

(1995) 07 AP CK 0038

In the Andhra Pradesh High Court

Case No : C.C.C. Appeal No. 11 of 1983

R.B. Bharatha Charyulu

APPELLANT

Vs

R.B. Aivelu Manga Thayaru

RESPONDENT

Date of Decision : 03-07-1995

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 14 Rule 1, Order 16 Rule 1, Order 41 Rule 27, Order 9 Rule 13
Constitution of India, 1950 — Article 14
Criminal Procedure Code, 1973 (CrPC) — Section 125
Hindu Adoptions and Maintenance Act, 1956 — Section 18
Hindu Marriage Act, 1955 — Section 25
Transfer of Property Act, 1882 — Section 108, 41, 51, 54

Citation : AIR 1996 AP 238

Hon'ble Judges : B.K. Somasekhara, J

Bench : Single Bench

Advocate : N.C.V. Ramanujachary, for the Appellant; T. Seshagiri Rao, for the Respondent

Judgement

1. The defendant is the appellant. He suffered the judgment and decree at the hands of the learned VI Additional Judge, City Civil Court, Hyderabad in O.S. No. 827 of 1980 dated 31-8-1982. The suit has been decreed for possession of the suit property in favour of the plaintiff along with the relief of maintenance amount at the rate of Rs. 400/- per mensem with costs.

2. The plaintiff is the respondent. The parties would be referred to as the plaintiff and the defendant. The suit property is described as a house in the plaint. The respondent has resisted the appeal.

3. The plaintiff and the defendant are the legally wedded wife, and husband. They married on 11-5-1966. They lived together a few months and did not pull on well together for certain reasons and the defendant took the plaintiff to her parents' house at Peddavuta-palli in Krishna District for Sankranti festival in the year 1968, visited her once in the year 1968 and thereafter, did not take her

back. Since then they are not living together. Then plaintiff alleges that she was not treated well by the defendant and deserted her without any justification. She also alleges that the defendant has contracted a second wife and has children through her.

4. The plaintiff has alleged that the site upon which a house is built, as described in the plaint, was purchased with her gold jewellery by pledging them by the defendant, that he constructed the house on her site by selling her gold jewellery, that she is the owner of the suit property, that she is entitled to possession of the same, that in spite of notice, the defendant neither delivered possession of the suit property to her nor paid the maintenance and therefore, she filed the suit for possession of the suit property and also maintenance at the rate of Rs. 750/- per mensem. She pleaded that the defendant has got sufficient income as an Engineer and also agricultural lands in the village, her requirement as claimed is necessary and that the suit may be decreed as prayed for. The defendant denied the allegation of desertion, and the right of the plaintiff to claim the maintenance at the rate of Rs. 750/- per mensem. He asserted that he purchased the suit site by selling his family land in the village for a consideration of Rs. 4,000/- out of which Rs. 2,500/- were paid as part consideration and the remaining, out of his own income, that he built the house on the site out of his own money by several ways which he gathered by raising loans, by getting advances from his Provident Fund and LIC policy and from out of his savings from the salary etc. He pleaded that the site was purchased in the name of the plaintiff benami with his own money as detailed above. The defendant contended that the plaintiff is not entitled to the relief claimed and that the suit is not maintainable and it is liable to be dismissed.

The following issues were framed :

- (1) Whether the plaintiff is entitled to recover the possession of the suit house?
- (2) Whether the plaintiff is entitled to the maintenance past and future and if so at what rate? And
- (3) To what relief?

1 5. The parties went to trial on the issues whereby the plaintiff herself examined as P.W. 1, her father as P.W.2 and two other witnesses as per P.Ws. 2 and 3 (sic) respectively and got marked seven documents as per Exs. A1 to A7 and the defendant examined himself as DW 1 and a witness as per DW 2 and got marked six documents as per Exs. B. 1 to B.6 respectively. After both sides submitted their arguments and on the basis of the material produced before him, the learned trial Judge recorded the issues 1 and 2 in favour of the plaintiff and consequently decreed the suit.

6. The defendant-appellant has raised number of grounds in the memorandum of appeal which are mostly in the arguments form and after having heard the learned Advocates for the parties, this Court feels that the grounds of appeal in

the form of contentions can be subject to the following:

(1) The learned trial Judge erred in holding that the site was purchased by the defendant out of the gold jewellery; constructed the house out of the sale proceeds of the gold jewellery of the plaintiff.

(2) The learned trial Judge erred in not accepting the case of the defendant regarding the benami transaction of the site which was purchased by him in the name of the plaintiff out of his own money and by paying the sale consideration by himself.

(3) The learned trial Judge erred in holding that the plaintiff is entitled to the maintenance and at the rate of Rs. 400/- per mensem as against the circumstances which disentitle the plaintiff from getting the maintenance.

(4) The learned trial Judge has not raised the issues properly in accordance with the pleadings thereby depriving the defendant from leading the evidence to prove his case.

(5) The learned trial Judge has not appreciated the evidence properly and thereby reached improper conclusions and recorded wrong findings.

(6) The learned trial Judge was bound to dismiss the suit and erred in decreeing the suit.

(7) The judgment and decree of the learned trial Judge are liable to be set aside by dismissing the suit.

7. In this Court, the defendant-appellant has filed C.M.P. No. 8531 of 1995 under Order 41, Rule 27 of the CPC to permit him to produce five documents by way of additional evidence to be considered for the purpose of the case. It is strongly opposed by the learned counsel for the respondent-plaintiff. It is contended that the documents are not relevant, they will not prove the case of the defendant and that at any rate they will not improve the case of the defendant as a whole. On the basis of this application, the learned Advocate for the appellant-defendant submitted that in case the application is allowed and in case the Court comes to the conclusion that the decree of the learned trial Judge cannot be set aside, the matter may be remanded as an alternative relief for disposal afresh according to law after giving opportunity to both sides. The learned Advocate for the plaintiff-respondent has submitted that judged the matter in any angle, there is no case for remand. It is made clear that this application and the consequences will be examined after the grounds of appeal are considered and depending upon the result in the appeal.

8. The learned Advocate for the respondent-plaintiff has totally tried to support the judgment of the learned trial Judge and contends that none of the grounds raised by the defendant-appellant has any merit and that the appeal deserve to be dismissed with costs of the respondent-plaintiff.

