
(1963) 10 MAD CK 0006
In the Madras High Court
Case No : Appeal No. 140 of 1958

V.N. Padmavathi Ammal

APPELLANT

Vs

V.R. Muthuswami Pillai (Died) and V.R. Balakrishna Pillai and
Others

RESPONDENT

Date of Decision : 15-10-1963

Acts Referred:

Citation : (1964) ILR (Mad) 483

Hon'ble Judges : Venkatadri, J; Jagadisan, J

Bench : Division Bench

Advocate : V.K. Thiruvengkatachari, General and S. Gopalaratnam, for the Appellant; R. Swaminatha Ayyar, E.A. Viswanathan and M. Ramachandran, for the Respondent

Final Decision : Dismissed

Judgement

Venkatadri, J.—This appeal is filed by the Plaintiff Padmavathi whose suit (Original Suit No. 33 of 1956) was dismissed by the learned

Subordinate Judge of Kumbakonam. The suit was against her brothers Defendants 1 to 5 her nephew (deceased brother's son) sixth Defendant,

her sister seventh Defendant and her niece (deceased sister's daughter) eighth Defendant for a declaration that she is the sole preferential heir to

her mother Nallamuthu Ammal and she is absolutely entitled to the plaint properties and for a permanent injunction restraining the Defendants from

taking possession of the properties from the Velathotti Agricultural Co-operative Society and from withdrawing certain amounts being the income

from the suit lands now lying in deposit with the said Co-operative Society. Her case as set up in the plaint is that the entire suit properties

belonged solely and absolutely to her mother Nallamuthu Ammal who purchased

the properties from and out of her stridanam funds from one Ponnuswami Nainar and his minor son under a registered sale deed, dated 7th December 1913. Her mother was in sole and exclusive possession of the properties in her own right till the date of her death in or about 1936. At the time of her mother's death, her sisters (seventh Defendant and the mother of the eighth Defendant) were married and were living with their husbands and she alone remained unmarried. She is the preferential heir to the properties of her mother under the Mitakshara Law as she is unmarried, indigent and unprovided (nirdhana). She inherited her mother's stridhana properties and became entitled to them. She has been in possession of the properties and neither her brothers, nor her surviving sisters nor her brother's son (sixth Defendant) nor her niece (eighth Defendant) have any claim or right or title or interest in the suit properties. The Defendants are proclaiming that they have got title to the properties and preventing the Plaintiff from withdrawing the amount in deposit with the Velathotti Agricultural Co-operative Society. In order to clear the cloud on the title to the properties and to have an adjudication of the disputes inter se between herself and her brothers, she brought the suit for a declaration and injunction as aforesaid.

2. Though Defendant 1 and Defendants 2 to 5 have filed separate written statements, their defence is common. Their case is that the entire suit properties are ancestral properties belonging to the joint family consisting of their father Velathotti Ramaswami Pillai and Defendants 1 to 5 and the father of Defendant 6. Their father obliged his friend Nagambadi Ramaswami Pillai by becoming a surety in respect of a simple debt for rupees twenty-five thousand and a suit (Original Suit No. 36 of 1905, Sub-Court, Kumbakonam) was filed against their father and the said Nagambadi Ramaswami Pillai for recovery of the said debt and decree was obtained against both for Rupees 38,255-6-3 on 7th October 1905. It was at the time when execution proceedings were taken for the arrest of their father, he set up his friend Ponnuswami Nainar to file a suit for specific performance of an alleged agreement to sell the properties and allowed an ex parte decree to be passed in favour of the said Ponnuswami Nainar and in pursuance of the decree he executed a sale deed to Ponnuswami Nainar. This sale deed was executed only to prevent the suit properties

from being proceeded with in execution of the decree in the said Original Suit No. 36 of 1905. Subsequently just about the time when the decree against Nagambadi Ramaswami Pillai was about to be satisfied, Ponnuswami Nainar conveyed the suit properties to the Plaintiff's mother Nallamuthu Animal and thus the suit properties reverted to their family. Though their father executed a sale-deed in favour of his friend Ponnuswami Nainar and subsequently Ponnuswami Nainar reconveyed the properties to Nallamuthu Animal, the properties continued to be in the possession of their father during his lifetime and after his death Defendants have been in possession of the properties. The Plaintiff never claimed the suit properties after her mother's death or asserted her title to them or demanded the income therefrom from her brothers. It was further alleged in the written statement that the patta for the properties stood in the name of their father during his lifetime and thereafter it was transferred in the name of the first Defendant as family manager on behalf of Defendants 1 to 5 and Nagaraja Pillai. On account of kisan agitation in the village the first Defendant as the joint family manager handed over the suit lands to the Velathotti Agricultural Co-operative Society-under the scheme of co-operative farming. At about that time, there were serious misunderstandings between the first and third Defendants (who have married sisters) in respect of their father-in-law's properties and to spite the third Defendant the first Defendant wrote a letter to the Velathotti Agricultural Co-operative Society asking him to hand over the income to the Plaintiff as his nominee. Subsequently when the other brothers came to know about the contents of this letter they gave notice to the Co-operative Society stating that the properties belonged to them and asking the Society not to pay any money to the Plaintiff. When the matter was about to take a serious turn, the first Defendant cancelled his nomination and wrote to the President of the Society to pay the income in equal shares to his brothers including himself Defendants 1 to 6. The Plaintiff taking advantage of the letter of the first Defendant to the Society is asserting her title to the suit properties. Defendants 1 to 5 further assert in their written statement that they alone have got right to the suit properties, which are their joint family properties and their mother had no manner of any right or title to these properties and that the Plaintiff cannot claim any legal right to these properties and cannot maintain this suit against the Defendants. They also raised

others pleas, which are not necessary to refer in this appeal.

