual capacity and not on behalf of any alleged composite family; the first-defendant

miserably failed to establish that the second-defendant was only a benamidar in relation to the predecessor in interest of the third-defendant, for

and on behalf of the alleged composite family; the first-defendant, the second-defendant, Srinivasalu Reddy D.W. 2, and others were not members

of any composite family as alleged; the hire-purchase agreement was not taken in the name of the second-defendant benami or the benefit of any

such composite family; but in his individual name only, and the composite family had no manner of right over the suit-property. On issue No. 2, it

was held that the partition has no legal effect and it could not be considered to be a valid partition deed. On issue Nos. 3 and 4, it was held that the

plaintiff became a tenant only with the second-defendant and not either with the alleged composite family or Srinivasalu Reddy D.W. 2. On issue

Nos. 5 and 6, it was held that there was no proof at all that at any point of time the plaintiff accepted Srinivasalu Reddy D.W. 2 as the landlord.

On issue No. 7, it was held that the payment of rent made by the plaintiff to the first-defendant was by mistake and the plaintiff is not estopped

from disputing the title of the first-defendant. On issue Nos. 8 and 9 it was found that the agreement between the plaintiff and the second-defendant

is true and the sale of the suit-property between the third-defendant and the plaintiff is equally true and supported by consideration. On issue No.

10, it was opined that this issue does not arise for consideration in view of the other finding that the second-defendant became a member of the

predecessor in interest of the third-defendant in his individual capacity and not on behalf of any composite family and that there was no composite

family as claimed by the first-defendant. On issue Nos. 11, 12, and 13, the findings are that the plaintiff is entitled to a injunction as prayed for by

her; the plaintiff is entitled to a declaration of title to the suit property as prayed for by her; and the third-defendant is a necessary party to the suit.

As a result, the learned single Judge in the original side, decreed the suit of the plaintiff as prayed for with costs against the first-defendant.

7. We may not have occasion to go into all the issues in view of the legal point raised by Mr. N. S. Varadachari, learned Counsel for the plaintiff,

based on the Benami Transactions (Prohibition) Act 45 of 1988, hereinafter referred to as the Act, and or inclination to sustain it on an

appreciation of the legal position in the factual background. Before we go into the point raised by Mr. N. S. Varadachari, learned Counsel for the

plaintiff, it will be proper to broadly refer to the genealogy of the alleged composite family and whose members were parties to the partition, on

which reliance is being placed by the first-defendant. There was an ancestor Eswara-vaka Moola Rusahudu Eswaravaka Chinna Reddy. He had

two daughters and two sons; Pitchamma, Chenchu Reddy, China Reddy and Lakshmi Amma, for the branch of Pit-chamma, there were six

representors in the partition of the year 1955; for the branch of Chenchu Reddy there were four representors. Of them, Chenchurama Reddy,

though of the branch of China Reddy, is stated to have been adopted by Chenchu Reddy; for the branch of China Reddy, there were five

representors, including the second-defendant. The husband of Lakshmiamma, Peta Venkataraghava Reddy is stated to have had been taken into

the family by way of illatom adoption and for his branch there were six representors, including Srinivasalu Reddy D.W. 2 and the first defendant,

who are brothers, being the grandsons of Peta Venkataraghava Reddy.

8. The specific case of the first-defendant with regard to the acquisition of the suit-property is found in paragraph 4 of the written-statement and it

stands extracted as follows :

This defendant states that himself, his brother Srinivasa Reddy and Venugopal Reddy, the second-defendant and their respective branches

constituted a composite Hindu Family recognised in law among the Reddy Community. The said joint family was possessed of several properties in

several villages which also include the suit-property and though the membership

with the 3rd defendant in respect of this property stood in the name of Venugopala Reddy; it was in his name only as a member of the composite joint family and the said composite family being entitled to an interest therein and in fact, this property was considered as an item available for division amongst the members of the family.

It was this case of the first-defendant that got reflected in issue No. I.

9. Now we shall take up the point raised by Mr. N. S. Varadachari, learned Counsel for the plaintiff, on the basis of the provisions of the Act.

