
(2000) 06 KAR CK 0058
In the Karnataka High Court
Case No : Regular First Appeal No. 83 of 1997

Smt. G.P. Lakshmi and Another

APPELLANT

Vs

Smt. T.B. Rajamma (Deceased) by L.Rs

RESPONDENT

Date of Decision : 07-06-2000

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 96

Citation : (2000) 7 KarLJ 342

Hon'ble Judges : Harinath Tilhari, J

Judgement

Hari Nath Tilhari, J.,-This first appeal arises from the judgment and decree dated 2nd December, 1996 by Sri K.H. Malleshappa, X Additional Civil Judge, Mayo Hall, Bangalore, decreeing the plaintiff's claim in the suit for holding and declaring plaintiff to be absolute owner of the suit property as well as granted relief for possession, directing the defendants-appellants to deliver vacant possession of the suit scheduled property to the plaintiff within two months, and further ordered, and passed the decree to the effect that defendants shall pay damages of Rs. 700/- to the plaintiff, and shall go on paying future damages at the rate of Rs. 60/- per month till the date of delivery of possession of the suit property to the plaintiffs-respondents. The above decree has been passed in original suit in O.S. No. 8389 of 1980.

2. The plaintiff filed the above suit with the allegations to the effect that the plaintiff-respondent is the absolute owner of residential premises bearing Old No. 2, New No. 9 of L. No. 7th Street, O.P.H. Road Cross, Civil Station, Bangalore-51, which has been more specifically described in the Schedule to the plaint.

Plaintiff alleged that plaintiff had acquired the above property by purchase under registered sale deed dated 22nd October, 1960, executed in her favour by the vendor, that is, the previous owner of the suit property, namely, Sri H. Mohammed Jaffar Hussain, for a valuable consideration of Rs. 10,000/- , and that the khatha of the suit property stands in the name of plaintiff. Plaintiff claimed to be in the enjoyment of the property, as the absolute owner.

Plaintiff further alleged that defendants 1 and 2, that is the present appellants were the daughter and son-in-law of late Smt. Kenchamma, that is, the mother-in-law of the plaintiff. According to plaintiff-respondent's case, plaintiff permitted her mother-in-law along with her husband Govindappa (father-in-law of the plaintiff-respondent) to reside in the suit scheduled property, and in the year 1972, plaintiff issued notice to Kenchamma, mother-in-law claiming rent, and arrears, thereof. As the relation became strained, the said notice was replied by Kenchamma, and thereafter interference by the elders and well-wishers of the family, the plaintiff permitted Kenchamma, to reside in the house, and thereafter during her lifetime, and she was, according to plaintiff's case, in possession, and use, and occupation of the suit scheduled property for and on behalf of the plaintiff. According to plaintiff-respondent's case, Govindappa, the father-in-law of the plaintiff as well as of defendant 2, and husband of Smt. Kenchamma, died in the year 1972. According to plaintiff's case, Smt. Kenchamma, died on 11-6-1979. According to plaintiff's case defendants-appellants 1 and 2, continued in the scheduled property representing the plaintiff that they will leave the scheduled premises within one month or to meet the demand being made for possession from them by the plaintiffs-respondents. According to plaintiff's case, she learnt that defendants were evading the plaintiffs and continued in occupation of the property, and plaintiff asked the defendants to vacate and deliver the vacant possession of the suit premises, but to the utter surprise of the plaintiffs, defendants started laying claim on the suit property on false and frivolous grounds. The plaintiff alleged, that since the date of plaintiffs asked the defendants to vacate the possession and hand over the possession, and since thereafter, the defendants' 1 and 2's possession was unlawful. According to plaintiff's case, the defendants were liable to pay damages for unlawful possession, and occupation from 16-12-1979, and are liable to be evicted and plaintiff is entitled to get possession from them. According to plaintiff's case, defendants issued a legal notice on 25-7-1979, with false, and frivolous statements, and allegations claiming right, title and interest over the suit property.

3. The said notice issued by the defendants, i.e., legal notice on 25-7-1979, was replied by the plaintiffs denying the allegations and claims made therein. The plaintiff's case is that the defendants have started denying plaintiff's title and interest, and as defendants had not vacated, and handed over the vacant possession of the suit property in spite of notice having been served, and continued in an unauthorised possession, the plaintiff is entitled to damages for the period from 12-6-1979 to 31-5-1980, amounting to a total sum of Rs. 700/- , and for the period thereafter at the rate of Rs. 60/- per month, plaintiffs alleged that, since after 12-6-1979, the possession of the defendants became unlawful, and the hostility was shown by the defendants with effect from 25-7-1979. So the cause of action and need arose for filing the suit, and the plaintiff claimed the following reliefs:

(a) The decree declaring that, plaintiff is the absolute owner of the suit property;

(b) Decree for possession directing defendants to hand over the vacant possession of the suit property to the plaintiff-respondent; and (c) Decree for money, that is, for damages for the period from 12-6-1979 to 31-5-1980 at the rate of Rs. 60/- , per month as well as for period, subsequent at the same rate till the date of delivery of suit premises to the plaintiffs-respondents.