9. On going through the pleadings, this Court feels that the trial Court has not

framed the issues properly although they have been considered and disposed of as being part of issues 1 and 2 leading to the final result. It must be reminded that issues must be clear and specific to bring all the controversies between the parties arising out of the pleadings. Sub-clause (1) of Order XVI, Rule 1 of CPC clearly lays down that issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other. Sub-clauses (2) and (3) of this provision go further to indicate that material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence and each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue. In this case, the clear assertions of the plaintiff are that she was deserted by the defendant without lawful cause, he has taken a second wife or living with another woman, he has got capacity to pay maintenance as claimed and at the rate of Rs. 750/- per mensem and that he has not paid it in spite of demand. These material assertions are denied by the defendant. Furthermore, the plaintiff has clearly asserted, as a material proposition of fact, that the site was purchased by her out of her consideration or out of her jewellery, that the defendant did not deliver possession of the same to her and, therefore, she is entitled to the possession of the suit property -- both the site and the building -- as the owner of the same. The defendant while denying these material propositions has clearly pleaded that he purchased the site benami in the name of the plaintiff out of his own consideration and that he built the house out of his own money by collecting the funds in various forms and from different persons. He also denied that the plaintiff is entitled to get possession of the suit property. Curiously enough, the learned trial Judge, has only raised two issues viz., 1 and 2 to the effect that whether the plaintiff is entitled to such reliefs. It must be impressed that such issues are never the issues within the meaning of sub-clauses (1) to (4) of Order 14, CPC. Therefore, the proper issues ought to have been:

- (i) Whether the defendant proves that the site forming part of the suit property was purchased by him benami in the name of the plaintiff out of his own funds by paying his own consideration.
- (ii) Whether the plaintiff proves that the defendant constructed the building or house on her site out of the sale proceeds of her gold jewellery given to the defendant at the time of marriage.
- (iii) Whether the plaintiff proves her title to the suit property as a whole.
- (iv) Whether the plaintiff proves that the defendant has deserted her without any lawful excuse.
- (v) Whether the plaintiff proves that the defendant has contracted a second marriage or living in the company of another woman and has children through her.
- (vi) Whether the plaintiff is entitled to separate maintenance from the defendant.

If so, whether she is entitled to Rs. 850/- per mensem by way of maintenance. If not to what amount?

(vii) Whether the plaintiff is entitled to possession of the suit property and to what order or decree.

10. Now the question is whether the matter cannot be disposed of by this Court in the appeal on the ground that proper issues were not framed by the trial Court. The law appears to be that always the improper framing of issues will not result in illegality so as to reconsider the whole thing afresh by framing appropriate issues. If the parties know that particular issues arose in a particular case depending upon such pleadings and the Court gives findings on all such issues and when no injustice is caused to either of the parties, there is no need to try the matter afresh by framing such issues. Moreover although by virtue of Order XIV of CPC, issues concerning facts and law are to be raised distinctly and separately and whittle Court disposes of such issues, it has to frame the points for consideration which are to be considered and not the issues as such. This is clear from sub-clause 4(2) of Order XX of CPC which reads as follows:

"Judgments of other Courts-- (2) Judgments of other Courts shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision."

Nowhere in the provision, it is mentioned that the Court will either repeat the issues or dispose of the issues technically in that sense so as to render justice. On the other hand, if the Court considers all the controversies between the parties either in their specific form for determination or incidentally, perhaps, the real purpose of sub-clause 4(2) of Order XX of CPC can be taken as complete in spirit. After hearing both sides and going through the records, this Court is convinced" that although no specific issues were raised" as above, all the controversies stated above arising under the pleadings have been understood by the parties, they have produced the evidence on such issues and the Court while-disposing of issues i and 2 has considered the points for determination which arose out of such controversy. Therefore, the matter does not require reconsideration or re-trial after raising such issues for determination. Moreover, this Court while disposing of this appeal will consider all such issues for determination.

11. The learned trial Judge has considered the evidence before him, both oral and documentary, and has come to the conclusion that the plaintiff is entitled to separate maintenance, that the defendant is capable of providing the maintenance to her and that the plaintiff is entitled to recover Rs. 400/-(per mensem by way of maintenance from -the defendant from the date of the suit. This Court is in full agreement with such conclusions and the findings of the learned trial Judge on such points. It is in the evidence that the plaintiff and the defendant are the legally wedded wife and husband married on 11-5-1966 and lived together as husband and wife for about a year and thereafter lived apart for

certain reasons. The reasons for their getting apart are not relevant in this case since it is established that they are not living together ever since after the expiry of one or two years after the date of their marriage. It appears from their evidence that they lived together under the same roof as husband and wife for few months, the defendant took the plaintiff to her parents' house at Peddavutapalli for "Sankranti" feast and thereafter did not bring her back. It further appears that he has visited her at her parents' house in the month of April, 1969, took her to Srisailam, left her at her parents' house and did not take her back. Since then the husband and wife are living apart. In whatever manner the parties and witnesses are trying to say this, it is certain that they have neither lived together nor reconciled to their separate way of life. The learned trial Judge has come to the conclusion that the defendant has deserted the plaintiff and he has also contracted a second marriage with one Vanaja or some such person according to her (plaintiff) testimony. Now the learned Advocate for the appellant says that his party is prepared to furnish the correct name of the second wife. It is significant to note that he had the guts and courage in his testimony to deny the said fact although he had admitted before the proceedings in the Magistrate's Court in O.P. No. 45 of 1976 that he has taken second wife and got children through her. Whatever be the name of the second wife, it is certain that the defendant has taken a second wife. The law is so clear that a Hindu husband contracting a second wife itself is a good ground for a Hindu wife or any wife to seek separate maintenance. The learned trial Judge was justified in holding that the plaintiff is entitled to maintenance. The learned Advocate for the defendant-appellant has contended that since the marriage of the plaintiff with the defendant has been declared as invalid in the suit filed by the second wife the plaintiff is not entitled to any maintenance. It is significant to note that the defendant himself failed in such proceedings as per Ex.B.6 (Original Petition) to seek divorce. But, however, the second wife appears to have filed a suit and obtained an ex parte decree dated 19-8-1993 before the First Additional Judge, City Civil Court, Hyderabad declaring that the marriage between the plaintiff and the defendant is null and void. A certified copy of the decree in that case has been produced by the learned Counsel for the appellant along with CM.P. No. 8531 of 1995. The learned Advocate for the plaintiff-respondent submits that having learnt about such an ex parte decree, his party has file an application under Order 9, Rule 13 of CPC to set aside the ex parte decision and that it is pending. The learned Counsel for the defendant-appellant admits that he has learnt about such proceedings having been filed on behalf of the plaintiff and that they are pending. Therefore, the inevitable inference is that the defendant has failed in getting such a decision in his favour whereas after his failure, the second wife appears to have made an attempt to get a decision in her favour as above which is sought to be set aside by the plaintiff in the proceedings which are still pending. Therefore, on the face of it, the relationship between the plaintiff and the defendant as husband and wife continues as on today. Even assuming that the marriage of a Hindu spouse is nullified by means of a decree of the Court on any ground, Section 25 of the Hindu Marriage Act, 1955 contemplates that even