Learned counsel for the plaintiff would say that no defence based on any right in respect of any property held benami whether against the person in

whose name the property is held or against any other person, shall be allowed in any suit, claim or action by or on behalf of the person claiming to

be the real owner of such property. In this behalf, he draws our attention to Section 4(2) of the Act, the express language of which, as we shall

presently see, is to the said effect. Section 2(c) of the Act defines property as follows :

2(c). "Property" means property of any kind, whether movable or immovable, tangible or intangible and includes any right or interest in such property.

As per the said definition, property would include any right or interest in such property and hence the right to purchase under the hire-purchase

agreement, entered into by the second-defendant with the third-defendant or its predecessor in interest shall certainly come within the ambit of

property. Section 4 of the Act, as a whole, reads as follows :

4. Prohibition of the right to recovery property held benami

(1) No suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or

against any other person shall lie by or on behalf of a person claiming to be the real owner of such property.

(2) No defence based on any right in respect of any property held benami whether against the person in whose name the property is held or

against any other person, shall be allowed in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property:

(3) Nothing in this section shall apply,

(a) where the person in whose name the property is held is a coparcener in a Hindu Undivided family and the property is held for the benefit of the coparceners in the family; or

(b) where the person in whose name the property is held is a trustee or other person standing in a fiduciary capacity, and the property is held for the benefit of another person for whom he is a trustee or towards whom he stands in such capacity.

10. Here we find, in a suit in which the plaintiff claims title through the second-defendant from the third-defendant, a defence is being raised by the

first-defendant that the second-defendant was only a henamidar for a composite family in respect of the property, namely, the right to purchase,

under the hire-purchase agreement. which stood in the name of the second-defendant, and which property came to be assigned to the plaintiff and

the suit property itself was conveyed to the plaintiff through a sale deed executed by the third defendant at the instance of the second-defendant.

Apparently, section 4(2) of the Act would apply. It is true that this is a suit which got instituted and in which decision has been rendered anterior to

the coming into force of the Act. But, the pronouncement of the Supreme Court in *Mithilesh Kumar and Another Vs. Prem Behari Khare*, has

settled the retrospective application of the provisions of the Act to suits, decided anterior to the coming into force of the Act, to all stages

subsequent to the decision by the first Court, namely, at all appellate stages. However, Mr. T. R. Rajagopalan, learned counsel for the legal

representatives of the first-respondent, who are prosecuting this original side appeal, would endeavour to bring the case on hand within the

exceptions found in Section 4(2) clauses (a) and (b) of the Act. First, he would take clause (b) of Section 4(2) of the Act. It speaks about the case

where a person in whose name the property is held is a trustee or other person standing in a fiduciary capacity and the property is held for the

benefit of another person for whom he is a trustee or towards whom he stands in such a capacity. The endeavour is to bring the case on hand

within the ambit of this clause. In this endeavour, learned Counsel for the legal representatives of the first-defendant wants to assign the role of a co-

owner to the second-defendant so that the provisions of Section 90 of the Indian Trusts Act could be banked upon to say that property was held

by the second-defendant as a trustee for the benefit of others. Section 90 of the Indian Trusts Act is found in Chapter IX dealing with "of certain

obligations in the nature of trusts". Section 90 of the Indian Trusts Act, shorn off the illustrations, reads as follows ;

90. 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

by such persons of their due share of the expenses properly incurred, and to an indemnity by the same persons against liabilities properly

contracted, in gaining such advantage,

As per the submissions made by the learned Counsel for the legal representatives of the first-defendant, we are not concerned with the tenant for

life : or a mortgagee or other qualified owner of a property: and the attempt is to say that the second-defendant was a co-owner. Apparently, the

property has not been acquired in the joint names of the second-defendant and another or others. There is a dispute as to whether the second-

defendant acquired the property not only for himself : but also for and on behalf of others representing a composite family, of which he was stated

to be a member as per the pleas put forth by the first-defendant. In the said circumstances, it would not be in order to implicitly accept and

proceed on with a theory that the second-defendant was a co-owner and hence any property that had been gained by him must be held by him for

the benefit of all persons interested in the property. The authorities cited by the learned counsel for the first-defendant have no relevance at all to

the facts as they stand exposed in the present case.