4. 1st defendant-appellant filed her written statement denying the plaintiff's case. This defendant denied that the plaintiff is the absolute owner of the suit residential premises bearing Old No. 2 (New No. 9), 7th Street, Old Poor House Road, Bangalore 51. The defendant further asserted that late Smt. T.B. Kenchamma, the mother of 1st defendant-1st appellant and the mother-in-law of 2nd defendant-2nd appellant was the absolute owner in possession of the suit property and that the sale deed where under the property had been purchased i.e., the sale deed dated 22-10-1960 was benami in the name of the plaintiff-respondent and the real owner of the property was Smt. T.B. Kenchamma, who according to the defendants-respondents purchased the suit property from her own money. The defendant asserted that the property was purchased by late Smt. T.B. Kenchamma out of her own money, but she got the same registered in the name of the plaintiff-respondent who is no other than the daughter-in-law. Thus the defendant has taken a plea that the transaction whereunder the property in dispute was purchased benami in the name of the plaintiff-respondent and the real owner thereof was Smt. T.B. Kenchamma, who according to the defendants-appellants purchased it from her own money. It was further pleaded that Smt. Kenchamma at the request of her son late G. Thimmaraju gave the sale deed in respect of the suit property to her son i.e., the husband of the plaintiff-respondent. The defendant admitted that the plaintiff-respondent to be in possession of the said sale deed dated 22-10-1960 since after the death or demise of G. Thimmaraju (i.e., plaintiff's husband). The defendant further asserted that as a matter of fact late Kenchamma advanced her money to the plaintiff to purchase the building at Madras which was accordingly done. The defendant further took the plea to the effect that the defendants have perfected title by adverse possession so far as the property in dispute is concerned. The appellants have been in continuous possession and enjoyment of the suit property adversely to the knowledge of the plaintiff for a statutory period. So, the suit is liable to be dismissed. The defendant denied that the plaintiff permitted her mother-in-law, Smt. Kenchamma and her husband Sri G. Thimmaraju to reside in the suit premises and suitable reply was given to the notice issued by the plaintiff in the year 1972. The defendants denied that they are liable to pay any amount as damages for use and occupation of the suit schedule premises. The defendant asserted that the plaintiff at no time stayed in the suit schedule premises. On this ground also, the suit is liable to be dismissed.

On the basis of the pleadings of the parties, the Trial Court framed the following issues:

(1) Whether plaintiff has permitted Kenchamma to stay in the suit house?

- (2) Whether Kenchamma was the real owner of suit property, but took the sale deed benami in the name of plaintiff as alleged?
- (3) Whether plaintiff is entitled to relief of declaration of title and possession?
- (4) Whether the plaintiff is entitled to past and future mesne profits?
- (5) Whether Court fee paid is in-sufficient?
- (6) To what relief?

Thereafter, two additional issues were framed by the Court below, which reads as under:

- (1) Whether defendant 1 has perfected title in respect of the suit property by way of adverse possession as contended in para 8 of her written statement?
- (2) Whether the suit is barred by law of limitation?

In support of their respective cases, the parties have filed their documents.

The plaintiff examined her power of attorney holder Sri T. Ravi, her own son as P.W. 1 and produced Exts. P. 1 to P. 16. While the defendants examined Sri K.T.V. Rangappa only as D.W. 1 and produced Exts. D. 1 to D. 169. After consideration of the material placed on records in detail, the Trial Court recorded the following findings:

That the plaintiff had permitted Smt. Kenchamma to live and stay in the suit house. That Smt. Kenchamma, was not the real owner, nor she did take the sale deed benami in the name of the plaintiff and that the defendants have failed to prove that the transaction under Ext. P. 2 was benami transaction in the name of the plaintiff-respondent, instead it held that the plaintiff-respondent to be the real purchaser. The Trial Court further held that the plaintiff has been entitled to the reliefs claimed in the suit and that the plaintiff is entitled to mesne profits past and future as claimed. The Trial Court further held that the plea of adverse possession has not been established and the two pleas could not be taken i.e., claiming of title, as owner of the property and claiming of title by adverse possession. So, the Trial Court answered additional issue 1 in the negative and it further held that the suit to be within time on the day when it is filed in the year 1980.