while passing such a decree or order at any time, the Court may grant alimony or maintenance. In such a situation, subject to the conditions of Section 25 of the Act, the defendant-husband cannot avoid the liability to pay maintenance to the plaintiff-wife. In that view of the matter, the finding of the trial Court that the plaintiff is entitled to separate maintenance should be supported.

12. Regarding the quantum of maintenance claimed by the plaintiff, it is in the evidence that the defendant is an Engineer employed in B.H.E.L. getting Rs. 1200/- per mensem at the relevant time and now more than that. His own admissions in his testimony show that his gross salary was Rs. 2,15.35ps. as on the date when he gave his deposition which is supported by his own document Ex.B.6 salary certificaes. Admittedly, the defendant has no other person to be maintained except the second wife and children and the plaintiff. Even according to his own evidence, he required Rs. 1,000/- per mensem for himself and sending another Rs. 100/- per mensem to the plaintiff. He stated so in the course of his deposition to show that he is able to save for purchasing the site, to pay part consideration and to construct the house by making up the balance of the money after collecting some of the money through various sources. The plaintiff was not employed at the relevant time. The status of the plaintiff as the wife of an Engineer earning so much should be normally equated to his status. Her requirement should be at least 50% of his if not more as it normally happens. Normally speaking, she should have been awarded the maintenance at the rate of Rs. 750/- per mensem as his income exceeds Rs.2,000/- and if she had claimed, she would have got even Rs. 1,000/- . She also stated that she wants to pursue her studies. In other words, she needs money not only for food and shelter, but also for education. In that view of the matter, the awarding of maintenance at Rs. 400/- per mensem is much lower than what she was entitled to. The learned trial Judge has given adequate reasons which are based upon evidence and this Court finds no reason to disagree with the same. Therefore, the decree for maintenance as directed by the learned trial Judge cannot be disturbed.

13. Although from the plaint it was not very clear whether the site was purchased by the plaintiff or the defendant or whether the plaintiff herself constructed the house, it is made very clear from the evidence that actually the site was purchased under Ex.B.2 on 22-7-1968 for a consideration of Rs.4,000/- and actually the house or the construction was put-up by the defendant while the plaintiff was away from him. There is not even a whisper by the plaintiff that she contributed any amount for the construction of the house, much less she took interest in constructing the house. On the other hand, the evidence is very clear both in her testimony and that of her father P.W. 3 that the defendant constructed the house by selling the jewellery of the plaintiff. In other words, from the evidence it is apparent that the site was purchased in the name of the plaintiff under Ex.B2 while the husband and wife were living together whereas the house was constructed by the defendant after they fell apart. Therefore, the two aspects, viz., the acquisition of site and the construction of the house or the

acquisition of the same should be dealt with separately.

14. The learned Advocate for the plaintiff-respondent with all sincerity contended that in view of the various pronouncements of the Supreme Court in *Mithilesh Kumar and Another Vs. Prem Behari Khare*, and *Musammam Murti Dussadhin and Others Vs. Surajdeo Singh and Others*, , by virtue of sub-clause (1) of Section 4 of the Benami Transactions (Prohibition) Act, the plaintiff would be presumed to be the owner of the suit site and the defendant is debarred from raising the contention that it is a benami transaction. But the learned Advocate for the defendant-appellant rightly brought to the notice of this Court that both the pronouncements have been overruled in *R. Rajagopal Reddy and Others (deceased by legal representatives) Vs. Padmini Chandrasekharan (deceased by legal representatives)*, , wherein it is held that the law of benami is so prohibited, and that the Act is not retrospective in operation and does not apply to pending suits already filed and entertained prior to coming into force of Section 4. In other words, as on the date when the transaction under Ex.B.2 came into force, such a law was not in operation and, therefore, the Court would be entitled to look into the theory of the defendant about the acquisition of the site by way of benami transaction.

15. It is clear from the evidence that the plaintiff and the defendant lived cordially as husband and wife for few months. Their marriage was solemnized on 11-5-1966. The site was acquired on 22-7-1968 under Ex.B.2, almost" after two years from the date of marriage. Although it was sought to be demonstrated by both the parties that they fell out after few months, it is clear from the evidence that the defendant took the plaintiff to her parent's house for Sankranti festival during the year 1968 which must be few months prior to Ex.B.2; he even visited them during April, 1969. The circumstances are so clear that although the husband and wife might have quarrelled, they did not actually separate for all purposes even while the site was acquired under Ex.B.2. It appears that the plaintiff was a suspicious wife. She went to the extent of connecting her husband-defendant with the daughter of one Seetamma, a neighbour, who was hardly 8 or 9 years old. Further, her testimony goes to the extent of saying that the defendant might have married secretly that girl. But she is neither able to establish that, nor the evidence discloses that. There is nothing on record to show that the defendant married the daughter of Seetamma. The defendant has given the reason as to why he could not pull on well with the plaintiff. Somehow he felt that he could not develop that relationship of a husband with the plaintiff as he was feeling difficult to manage with her even in the sexual relationship. According to him, he developed some hallucinations and had some skin burning sensation etc., and therefore, started addressing her as mother or sister (Amma or Chelli). In other words, there was no compatibility between the husband and wife after sometime and ultimately it resulted in their separation for a long time and resulting in the defendant taking another wife. Admittedly, the plaintiff is the sister's daughter of the defendant. They are close relatives. In such a situation, for their falling apart, the reasons must be stronger than what the parties are