11. Then, submissions were made that Section 4(3)(a) of the Act would be attracted. The language of the said provision is unambiguous when it

speaks about the case where a person in whose name the property is held, is a coparcener in a Hindu Undivided family and the property is held for

the benefit of the coparceners in the family the specific allegation in the written-statement of the first-defendant is that the property was held by the

second-defendant for and on behalf of a composite family.

12. The concept of composite family is not one known to conventional Hindu Law. It has come to be recognised in law on the basis of custom prevailing in certain parts of South India and in particular in the State of Andhra Pradesh, Judicial precedents have set down the requirements before there could be a spelling out of such a custom. There must be such a custom in the family itself. The constitution of the composite family must be traced to an agreement express or implied. The constitution should have been for the purpose of living and working together, so that the resources of the families could be pooled ; their gains thrown into the joint stock; the common risks could be shouldered together and the resources of the units could be exploited without discrimination for the purposes of the entire family called the composite family. Only when these ingredients are demonstrated to have had been present by acceptable evidence, Courts could accept this theory of composite family. The learned single Judge in the original side points out that in the written-statement of the first-defendant the necessary details from which an inference could be drawn that the families concerned became a composite family are lacking and the written-statement of the first-defendant is not clear as to when and for what purpose and on what terms the families agreed either expressly or impliedly to live together as a composite family. We are not investigating into this question and we shall assume that there was such a composite family for the purpose of testing this endeavour on the part of the learned counsel for the legal representatives of the first-defendant to invoke S. 4 (3)(a) of the Act to get out of the mischief of the Act. The concept of a composite family certainly cannot be equated to the concept of a coparcenary, A coparcenary is purely a creature of law and it cannot be created by act of parties. In contrast, a composite family is the result of an agreement express or implied. There are incidents to the constitution of a composite family, but all incidents are consequences of the agreement between the parties. Hence, it is not possible to accept the line of thinking put forth by the learned counsel for the legal representatives of the third-defendant when he said that the exception under S. 4(3)(a) could be attracted.

13. Then learned counsel for the legal representatives of the third-defendant would hang on to the partitions and in particular to the partition of the

year 1955 on the basis of which the subsequent partitions followed. One need not over stress the difference between a partition and a transfer. The basic proposition is, partition is not a transfer of property, it presupposes that each of the parties to a partition has an antecedent title to the subject-matter of partition, though its extent is not determined until actual partition. The problem comes because under the partition of the year 1955, the property had to be allocated to the branch of the son-in-law Peta Venkataraghava Reddy. To confer right and title on him to the properties of the family as a whole, learned counsel for the legal representatives of the third-defendant would advance a theory that Peta Venkataraghava Reddy was taken in illatom adoption into the family and by virtue of that adoption he acquired a right in the properties and hence the partition could be validly effectuated. Learned counsel for the legal representatives of the third-defendant wanted us to initially climb a step to appreciate and accept this agreement of his, by saying that the second-defendant was a coparcener in a Hindu Undivided family and the acquisition of the property by him must be held to be as a coparcener in a Hindu Undivided family and further the property must be deemed to have been held for the benefit of the coparceners in the family and thus the property became an item available for division and Peta Venkataraghava Reddy having had come into the family by virtue of illatom adoption, acquiring a right in the properties of such a family, the partition of the year 1955 has got to be upheld. Leaving alone the case of illatom adoption of Peta Venkataraghava Reddy, the case that the acquisition by the second-defendant was the benefit of the coparceners in a Hindu Undivided Family was not at all conceived of and put forth in the pleadings and equally so it was not advanced through evidence. The present case seems to be the result of desperation, and we are not prepared to countenance it.