Feeling aggrieved from the said judgment and decree of the Trial Court decreeing the plaintiff's suit for the reliefs claimed, the defendants have come up in appeal before this Court under Section 96 of the Code of Civil Procedure.

5. I have heard Sri R.U. Goulay, learned Senior Counsel assisted by Miss. Sreedevi, Advocate for the appellants and Sri M.M. Poonacha, learned Counsel for the respondents at great length.

6. On behalf of the appellants, it has been submitted that the present suit being one for decree for declaration primarily and for possession and declaration being

the main relief, the suit was governed by Article 58 of the Schedule to the Limitation Act, 1963 and under Article 58 of the Limitation Act, only three years limitation is prescribed from the date of the accrual of cause of action viz., the date on which right to sue first accrues. The suit is barred by time as the cause of action in this case accrued in 1972 when the defendants denied the plaintiff's title where by the notice issued on behalf of Smt. Kenchamma when it was sent by defendant 2 on behalf of the defendants along with her lawyer. The first contention of the learned Counsel for the appellants has hotly been contested by the learned Counsel for the respondents.

7. The learned Counsel for the respondents submitted that the principal and effective relief was decree for possession against the defendants which the plaintiff sought and the suit for possession was filed against the defendants-appellants by the plaintiff-respondent on the basis of her title based on registered sale deed dated 22-10-1960. The learned Counsel contended that the plaintiff claimed title and ownership of the suit property. According to the plaintiff's case the cause of action accrued against the defendants in 1979 when the defendants started denying the plaintiff's title. He further contended that Smt. Kenchamma, no doubt, had sent a reply and she had claimed sole ownership in the property denying the plaintiff's right, but later on with the intervention of the elderly persons in the family, the parties came to settlement and she was allowed to live in permissive capacity and after her death in 1979 the defendants were asked to vacate and hand over possession of the property when they started denying plaintiff's title. So, the real cause of action accrued to the plaintiff against the defendants in 1979 and the suit having been filed in 1980 even if for a moment be taken to be governed by Article 58 of the Limitation Act, without conceding that the suit was well-within three years. In the alternative, the learned Counsel contended that the suit of the plaintiff here was based on title for possession against the defendants-appellants. The claiming of declaratory relief is immaterial and the plaintiff's case was that the defendants were in use and occupation with Smt. Kenchamma, no doubt, in permissive capacity. But, later on when they turned hostile after the death of Smt. Kenchamma and started denying plaintiff's title, their possession became hostile and adverse. So, the limitation for filing of the suit was governed by Article 65 of the Schedule to the Limitation Act. The learned Counsel for the respondents further contended that under Article 65, limitation prescribed is twelve years from the date when the possession of the defendant became or did become adverse to the plaintiff. He contended that even if it is taken that Smt. Kenchamma denied the plaintiff's title and claimed absolute ownership in herself and the cause of action accrued even according to the plaintiff in 1972 the suit having been filed in 1980 was well-within the period of twelve years. The learned Counsel contended that Article 58 really will not apply to the present case.

The learned Counsel for the respondents in this connection made reference to the following decision.-

1. The judgment of this Court delivered on 20-1-2000 in the case of V.N. Murthy v P. Raman, R.F.A. No. 238 of 1997, DD: 20-1-2000, was placed before me.

In fact both the learned Counsels have made reference to the decision of their Lordships of the Supreme Court in the case of State of Maharashtra v Pravin Jethalal Kamdar (dead) by L.Rs, AIR 2000 SC 1099 and also made reference to the earlier decision of the Supreme Court in the case of Indira v Arumugam and Another, ILR 1998 Kar. 1422 (SC).

I have applied my mind to the above contentions advanced by the learned Counsels appearing for the parties.