stating. At any rate, though they did not pull on well, the defendant appears to have still retained the warmth and concern for the plaintiff which is demonstrated from the fact that he purchased the site under Ex.B.2. Even according to him, he had left the plaintiff in the house of her parents for Sankranti festival during the year 1968 which should be in January. Whatever be the reason, the site was purchased in the name of the plaintiff while the relationship of husband and wife lasted for more than two years. It is in the evidence that Ex.B.2 stands in the name of the plaintiff. The recital in Ex. B.2 shows that the consideration was paid by the plaintiff to the vendor. The defendant is one of the attestors to Ex.B.2. The vendor is said to be dead. His son is alive. He is not examined. There is nothing to indicate from the evidence that the defendant purchased the site benami in the name of the plaintiff for any reason. Except saying that he paid the consideration for purchasing the site, he has not given any other reasons as to why he purchased the site in the name of the plaintiff. Possibly, he might have helped her by advancing the consideration to purchase the site. How a transaction becomes a benami transaction has been explained by the Supreme Court in *Meenakshi Mills, Madurai Vs. The Commissioner of Income Tax, Madras*, . The tests therein are not satisfied in this case. Benami transactions may be synonymous to fraudulent transactions. Sometimes, they may become synonymous to nominal transactions or lending of the name of somebody although the real owner is different. No such pleadings are there in the written statement nor in the evidence. Therefore, in the strict sense of the term, Ex.B.2 may not be a benami transaction. But the defendant is trying to prove that he actually purchased the site by paying his own money although the plaintiff lent her name. In the considered opinion of this (Court, the law may not take such circumstance as the only circumstance or a strong circumstance although such a circumstance may play an important role in deciding whether a property was purchased by one or the other individual, because in order to complete a sale, the passing of consideration is not at all one of the true" or real tests. Sub-clause (1) of Section 54 of the Transfer of Property Act reads as follows:

"Sale is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised."

Even where no consideration passes, the sale will be complete provided it conforms to the requirement of Section 54. Ex.B.2 complies with such a formality. The execution of the document is not denied. Passing of consideration is admitted. It is a registered document. Therefore, the only question is whether the defendant paid the consideration amount to the vendor and hence entitled to get refund of such amount if he has paid it on behalf of the plaintiff. Therefore, within the correct and true implication of law, the site was legally transferred as a sale in favour of the plaintiff.

16. Now the question is whether the defendant paid the consideration to the vendor under Ex. B.2. The case of the plaintiff is, that her gold jewellery was with the defendant which he pledged, raised money and purchased the site. Such

an expression is found in the testimony of the plaintiff, her father P.W.2, her relative P.W. 3 and a neighbour. P.W. 4. As against this, the defendant has testified and tried to prove that he sold a landed property for a consideration, of Rs. 2,500/- and paid the balance to the vendor in instalments at the rate of Rs. 100/- per mensem out of his own income. Therefore, the Court was confronted with examining the probability of two theories. The testimony of the plaintiff and other witnesses in regard to her father giving jewellery worth 20 sovereigns of gold is consistent. It is also in the evidence that in turn the defendant also gave some jewellery to the plaintiff at the time of marriage. We are here concerned with a Hindu marriage wherein Sastric law traditions and practices will conform to kanya-dana or gifting of the bride bedecked with jewellery (Salankrutha Kanya). Even a poor man is normally expected to adorn the bride with at least some gold if not to the satisfaction of the husband. As already pointed out, the plaintiff and the defendant are close relatives and in particular to say that the plaintiff is the sister's daughter of the defendant. It is not the case of the defendant that either he was compelled to marry the plaintiff or that the plaintiff's father was in utter poverty not even to present some gold ornaments to his daughter at the time of the marriage. It cannot be forgotten that the defendant was an Engineering Graduate or that he was already employed. It was difficult to think that he was accepting to marry the plaintiff without there being proper celebration of the marriage with at least minimum presentations as normally expected in such circumstances. Presenting 20 sovereigns of gold jewellery may not be that big or excessive during the year 1965. It may be judicially noticed that the value of gold in early 1960's was not more than Rs. 100/- per sovereign. As a whole, if P.W. 2 had given gold jewellery worth 20 sovereigns, it would not have exceeded hardly Rs. 2,000 / -. It is in the evidence that the father of the plaintiff is a Pujari earning some reasonable amount to maintain the members of the family and also to celebrate the marriage. It is also in the evidence of the defendant himself that the plaintiff's parents left 5¼ acres of wet land and a share in the archakatyam of the temple at Akulamallaram in Krishna District in favour of the defendant's family. It shows the financial status of the plaintiff's father. The defendant except stating that the plaintiff's father did not give any jewellery, did not produce any acceptable evidence before the Court. He is an employee in B.H.E.L. since a long time. He is normally expected to submit his statement of returns of assets and liabilities. He could have produced any document worth the value to know whether at least he had given a declaration that he had particular assets and liabilities and clearly excluded any such gold from it at any point of time. It is not his case that he purchased the site or constructed the building when he was not employed. On the other hand, it is his case throughout that he was able to save out of his earnings and not only paid part of the consideration for Ex.B.2 and was also able to make the balance regarding construction of the house at a particular point of time. Therefore, the learned trial Judge is right in accepting the evidence and concluding that the gold jewellery of the plaintiff worth 20 sovereigns were with the defendant at the time of purchasing Ex.B.2. The truth or otherwise of the defendant's theory trial he