14. Even when we take up the case of illatom adoption of Peta Venkataraghava Reddy into the family, as advanced by the learned counsel for the legal representatives of the first-defendant, we find, that was not set forth in the pleadings at all. Illatom adoption is something peculiar to certain communities in this State and in the State of Andhra Pradesh. It is a custom of affiliating a son-in-law and giving him a share. This custom has now judicial recognition. We are not to be troubled with the prevalence of the custom of illatom adoption in the communities concerned, namely,

Reddies, Kappus and Kammass in this State and in the State of Andhra Pradesh; but we are concerned with the factum of illattom ad option, as

claimed by the legal representatives of the first-defendant through their learned counsel. There are two essential conditions which should be

satisfied before Courts could spell out illattom adoption. One is the adoptee must marry the daughter of the adoptor. So far as this condition is

concerned, this did happen, need not be a matter of disputation. The second condition is; there should be an agreement to give the son-in-law

taken in illattom adoption a share. Mere marrying the daughter of the family and mere living in the house of the father-in-law and helping him in the

administration and management of the properties, would not lead to the result of affiliation. The second condition is the significant and important

one and there should be requisite specific agreement which alone could form the basis for this affiliation. No plea was put forth by the first-

defendant that Peta Venkataraghava Reddy was taken in illattom adoption into the family. However, Mr. T.R. Rajagopalan, learned counsel for

the legal representatives of the first-defendant, would say that the parties, when they went into trial, were fully aware of the scope of all the aspects

of the controversy and, in fact, number of questions touching this aspect were put for and on behalf of the plaintiff to the first-defendant, examined

as D.W. 1, and Srinivasalu Reddy D.W. 2. But this, in our view, has not at all proved helpful to the first-defendant as proof of the illattom adoption

alleged. It is true there is a reference in the partition deed of the year 1955 to Peta Venkataraghava Reddy marrying Laksh-miamma and remaining

for many years in the family by becoming member of his father-in-law's household (illattom) and he being given a share in the family properties.

From this bare reference one cannot conclude on this question that there was illattom adoption of Peta Venkataraghava Reddy into the family. The

learned single Judge in the original side points out the dearth of evidence that Peta Venkataraghava Reddy became illattom son-in-law of the family

and there being no plea and no proof of any agreement that he would be given a share in the family properties. We are not inclined to countenance

this case of the legal representatives of the first-defendant put forth through their learned counsel. As a result, we eschew the attempt on the part of

the legal representatives of the first-defendant to sustain the partition on the aforesaid basis.

15. Lastly, learned counsel for the legal representatives of the first-defendant would say that the partition of the year 1955 could be and should be

construed as effectuating a transfer in favour of Peta Vankataraghava Reddy's Branch. The learned single Judge in the original side relevantly

point's out that this case that partition could operate as a transfer was not advanced before him. Apart from that, we find there was no such plea

put forth by the first-defendant in his written statement. Mr. T.R. Rajagopalan, learned counsel for the legal representatives of the first-defendant

was anxious to draw our attention to the pronouncement of the Supreme Court in Kuppuswamy Chettiar Vs. A.S.P.A. Arumugam Chettiar and

Another, , where a registered instrument styled as a a release deed, releasing right, title and interest of the releasor without consideration was

construed as operating as a transfer by way of gift when the document clearly showed intention to effect transfer and was signed by and on behalf

of the releasor and attested by two witnesses. After going through the pronouncement, we are obliged to say that the view was taken on the basis

of the evidence in that case, and it would be improper for us to extend the ratio expressed therein as of universal application and in particular to the

facts of the present case,

16. We find that the case of the first-defendant to negative the title of the plaintiff could have no countenance at all in view of the provisions of the

Act. The Plaintiff had to succeed on the title claimed by her and the decree granted in her favour by the learned single Judge in the Orginal Side has

got to be maintained. In the view, which we have taken, we found no warrant advert to and assess the other questions and the factual aspects

relating to them, exposed in the case.

17. The discussion, which has preceded, obliges us to dismiss this Original Side Appeal and we accordingly dismiss the same with the costs of the

plaintiff the first-respondent herein.

18. Appeal dismissed.