8. The contention of the learned Counsel for the appellants has got no force for the reason that the suit for possession of immovable or any interest therein on the basis of title is covered by Article 65. In the suit for possession of the property on the basis of title even if the relief of declaration is sought that is immaterial, because in such suit the main and effective relief is possession. The assertion of title by the plaintiff and denial thereof and setting up of different case of the defendants will no doubt involve the issue which will have to be decided i.e., issue on title and if the plaintiff establishes her title by relevant evidence, then unless the defendants has proved and establishes accrual of title by adverse possession the plaintiff will be entitled to the relief for possession. The assertion of title no doubt is necessary in the plaint and when it has been so made and denied by defendant in written statement the question no doubt has to be decided in order to decree the plaintiff's suit for possession based on title. But claiming of declaration of title as a specific relief in the plaint is not necessary. In case the plaintiff is in possession and she simply claims declaration then situation may be different, but where the plaintiff's case is that the defendants got possession through the plaintiff and subsequently his possession turned hostile, then the suit for possession will be covered by Article 65. In case, the suit for possession is based on possession and dispossession of the plaintiff Article 64 may apply. But, where the suit is for possession on the ground that the defendants had been in permissive possession, his possession has become hostile on certain day, the suit will be governed by Article 65. In the case of Pravin Jethalal Kamdar, the Supreme Court has observed that such suit would be governed by Article 65 even if the decree for declaration of title is also been claimed in the suit for possession vide the observations made in paragraph 6 of the judgment in the case of Pravin Jethalal Kamdar. The two decisions referred to above, in my opinion answer the contention of the learned Counsel for the appellants in the negative and as such I hold that the first contention of the defendants-appellants to the effect that the suit being governed by Article 58 is without substance. In the present, I may mention even if the denial of plaintiff's title indicated hostility on the part of Smt. Kenchamma through whom the defendants-appellants claims right and possession in 1972 is taken to be furnishing the cause of action for filing the suit for possession in the year 1972 and the limitation being twelve years the suit having been filed in the year 1980

the present suit giving rise to the appeal cannot be said to have been barred by limitation and the finding of the Trial Court in my opinion on the question of limitation does not suffer from any error of law or fact, nor does the finding on the question of the plea of adverse possession suffer from any error of law as firstly, hostile possession for 12 years period has not been pleaded and secondly, the defendants-appellants claim title in themselves without admitting the plaintiff's title so the plea of adverse possession was not open. Any way, thus considered in my opinion, the suit was well-within time and cannot be said to be barred by limitation. As such, the first contention of the appellants is without substance.

9. The learned Counsel for the appellants further contended that the plaintiff was not the owner of the suit property and they really insist of the fact that the sale deed Ext. P. 2, dated 24-10-1960 was in the name of the plaintiff. The learned Counsel submitted that it was benami transaction in the name of the plaintiff and plaintiff was not the real owner and really the consideration on being passed and paid by Sri P. Govindappa the father of the defendant-appellant 1 and the father-in-law of defendant-appellant 2 as well as father-in-law of plaintiff. The learned Counsel contended that when consideration did pass on for the transaction from Govindappa, the real owner of the property was Govindappa or Kenchamma as the property was purchased by Govindappa the husband of Smt. Kenchamma and father-in-law of the plaintiff. The learned Counsel contended that the very important test to be applied to determine whether the transaction was benami or not is passing of sale consideration and payment of sale price/consideration and the person who provided sale consideration and paid it to the seller will be the owner and not the person in whose name the deed stands. The learned Counsel very vehemently contended that the plaintiff did not appear in the witness-box to depose her case on oath and to give opportunity to the defendants to cross-examine and abstinence of the plaintiff from the witness-box without any rhyme or reason gives birth to and raises the adverse presumption or inference being drawn against the plaintiff's case under Section 114-G of the Indian Evidence Act, 1872.

10. The learned Counsel for the appellants made reference in connection with the plea of transaction being benami to the decision of the Supreme Court in the case of Bhim Singh (dead) by L.Rs and Others v Kan Singh, AIR 1980 SC 727, and with respect to his plea of adverse inference or presumption being drawn from failure of the plaintiff to appear in the witness-box, he made reference to the decision of the Privy Council in the case of Sardar Gurbakhsh Singh v Gurdial Singh, AIR 1927 PC 230. Further, he made reference to the decision of the Supreme Court in the case of Iswar Bhai C. Patel alias Bachu Bhai Patel v Harihar Behera and Another, AIR 1999 SC 1341. He further made reference to the decisions of the various High Courts including Allahabad High Court in the case of Arjun Singh v Virendra Nath and Another, AIR 1971 All. 29.

11. As regards benami nature of transaction, the transfer deed being a solemn

document between the parties entering into the transaction of sale or person or party who claims that the transaction was benami one and not as represented by the document. The strong burden lies on him to prove by strong evidence that the transaction in question was benami because prima facie the party in whose favour the sale transaction was entered into and the person whose name was mentioned in the document as purchaser starts with basic presumption in his favour that the property was transferred to him and he is the real transferee. So, any person or party denying such position and one who intends to rebut such position he has to produce clear evidence to rebut the presumption and to prove that the transaction exhibited by that document is benami in the name of the person whose name is mentioned as purchaser and the real purchaser is some one else, or defendant or third party. Before, I proceed further, it will be appropriate at this juncture to make reference to the decision of their Lordships of the Supreme Court in the case of *Jaydayal Poddar (deceased) by L.Rs and Another v Mst. Bibi Hazra and Others*, AIR 1974 SC 171, dealing with this question, their Lordships observed as under:

"It is well-settled that the burden of proving that a particular sale is benami and the apparent purchaser is not the real owner always rests on the person asserting it to be so. This burden has to be strictly discharged by adducing legal evidence of a definite character which would either directly prove the fact of benami or establish circumstances unerringly and reasonably raising an inference of that fact. The essence of a benami is the intention of the party, or parties concerned; and not un-often such intention is shrouded in a thick veil which cannot be easily pierced through. But such difficulties do not relieve the person, asserting the transaction to be benami of any part, of the serious onus that rests on him, nor justify the acceptance of mere conjunctures or surmises, as a substitute for proof. The reason is that a deed is a solemn document prepared and executed after considerable deliberation, and the person expressly shown as the purchaser or transferee in the deed, starts with the initial presumption in his favour that the apparent state of affairs is the real state of affairs. Though the question whether a particular sale is benami or not, is largely one of fact, and for determining this question, no absolute formulae or acid test, uniformly applicable in all situations, can be laid down; yet in weighing the probabilities and for gathering the relevant indicia, the Courts are usually guided by these circumstances; (1) the source from which the purchase money came; (2) the nature and possession of the property after the purchase; (3) motive, if any, for giving the transaction a benami colour; (4) the position of the parties and the relationship, if any, between the claimant and the alleged benamidar; (5) the custody of the title deeds after the sale; and (6) the conduct of the parties concerned in dealing with the property after the sale.

The above indicia are not exhaustive and their efficacy varies according to the facts of each case. Nevertheless 1, viz., the source when the purchase money came, is by far the most important test for determining whether the sale standing in the name of one person, is in reality for the benefit of another".

12. The learned Counsel for the appellants laid great emphasis on this later part viz., the source from where the purchase money came, is by far the most important test for determining whether the sale standing in the name of one person, is in reality for the benefit of another. Laying great emphasis, the learned Counsel contended that while consideration or purchase money was paid to the vendor by Govindappa, so Govindappa was the real purchaser. In this context, he submitted that the plaintiff did not come in the witness-box, so adverse inference may be drawn under Section 114 of the Indian Evidence Act. In this case, as mentioned earlier, the learned Counsel has referred to the decision of the Supreme Court in Bhim Singh's case. He submitted that where a person purchases or buys a property with his own money, but in the name of another person without any intention to benefit the other person in whose name the property has been purchased it called benami. Before proceeding further, it will be appropriate at this juncture to refer to the evidence adduced by the defendants-appellants.

No other witness has been examined on behalf of the appellants-defendants except Sri K.T.V. Rangappa (K.T. Venkata Reddy) D.W. 1 who is the husband of defendant-appellant 1, who is the only defendant's witness.

13. D.W. 1-K.T.V. Rangappa claims to be the power of attorney holder from first defendant i.e., appellant 1. Before, I refer to the statement of D.W. 1, it would be appropriate to refer to the pleadings of the defendants and the case of the defendants. As mentioned earlier, the case of the defendants in the pleadings has been that late T.B. Kenchamma, the mother of defendant 1 and mother-in-law of defendant 2 has been the absolute owner in possession of the property in question and that during her lifetime she purchased the suit property from her own money for the purposing of residing in the house. According to the defendants' case Smt. Kenchamma though purchased the property from her money, but got the document/deed registered in the name of the plaintiff vide paragraphs 3 and 4 of the written statement. In the oral statement, i.e., deposition what has been stated by D.W. 1 clearly indicates the shifting and changing of the stand. D.W. 1 states that the suit property was purchased by my parents-in-law on 22-10-1960 under a registered sale deed. The sale consideration was paid for the above purchase by my father-in-law. While in the pleadings as mentioned earlier, the stand taken was that the property was purchased by Smt. Kenchamma of her own money. It has no where been pleaded in the written statement that money was paid by Sri Govindappa or by the defendants' mother Kenchamma through Govindappa. It appears that on perusal of the document and the endorsement the stand was tried to be changed or shift was being made from the stand and the case taken in the written statement. In paragraph 2 of the deposition of D.W. 1-K.T.V. Rangappa, dated 8-12-1996 at page 27 of the paper book D.W. 1 states that since my father-in-law was not in good terms with his children and since they were not close with him, the sale deed was executed in the name of the plaintiff. My father-in-law himself paid the consideration amount of Rs. 10,000/- for the above sale deed. In the

examination-in-chief he further deposed that the suit property was purchased by my parents-in-law. It appears D.W. 1 narrated the same that his mother-in-law, Smt. Kenchamma was the real owner and real purchaser. Now, the stand was taken by parents-in-law, which parents-in-law was not clear. He further deposed that my father-in-law paid sale consideration for the above purchase. At page 29 of the paper book, D.W. 1 states that in view of the good relationship the plaintiff had with my parents-in-law the suit property was purchased in the name of the plaintiff and plaintiff was only a name lender to the sale deed since the other children of my parents-in-law were not in good terms with them and therefore the property was purchased in the name of the plaintiff. The endorsement on Ext. P. 2 at page 2, it is mentioned as under:

"Now this indenture witness that in pursuance of the said agreement and in consideration of the sum of Rs. 10,000/- (Rupees Ten thousand only) paid by the purchaser to the vendor in cash before the Sub-Registrar of the station, the receipt of which full sale price of Rupees Ten Thousand only the Vendor does hereby acknowledge and the vendor does hereby grant.....".

This per se reveals that the sale price was paid to the vendor by the purchaser. Purchaser in the sense through some one. The endorsement of the Sub-Registrar on Ext. P. 2 reads "paid in my presence today Rupees Ten Thousand only (Rs. 10,000/- by Govindappa for the claimant to H.M. Jaffar Hussain". At the time of sale, there was no other claimant, but the purchaser in whose name the transfer has been made. Had Govindappa paid the money in his own right, there was no need to put expression for purchaser/for the claimant. The claimant under the deed could not be any person other than the purchaser mentioned in it. It is well-settled principle of law that the endorsement of the Sub-Registrar, as Ext. P. 2(a) here, is a valuable piece of evidence indicating who paid and in what capacity. Section 58 of the Registration Act, 1908 provides what particulars are to be endorsed on document admitted to registration. The said section reads as under:

58. Particulars to be endorsed on document admitted to registration.-(1) On every document admitted to registration, other than a copy of a decree, or order, or a copy sent to a registering officer under Section 89, there shall be endorsed from time to time the following particulars, namely.-

(a) the signature and addition of every person admitting the execution of the document, and, if such execution has been admitted by the representative, assign or agent of any person, the signature and addition of such representative, assign or agent;

(b) the signature and addition of every person examined in reference to such document under any of the provisions of this Act; and (c) any payment of money, or delivery of goods made in the presence of the registering officer in reference to the execution of the document and any admission of receipt of consideration in whole or in part, made in his presence in reference to such execution.

(2) If any person admitting the execution of a document refused to endorse the same, the registering officer shall nevertheless register it, but shall at the same time endorse a note of such refusal.

14. The endorsement of payment of money and through whom it was made or paid, made by the registering officer starts with initial presumption. Five Judges Bench in the case of *Nawab Syed Allee Shah v Mussamut Amanee Begum*, *The Weekly Reporter Sutherland*, Vol. XIX, page 149, their Lordships observed as under:

"Thus, the Legislature has thought it desirable that the public register should contain a record of any payment that takes place in the presence of the registering officer and of any admission of payment made in his presence in reference to such execution, and requires him to record it. The acknowledgement was made and recorded in pursuance of this Act, and the presumption ought to be in favour of the truth of such a public declaration, requiring cogent and convincing evidence to rebut it.

Their Lordships do not say that an admission so made is conclusive, but still it ought to afford a strong presumption of truth and throw upon him who makes it, when he comes to impeach such an acknowledgement, the burden of satisfying the Court, by strong and cogent evidence, that it was made under some circumstances of mistake or error".

15. Section 114 of the Indian Evidence Act, 1872 provides that the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

In the case of *Baijnath Singh v Jamal Brothers*, AIR 1924 PC 48, Sir Lawrence Jent in speaking on behalf of the Court observed as under:

"The correctness of this official endorsement is to be presumed, and the Tamil signature for which there was no legal sanction cannot operate to contradict it".

16. This decision very clearly establish that the endorsement of registering officer made under Section 58(1)(c) of the Registration Act, 1908 about the payment being made by whom it was made and for whom it was made has got importance as a valuable piece of evidence and is presumed to be correct, unless the person challenging that acknowledgement and endorsement proves otherwise by strong clear evidence. So this endorsement is evidence of payment, no doubt, it indicates that payment was made by Govindappa for and on behalf of the purchaser and payment was made to H.N. Jaffar Hussain. It appears that the defendants have changed their stand at the stage of evidence and shifted their stand from their mother-in-law by using the expression parents-in-law and then stated the said payment was made by Govindappa, but the endorsement indicates that payment of the sale price was made by Govindappa on behalf of the purchaser. So, it appears that the defendants were themselves not very clear