purchased the site and paid Rs. 2,500/- as major consideration for purchasing the site under Ex.B.2 has been meticulously examined by the learned trial Judge with the evidence on record. It is true that the defendant sold a land under Ex.B.1 at Chennur for a consideration of Rs. 2,00/- . It is dated 15-6-1968. His theory is that he made use of such consideration for purchasing the suit site. It is true that there is a recital in Ex.B.1 that he sold the land as it was useless, to acquire some other properly. There is nothing to indicate in the sale deed that it was for the purpose of acquiring a site. Even then, there is one more strong circumstance against the defendant to show that he would not have paid even that amount towards the consideration for Ex.B. 1. His theory that he paid Rs. 2,500/- as major part of the consideration and the remaining amount at the rate of Rs. 100/ - per mensem by way of instalments is without any merit. As already pointed out, the son of the vendor, who is available, is not examined. The recital in Ex.B.2 shows that the entire consideration of Rs. 4,000 / - was paid to the vendor under the document at the time of execution of the document. There is also a recital, as already pointed out, that the consideration was paid by the plaintiff himself to the vendor. It is a registered document. The defendant is an attester, to the said document. Therefore, he was totally estopped from challenging the contents of Ex.B.2 inasmuch as his theory about the payment of consideration in a different manner than what is mentioned in Ex.B.2 itself cannot be believed. Moreover, it is difficult to think that a vendor would accept to receive the sale consideration at the rate of Rs. 100/- per mensem. To repeat again, the defendant has not produced any document regarding the statement of assets and liabilities to his employer to demonstrate as to how he acquired the site Ex.B.2 either by part payment of the consideration or by payment by way of instalments. It is highly improbable that any vendor would accept the consideration in monthly instalment of Rs. 100/- unless for extraordinary reasons which are lacking in the present case. It is significant to note that at the time of Ex.B.2, the plaintiff was living away from the defendant. If he had the gold ornaments of the plaintiff and in the absence of proving any other sources, it is possible that as a husband, who was still continuing in such status, might have made use of that gold as it normally happens. Perhaps, the plaintiff might have obliged for the use of such gold jewellery as such instances may not be rare. The defendant appears to have liberally used such an opportunity. Even assuming that he paid Rs. 2,500/- to the vendor under Ex. B. 2, it is possible that at least for the balance of the consideration, he might have made use of the gold jewellery of the plaintiff. At any rate, his theory that he paid his own money to the vendor under Ex. B. 2 is found to be not convincing or probable. Therefore, the learned trial Judge for justifiable reasons based on evidence was right in concluding that the defendant had failed to prove the theory of benami transaction under Ex. B. 2 in regard to the site. In other words, in law and on facts, the plaintiff had acquired title to the site which is part of the suit property and by virtue of Ex. B. 2 the defendant could not or did not get it. In other words, the plaintiff was having the title to the site as on the date of the suit and is entitled to get the possession of the same in her suit.

17. Now coming to the construction of the house or acquisition of the house, I must examine the rival contentions of the parties. It is the clear case of the plaintiff that the defendant constructed the house by selling the gold ornaments belonging to the plaintiff worth 20 sovereigns. According to the defendant, he raised money from various sources and made up the deficit out of his own income. The learned trial Judge has pointed out several circumstances from the evidence to accept the case of the plaintiff and to reject the case of the defendant. Admittedly, the plaintiff and the defendant did not live together when the house was constructed. It is the defendant who constructed the house on the site of the plaintiff. The plaintiff or her father P. W. 2, as can be gathered from their evidence, did not contribute even a single pie to construct the house. They consistently stuck to the theory that the gold jewellery of the plaintiff worth 20 sovereigns was used by the defendant for constructing the house. In other words, the worth of the construction should be equivalent to the worth of the gold jewellery viz., 20 sovereigns. As already pointed out, the value or the worth of 20 sovereign of gold was not more than Rs. 2,000/- . It is not the case of the plaintiff that the house on the suit site was built or could be built with Rs. 2,000/-. Not even a slight attempt is made to prove the value of the building on the suit site. As against this, the defendant is consistent throughout in saying that he put up the construction by spending Rs.20,000/- to Rs. 25,000/-. He has given details as to how he collected the said amount. It appears that he borrowed Rs. 3,000/- from one Sri Ramachandra Murthy and repaid it and Ex. B. 3 is the pronote. He raised a loan of Rs. 1,400/- from the Life Insurance Corporation and Ex. B. 4 is the sanction order. He borrowed Rs. 5,000/- from Sri M, R. K. Charyulu, D. W. 2 as a hand loan. He also raised a loan of Rs. 5,000/- from his provident fund. According to him, he was able to save Rs. 750/- to Rs. 800/- per mensem and out of the savings, he was able to complete the construction of the house. On the face of it. the evidence of the defendant is convincing and satisfactory in regard to the same. Admittedly, he is employed. Ex. B. 3 the pronote clearly shows that not only he borrowed the money but he must have discharged the same. It is true that Mr. Ramachandra Murthy is not examined. But the defendant has tried to produce the best evidence possible as against the plaintiff not producing satisfactory evidence. Ex. B. 4 is the sanction order of the LIC evidencing taking of loan of Rs. 1,400/-. D. W. 2 has corroborated his testimony regarding borrowing an amount of Rs. 5,000/-. His raising provident fund loan from his employer to the extent of Rs. 5,000/- cannot be doubted. When he had completed the construction of the building, he is expected to have collected money from various sources. It is anybody's experience to judicially notice that the construction of a house is a big venture. In that situation, not only the well-wishers come to the rescue of an individual but also the individual will resort to all efforts to collect the money to complete construction. When the plaintiff or her father P. W. 2 did not produce any positive evidence in this regard, there is no reason to discredit the testimony of the defendant regarding the manner in which he constructed the house. Being an engineer in BHEL with so much of resources and with a fixed income, the

defendant could have collected so much of money and constructed the house which is said to be worth Rs. 20,000/- to Rs. 25,000/-. The plaintiff has never said that the worth of the house constructed by the defendant is only Rs. 2,000/- or cannot be Rs. 20,000/- to Rs. 25,000/-. The defendant did it after obtaining the permission from the Municipality as a normal person would do it for putting up construction. The circumstance would clearly demonstrate that he was capable of constructing a house worth Rs. 20,000/- to Rs. 25,000/- at the relevant time. As between the case of the plaintiff and the defendant regarding the manner in which the house was constructed, the case of the defendant is more probable, convincing and satisfactory. With the gold jewellery worth Rs. 2,000/- it was impossible to put up such a construction. The plaintiff did not provide sufficient material in proof of the same that the house was built with her gold jewellery. The learned trial Judge appears to have gone by surmises and not from evidence. He has gone to the extent of saying that the proof should be beyond reasonable doubt. The known concept is that the proof of a fact in several cases is probandum or the degree of probability and not beyond reasonable one. If we judge the two theories of the parties, any reasonable and prudent man in such a situation would believe that it was the defendant who put up the construction with his own money and not out of the gold jewellery of the plaintiff, because by then, he had already made use of the gold jewellery worth Rs. 2,000/-, perhaps by putting some more amount from his salary, to secure the site and no gold jewellery belonging to the plaintiff was left with him to construct the house. Therefore, it is difficult to support the reasoning or the finding of the learned trial Judge regarding the plaintiff being the owner of the house put up by the defendant on her site. To that extent, the finding of the learned trial Judge deserves to be set aside.