as to who was the real owner and purchaser when they took a stand that the plaintiff was a benamidar. Further, the deposition of D.W. 1 at page 27 of the paper book clearly shows the intention and motive of Govindappa's father-in-law while making the payment would have been to benefit the plaintiff. Even for a moment without going into the question whether it was made on behalf of the plaintiff or on behalf of himself of any body. The intention appears to be to benefit one with whom Govindappa's relations were good, close and happy. D.W. 1 deposed that since my father-in-law was not in good terms with his children and since they were not close with him, the sale deed was executed in the name of the plaintiff. I have referred in the later part of the statement at page 29 of the paper book D.W. 1 has deposed that in view of the good relationship the plaintiff had with my parents-in-law the suit property was purchased in the name of the plaintiff and plaintiff was only a name lender to the sale deed since the other children of my parents-in-law were not in good terms with them and therefore the property was purchased in the name of the plaintiff. Really this evidence shows the relationship of the parents-in-law were not good with his own children and daughters, but the relationship with plaintiff i.e., his daughter-in-law, by Govindappa was in good terms that is why the property was purchased in her name. As per the deposition of D.W. 1 it indicates that even if for a moment it be taken that the sale consideration was paid by Govindappa the property was purchased with intention to benefit the daughter-in-law, the plaintiff in whose name the deed was got executed. Apart from this what the endorsement of the Sub-Registrar indicates is that the consideration was paid by Govindappa for and on behalf of purchaser under the deed to the vendor. So this endorsement firstly reveals that the payment was made for and on behalf of the purchaser mentioned in the deed. Secondly, as I have mentioned earlier even if the sale consideration was paid, the intention appears to be to benefit his daughter-in-law i.e., the plaintiff. Apart from that P.W. 1-T. Ravi has no doubt stated that the sale consideration was paid by his mother the plaintiff through her father-in-law at the Sub-Registrar's Office. P.W. 1 stated that my mother paid consideration of Rs. 10,000/- through my grandfather. My grandfather signed at Ext. P. 2(a) for having paid the sale consideration of Rs. 10,000/- for my mother. The learned Counsel contended that this statement is not admissible as P.W. 1 was a young boy of 8 years and his statement may be ignored. This statement of P.W. 1 appears to be either from the instructions of his mother, or based on the endorsement. No doubt, it corroborates the endorsement even if for a moment it be ignored the endorsement of the Sub-Registrar itself is a valuable piece of evidence supporting the plaintiff's case and dis-lodged the claim of the defendants-appellants. It shows that money was paid by the plaintiff no doubt through her father-in-law to the vendor. The correctness of the endorsement could not be dislodged. Apart from that D.W. 1's evidence can be said to be unworthy and inadmissible as at the time of purchase of the property D.W. 1 was not in the family. He has not disclosed how he come to know that the property was either purchased in her or his own right by his mother-in-law or the father-in-law. Really the stand taken by the defendants-appellants and the

evidence deposed by D.W. 1 (appellant 2 herein) taken together disclose that the defendants were not sure as to who was the real purchaser of the property, otherwise than the person named in the sale deed as purchaser. Apart from that it is an admitted fact that the document was in possession of the plaintiff and her husband. No doubt, D.W. 1 states that the original document was with his mother i.e., Smt. Kenchamma. Later, the husband of the plaintiff asked Smt. Kenchamma to hand over that document to Sri Thimmaraju, so she handed over it and at the time of the suit it was in possession of Thimmaraju or his widow. The document was in the name of the plaintiff and Smt. Kenchamma did not object it, nor at any time she asserted that the property was purchased benami in the name of the plaintiff and the plaintiff was only the benamidar and she was the real owner. No such assertion has been made by Smt. Kenchamma during the years 1960 to 1972, nor even in the deed Ext. P. 9 that the plaintiff was only benamidar or name lender. The subsequent conduct of Smt. Kenchamma further dislodges the theory set up by the defendants-appellants. It is not doubt an admitted fact as per the deposition of D.W. 1 that Smt. Kenchamma executed the Will of her properties on 19-5-1972. It is stated by D.W. 1 that it is true that the suit property is not included in the said Will. Under the said Will the defendant-appellant 1 as well as the sisters of the defendants-appellants viz., Smt. Chikkamma and Smt. Sakamma got their properties after the death of Smt. Kenchamma. No suitable and satisfactory reply has been given or suggested as to why the property in suit was not included in the Will executed by Smt. Kenchamma the only answer that comes out and the reason appears to be that Smt. Kenchamma always treated the property in suit as belonging to the plaintiff and she never claimed herself to be its real owner. Had she considered herself to be the owner of the property definitely she would have included this property as well in the Will. Therefore, in my opinion, it appears that the defendants-appellants have failed to establish that the sale deed dated 22-10-1960 was benami transaction. The learned Counsel contended that adverse presumption should be drawn against the plaintiff's case as the plaintiff has not entered the witness-box. Ordinarily no doubt it is well-settled when a party abstains from appearing in the witness-box without any rhyme or reason as well as without leading any evidence, it is open to the Court and it is permissive to the Court to draw adverse inference against the party's case, but this is not always true. If the party, who has not appeared or entered in the witness-box, but has lead other evidence in support of her/his case documentary, oral or circumstantial the other presumptions under law support his/her case, then it is not proper to raise such a presumption. When I so observe, I find support for my view from the decision of their Lordships of the Supreme Court in the case of Smt. Indira Nehru Gandhi v Raj Narain, AIR 1975 SC 2299. In paragraph 505 of the said report, their Lordships of the Supreme Court observed as under:

"I do not think, that it is possible to shift a burden of the petitioner on to the original respondent whose case never was that Shri Dal Bahadur Singh spent any money on her behalf. The case of M. Chenna Reddy v Ramachandra Rao,

(1972)40 Ele. L.R. 390 (SC), was relied upon to submit that a presumption may arise against a successful candidate from the non-production of available evidence to support his version. Such a presumption under Section 114 of the Indian Evidence Act, it has to be remembered, is always optional and one of fact, depending upon the whole set of facts. It is not obligatory".

@BODY-MORE = 17. In the case of Pandurang Jivaji Apte v Ramchandra Gangadhar Ashtekar (dead) by L.Rs, AIR 1981 SC 2235, their Lordships of the Supreme Court have laid down "that a presumption which is sought to be raised under Section 114-G or the question of drawing an adverse inference against a party for his failure to appear in Court would arise only where there is no evidence on the record". In this view of the matter, as in the present case there was evidence on record oral, documentary and circumstantial i.e, clause in the deed and the endorsement of the Sub-Registrar coupled with the statement of P.W. 1 suffice the reason why the plaintiff was not examined. The Court below in my opinion was justified in not drawing an adverse inference against the plaintiff/respondent and an inference in favour of the defendants-appellants. Looking to the facts and circumstances on record, I am of the opinion that the Trial Court was justified in holding that the defendants-appellants failed to establish or to prove that the transaction exhibited by Ext. P. 2 the registered sale deed dated 22-10-1960 was a benami transaction, and it rightly held that the plaintiff had title to the property and had established her title. As relations were good between the parents-in-law and the plaintiff when the plaintiff and her husband at Madras, the parents-in-law were allowed to make use of the house in permissive capacity and they did not claim any title. Primarily disputed question of title arise when defendants i.e., appellants herein came into picture and after the death of Govindappa the defendants might have instigated the mother-in-law. Anyway, it appears that possession of Smt. Kenchamma was permissive and the defendants were permitted to reside in the house. Their possession was permissive may be of tenant or of licensee. But when the problem would have arisen and the defendants started denying the title of the plaintiff and after her by other actions, the plaintiff was compelled to file the suit for possession. The present suit having been filed within the period of limitation as mentioned earlier title having been established in my opinion the Court below had rightly decreed the suit for possession and damages. The relief of declaration was not essential or necessary to be claimed but even it was claimed it was not the principal relief. Thus, considered in my opinion the appeal is devoid of merits and has to be dismissed and is hereby dismissed. The judgment and decree of the Court below are confirmed. Thus, the regular first appeal is dismissed with costs of both the Courts.

@BODY-MORE = 18. At this stage, the learned Counsel for the appellants prayed that the appellants may be granted some time to vacate and hand over vacant possession. The learned Counsel appearing for the respondents has no objection to the appellant's request being granted for time being given to the appellant to vacate and to hand over vacant possession of suit property to plaintiffs-

respondents provided the appellants gives undertaking by way of affidavit that they shall hand over vacant possession of the suit schedule property without any objection and without causing any further obstruction within the time specified by the Court without causing any damage thereto.

@BODY-MORE = 19. In view of the above, it is ordered that the appeal having been dismissed as above and the appellants are granted three months time to hand over vacant possession of the suit schedule house/premises in good condition as well as to deposit the damages up-to-date within a period of 15 days of getting copy of this judgment/order or getting of copy of the operative portion of the order on payment of necessary charges and moving of application for thereof whichever is earlier.

@BODY-MORE = The undertaking shall be filed in the Registry of this Court as well as in the Trial Court in the form of affidavit sworn to by the appellants.