18. With the findings as above, the judgment and decree of the learned trial Judge cannot be sustained as a whole and the appeal should succeed partly.

19. The stage is opportune that the application filed by the defendant-appellant in C. M. P. No. 8531 of 1995 under O.41, R. 27, C.P.C. should be considered. He has produced five documents and has requested the Court to mark those documents viz., Exs. B.7 to B.11 as additional evidence in support of his case. The documents are Items 1 to 3, Tax Receipts issued by the Municipal Corporation of Hyderabad dated 30-12-1976, 11-3-1980 and 7-4-1981 and the demand notice at Item No. 4 to the defendant. Item No. 5 is a certified copy of the judgment and decree in O. S. No. 1237 of 1984 passed by the First Additional Judge, City Civil Court, Hyderabad dated 19-8-1993 which is already referred to once for a different purpose. The learned counsel for the plaintiff-respondent has strongly contended that the documents are not relevant in the first instance and secondly they will not establish or improve the case of the defendant. The first contention appears to have no force. The documents are very much relevant because the payment of tax on property throws light as to the conduct of the parties in dealing with the property. The payment of tax is also one such relevant circumstance. Therefore, Items 1 to 4 are relevant

documents. Item No. 5 is also relevant which throws light about the legal existence of the relationship between the plaintiff and the defendant to decide the question of the right of the plaintiff to recover maintenance from the defendant at a particular point of time. Therefore, the documents deserve to be admitted by way of additional evidence to consider them. Whatever may be the reasons for the non-production of the same before the trial Court, the documents being relevant would be useful to examine the rival contentions of the parties. That will meet the ends of justice to put a finality to the litigation. Since the learned Advocate for the appellant-defendant proposes to mark those documents as Exs. B. 7 to B. 11, they will be formally marked as such to examine whether they will be useful to prove the case of the defendant. At the best, Exs. B. 7 to B. 10 will only prove that the defendant paid the Municipal tax demanded by the Corporation. It is not the case of the plaintiff that she paid the tax on the building in question. Because the defendant had constructed the house, he might have paid the taxes. Thus, by admitting these documents, the case of the plaintiff to the extent indicated above is not impaired. As regards Ex. B. 11, the certified copy of the judgment and decree in the said proceedings, as already pointed out, the matter is not conclusive and on the other hand it is conflicting with a decision already rendered that the marriage sought to be declared as invalid is not accepted by the Court once and it is sought to be set aside by the plaintiff by filing an application under O. 9, R. 13 of C.P.C. As already pointed out, by virtue of S. 25 of the Hindu Marriage Act, the liability of the defendant to pay permanent alimony even after severance or disruption of the relationship of husband and wife will not cease unless for justifiable reasons to be decided by the Court. Therefore, even by accepting the document filed by the defendant by way of additional evidence, his case will not be improved and the conclusions arrived at by this Court as above, cannot be challenged. C.M.P. No. 8531 of 1995 shall, therefore, stand allowed with no costs.

20. Now we have reached a stage where the plaintiff has proved her title to the site forming part of the suit property and the defendant has proved title to the superstructure or the house put up on the site. Therefore, if the plaintiff succeeds, she would be entitled only to the site and not to the superstructure or the building. The learned trial Judge has unfortunately dealt with such a question as to what is to be done where the plaintiff establishes her title and right to possession to a portion of the property whereas the defendant possesses it in regard to the remaining part. Therefore, a serious question was put up to both the learned counsels as to what is to be done in such a situation. Both of them have submitted their respective considered views and submissions in their own way. The learned Advocate for the appellant-defendant Sri Ramanujachari has submitted that the defendant put up the construction with the bona fide belief that he is the owner of the suit site as he purchased it in the name of the plaintiff by saving his money either partly or fully, put up the construction out of his own money to the knowledge and implied consent of the plaintiff, the plaintiff acquiesced totally about the conduct of the defendant in putting up the

construction which continued for long without her little effort to prevent the construction at any point of time. Even in the exchange of notices, she never said that the defendant put up construction unlawfully against her wishes. Even from the evidence, it is apparent that either the plaintiff or her father P. W. 2 ever resented or obstructed the conduct of the defendant in putting up the construction. On the other hand they were happy that he was putting up the construction on the site belonging to the plaintiff. In fact, P. W. 2 the father of the plaintiff and other witnesses, P.Ws. 3 and 4, are totally ignorant as to how the defendant put up the construction. There was even an incident wherein the plaintiff was invited to the Gruhapravesam ceremony celebrated by the defendant when the plaintiff was not permitted to sit with the defendant for celebrations and rituals and there were abuses etc. In other words, the defendant asserted his attitude as against the plaintiff in regard to the house throughout. It is not the case of the plaintiff that she had no knowledge that the defendant was putting up house on her property by spending more money than her own gold jewellery. Perhaps, she thought that whatever belongs to her husband belongs to her, but the law appears to be something different. Therefore, the learned Advocate for the appellant-defendant appears to be justified in saying only to the extent that the defendant was not acting mala fide as against the plaintiff in putting up construction on the site. When she thought that the site belongs to herself under the circumstances, for whatever be the reason, there is no wonder he thought that the house also belongs to him. Now coming to the conduct of the plaintiff, as already pointed out, she and her father slept over the matter for long. They allowed the defendant to put up the construction and complete it. They allowed him to reside in it for long. They were content with the feeling that the house belongs to the plaintiff. Perhaps, due to incompatibility and discontentment, neither the plaintiff nor P. W. 2 undertook, any financial risk to put up the construction except P. W. 2 saying that he contributed some money to the defendant. There is no proof in this regard. Therefore, examining the probabilities, this is not a fit case to think that the plaintiff can gain title to the superstructure put up by the defendant on the suit property as both the properties have become one both in law and in fact. It is at this stage both the learned Advocates argued presenting the doctrine of equity where the Court should examine the whole material before it and adjust the rights of the parties by applying the "rule of equity" where the law may not be able to help the parties. However, both the learned Advocates have stood to their contention that each of them should get their due right in law. Now we have to examine such submissions in the light of the law operating upon such a situation.

21. The learned Advocate for the plaintiff-respondent has postulated that in law any improvement on a property, particularly on immovable property becomes part of the suit. In this regard, he has relied upon a judgment in AIR 1927 135 (Privy Council) . It is also his contention that the "doctrine of equity" as is understood and applied in English law can be borrowed in India subject to the statute, which according to him, in this case, may not be beyond S. 51 of the

Transfer of Property Act. The learned Advocate for the appellant-defendant has postulated that in the first place S. 51 of the Act cannot be attracted and secondly and ultimately even accepting S. 51 of the Act, the facts and circumstances of the case do not justify the application of such a "rule of equity" in favour of the plaintiff as against the conduct of the defendant who is more bona fide in his conduct than the plaintiff. According to him, the plaintiff having remained away from the defendant for certain reasons, never evinced any interest and that the defendant put up construction on the site with his own money and remained there for a long. He has also submitted that the value of the property is one of the considerations which stands in the way of the Court not to apply the "doctrine of equity" in favour of the plaintiff and if possible it may have to be applied in favour of the defendant. According to him, even assuming that the site was acquired for Rs. 4,000/- the worth of the building is Rs. 22,000/- to Rs. 25,000/- even in those days and it must be quite high as at present, and therefore, it may be difficult to work out the equity as suggested by the learned counsel for the respondent. The counsel for the respondent-plaintiff has alternatively submitted that in case the Court comes to the conclusion that by applying the "rule of equity" the rights of the parties may be adjusted, his party viz., the plaintiff is prepared to purchase the house and take the entire property along with the site by paying the actual amount spent at the time of construction and not as on today.

22. Section 51 of the Transfer of Property Act reads as follows :

"When the transferee of immovable property makes any improvement on the property, believing in good faith that he is absolutely entitled thereto, and he is subsequently evicted therefrom by any person having a better title, the transferee has a right to require the person causing the eviction either to have the value of the improvement estimated and paid or secured to the transferee, or to sell his interest in the property to the transferee at the then market value thereof irrespective of the value of such improvement.

The amount to be paid or secured in respect of such improvement shall be the estimated value thereof at the time of the eviction.

When, under the circumstances aforesaid, the transferee has planted or sown on the property crops which are growing when he is evicted therefrom, he is entitled to such crops and to free ingress and egress to gather and carry them."

The law is settled that "rule of equity" has been the part of this provision. Whether the "rule of equity" is borrowed from English law or not, it has been codified under S. 51 of the Act. It is subject to the stipulations in the very provision. It is true that as the expression goes under the provision, it is intended for the benefit of the transferee of immovable property when he makes any improvement on the property believing in good faith that he is absolutely entitled thereto. It does not spell out as to what should happen to the other party to the document or any other party who is going to be affected by the

operation of such a "rule of equity". Therefore, it appears that the "rule of equity" codified under S. 51 of the Act, to meet such a situation, is not exhaustive or absolute. The illustration is ample in this regard. The implication of this provision has been elaborated as follows :

"This section is an application of the equitable maxim that he who seeks equity must do equity. This equity has been enforced in England when a person entitled in equity recovers the property from the owner of the legal estate with the assistance of the Court. The Court may then put him to equitable terms and compel him to make an allowance for an expenditure which would not form the subject of an active claim against him. As compensation could not be claimed in an independent action by the defendant, the equity which requires a plaintiff to allow compensation has been called a passive equity."

(p. 230, T. P. Act, Mulla, Sixth Edition)

In some of the English pronouncements and in particular, Dart has explained the "rule of equity" underlying the provision :

"Where a purchaser for value is evicted in equity, under a prior title, he will be credited with all moneys expended by him in necessary repairs or permanent improvements (except improvements made after he had discovered the defect of title), and will be debited with the rents which he has received." (p. 230 of Mulla, T. P. Act supra)

In fact, the "rule of equity" having regard to the facts and circumstances of a particular case was applied dehors S. 51 of the Transfer of Property Act although the rule underlying equity postulated therein was applied. Kidar Nath Vs. Mathu Mal, Apart from this, the true purpose and the principle underlying the "doctrine of equity" may be independently examined. In the well-known treatise and the learned expressions of Snell's Principles of Equity, the nature, origin and history of equity has been explained in brief as follows :

"The term equity is used in various senses. In its popular sense it is practically equivalent to natural justice. But it would be a great mistake to suppose that equity, as administered in the Courts, embraces jurisdiction as wide and extensive as that which would result from carrying into operation all the principles of natural justice. A large proportion of natural justice, in its widest sense, cannot be judicially enforced, but must be left to the conscience of each individual.

The field of equity, in its technical sense, is still further narrowed by the fact that it does not include nearly the whole of that portion of natural justice which is capable of being enforced by legal sanctions and administered by legal tribunals. The greater part of that portion is embodied in the rules of the common law and in the statute law.

Equity then, in its technical sense, may be defined as a portion of natural justice which though of such a nature as properly to admit of being judicially enforced,

was, from circumstances hereafter to be noticed, omitted to be enforced by the Common Law Courts --an omission which was supplied by the Court of Chancery. In short, the whole distinction between equity and law is not so much a matter of substance or principle as of form and history."

(P1 -- Snell's Principles of Equity, First Edition 1930)

Therefore, as is well known, the "rule of equity" is a part of natural justice. In other words, it is only a part or portion of natural justice, a portion of which may be codified now and then by human beings who frame law and administer law for human beings. It is a myth to think that the entire "rule of equity" can be codified. It is said to be human when human beings apply for human beings, in humane way and divine when they traverse beyond the subjective core and act within the objective mind and heart of a "sthithapragna" within the meaning of Chapter II of Song Celestial Bhagavadgeetha of Lord Krishna. In this context, it may be necessary to point out that the "rule of equity" whether in England or India or elsewhere in the universe may not be different in the sense that it is going to be applied for human beings in a particular situation depending upon the facts and circumstances. It cannot be a technical rule. However, it is subject to certain restrictions as per the well settled principles. Under the circumstances, this Court may not be wrong in saying that the "rule of equity" or "doctrine of equity" is not exhaustively codified under S. 51 of the Act and this Court is entitled to apply such a principle to the facts and circumstances of this case also to meet the ends of justice. There is one more illustration to support such an inference. There may be many instances where there may be improvements by certain persons although the property belongs to others. The illustrations may be plenty, but the very common illustrations are by mortgagee, inter-meddlers, lessees, agents etc. Under S. 108(b) of the Transfer of Property Act, as rightly propounded by the learned counsel for the plaintiff-respondent, the rule that any improvement forms part of the soil has been enshrined. Therein, the implication is that if during the continuance of the lease any accession is made to the property, such accession shall be deemed to be comprised in the lease itself to go to the benefit of the lessor. However, by operating the "rule of equity" in such a situation, the law has allowed option to the tenant or the lessee to remove the superstructure before the delivery of possession and not thereafter. That is made amply clear in Section 108(h) of the Act. In other words, the "rule of equity" has been codified in the form of statute here and there to meet the ends of justice. If we logically think that the whole "rule of equity" applies to only such a situation as has been codified either under S. 51 or 108 of the Act, perhaps, the results may be disastrous and may lead to injustice. Thus the expression "transferee" under S. 51 of T. P. Act need not be confined to an alienee in the strict technical sense, but should be understood to be any person (except a trespasser) acting under some colour of title and possession or bona fide belief and who improves it with such a bona fide belief. *Daya Ram and Others Vs. Shyam Sundari*, . The law settled in such a situation is that such a person improving the property on eviction be compensated in two ways, either (1) by

being paid the value of the improvements, or (2) by buying out the better title at a valuation of the property irrespective of the improvements. It is settled that the option as to the mode of compensation is that of the evictor, who can either pay the value of the improvement and take the land or sell the land instead of evicting him. (Pages 225 and 226 of the Transfer of Property Act, Mulla's 7th Edition). Therefore, in the background of the law stated above and the facts and circumstances of this case, now we are to decide as to what has to be done by extending the "rule of equity". However, this Court is totally convinced that this is a fit case) to operate upon such a doctrine to meet the ends of justice or otherwise one or both the parties will be put to unnecessary hardship.

23. The conduct of the parties is already noted. The defendant knowing fully-well that the site belongs to his wife, however, with bona fide belief under the circumstances stated above, risked to put-up the construction. The plaintiff allowed the defendant to put up the construction, perhaps with the hope that ultimately she may get the benefit of it in view of her status as the wife of the defendant. In other words, neither the plaintiff nor the defendant can be deprived of their right to their respective properties viz., the site and the building. In fact and in law, the learned Advocate for the plaintiff-respondent was justified in contending that in the normal circumstances, the present case may not give the defendant the protection of equity. In *K.K. Das, Receiver and Others Vs. Sm. Amina Khatun Bibi and Another*, it was held that "where a husband builds on the land belonging to his wife knowing he has no right to do so, the latter is entitled to the building." If this rule is applied strictly, the defendant will be out of the benefit. But it is clear that such a rule was discharged having regard to the facts and circumstances of such a case. Here is not a case where the defendant built the house on the site belonging to the plaintiff mala fide or with the total understanding that the site belongs to his wife only. Although his impression may be wrong that the site belongs to him, he made sufficient efforts to acquire the property for the wife whether by attesting the document or by supplementing the payment of consideration or in any other manner. Therefore, the ruling cited above, may not apply to the facts and circumstances of this case.

24. If we borrow the "rule of equity" from S. 51 of the Transfer of Property Act which is already extracted above, it is clear that the amount to be paid or secured in respect of such improvement shall be the estimated value thereof at the time of the eviction. In other words, in case if the plaintiff has to be put into possession of the site by passing a decree, she must be given the first option to have the building thereon, by paying the amount or the estimated value for that, prevailing at the time of eviction and not at the time of improvement. If she fails to avail the same, then the equity will move towards the defendant wherein he will have to pay the estimated value of the site prevailing at the time of eviction and not at the time of acquisition. The law appears to be settled in this regard.

25. The valuation of improvement would be, as pointed out in *Kidar Nath v. Mathumal* ILR(1913) Cal 555 : 19 Ind 946; *Kunhi v. Kunkan* ILR (1896) Mad 384

and Gangadhar Tukaram Akul Vs. Rachappa Nagappa Kinage, , not the amount expended in making the improvement, but the extent to which the value of the property as a marketable subject has been enhanced thereby. It has been observed by a single Judge of the Bombay High Court that a transferee is even entitled to the general rise in prices since the date of transfer Shripati Raoji Khopare Vs. Vishwanath, . The valuation has to be made as on the date of actual eviction, and not the date of the exercise of the option by the real owner J. Narayana Rao Vs. V.G. Basavarayappa and Others, .

26. Therefore, in effect, the appeal partly succeeds and the judgment and decree of the trial Court are partly set aside. The decree directing the defendant to pay maintenance at the rate of Rs. 400/- per mensem to the plaintiff from the date of the suit is confirmed. The decree directing the defendant to put the plaintiff into possession of the suit property is also confirmed subject to the condition that the plaintiff shall pay the estimated value of the building or the structure put up by the defendant on the site. Such estimated value shall be fixed by the trial Court or the Executing Court before the delivery of possession is effected and such a value shall be as prevailing as on the date of eviction. If the plaintiff fails to exercise such an option to pay the estimated value of the structure or the building on the suit property on her side, the defendant shall be entitled to have the entire suit property for himself including the sit subject to payment of the estimated value of the site prevailing as on the date of eviction.

27. The defendant-appellant shall pay the costs of the plaintiff-respondent incurred both in the suit and in this appeal.

28. Order accordingly.