3. On these pleadings the learned Subordinate Judge of Kumbakonam framed various issues, the important issue being whether the sale in favour

of Nallamuthu Ammal was benami for the joint family consisting of Defendants 1 to 5 and their father Ramaswami Pillai and whether the Plaintiff is

the sole heir of deceased Nallamuthu Ammal and as such entitled to the plaint properties.

4. The learned Subordinate Judge considered at length the issue relating to the benami nature of the sale in favour of Nallamuthu Ammal and

applied the tests such as motive, source of purchase money. inadequacy of consideration, possession, custody of the title deeds and conduct of

parties, which are usually applied for determining whether a transaction is benami. The learned Judge found that there was sufficient motive for

transferring the properties first in the name of Ponnuswami Nainar and subsequently in the name of Nallamuthu Ammal, that Nallamuthu Ammal

could not have purchased the properties from and out of her moneys, that the prices mentioned in Exhibits B-5 and B-6 were inadequate, that

notwithstanding the sales in favour of Ponnuswami Nainar and Nallamuthu Ammal, possession of the properties was all along with the Defendants

and the custody of the title deeds was also with the Defendants and that the belated filing of the suit was a strong circumstance throwing light on the

lack of bona fides on the Plaintiff's part. In the end, the learned Judge dismissed the suit with costs. It is against this dismissal of the suit that the

Plaintiff has preferred this appeal.

5. The Plaintiff is claiming the suit properties on the basis of the sale deed executed in favour of her mother Nallamuthu Ammal and that her mother

was the absolute owner of the properties from the date of the sale. The Defendants set up a clear case in their written statement that the properties

are their ancestral joint family properties, that their father put the family properties ostensible in the name of Ponnuswami Nainar, a trusted family

friend, who in turn conveyed the properties, to the Plaintiff's mother Nallamuthu Ammal under Exhibit B-6. The learned Subordinate Judge

approached the question from the stand point whether the above transactions were benami in nature. We are not happy over the framing of the first

issue, viz., whether the sale in favour of the Plaintiff's mother was benami for

the joint family consisting of Defendants 1 to 5 and their father

Ramaswami Pillai. The learned Judge failed to keep in mind the distinction between a sham and benami transaction. In a sham transaction title is

never intended to pass, but in a benami transaction title to the property passes till it is questioned by the real party. There is a Bench decision of our

High Court in Rangappa Nayakar Vs. Rangaswami Nayakar and Others, where the nature of these transactions was explained thus. The essence

of a sham transaction is that though a registered deed is brought into existence, no title of any kind, either legal or beneficial, is intended to be

passed thereby to any person whatsoever, that is the deed of transfer is not intended to effect any transfer of property.

6. The difference between sham transactions and benami transactions is one of intention. If the deed of transfer is made with the intention of placing

the property in the name of a third person, the intention clearly amounts to a transfer of the legal title and such a transaction can scarcely be called a

sham transaction, but comes directly within the meaning of benami transactions....

7. In Meenakshi Mills, Madurai Vs. The Commissioner of Income Tax, Madras, , the Supreme Court discussed the nature of sham and benami

transactions and pointed out the distinction between them at page 722:

...it is necessary to note that the word "benami" is used to denote two classes of transactions which differ from each other in their legal character

and incidents. In one sense, it signifies a transaction which is real, as for example, when A sells properties to B but the sale deed mentions X as the

purchaser. Here the sale itself is genuine, but the real purchaser is B, X being his benamidar. This is the class of transactions which is usually termed

as benami. But the word "benami" is also occasionally used, perhaps not quite accurately, to refer to a sham transaction, as for example when A

purports to sell his property to B without intending that his title should cease or pass to B. The fundamental difference between these two classes of

transactions is that whereas in the former there is an operative transfer resulting in the vesting of title in the transferee, in the latter there is none

such, the transferor continuing to retain the title notwithstanding the execution of the transfer deed. It is only in the former class of cases that it

would be necessary, when a dispute arises as to whether the person named in

the deed is the real transferee or B, to enquire into the question as to who paid the consideration for the transfer, X or B. But in the latter class of cases, when the question is whether the transfer is genuine or sham, the point for decision would be, not who paid the consideration but whether any consideration was paid.

8. Now we have to examine the facts in this case for deciding whether the transactions, viz., the conveyance in favour of Ponnuswami Nainar and Nallamuthu Ammal (exhibits B-5 and B-6) were sham or benami transactions. The Plaintiff's father Velathotti Ramaswami Pillai obliged a near relation Nagambadi N.S. Ramaswami Pillai by standing as surety for him for a borrowing of rupee twenty-five thousands. For recovery of that amount, a suit was filed in the Sub-Court, Kumbakonam (Original Suit No. 36 of 1905) and a decree was passed against the Plaintiff's father and the principal debtor N.S. Ramaswami Pillai for Rs. 38,285-6-3 on 7th October 1905. Though the said N.S. Ramaswami Pillai was possessed of vast immovable properties about 174 acres in extent, he was indebted and the decree-holder was able to realise only about rupees twenty-one thousand from the said N.S. Ramaswami Pillai within three years of the decree and there was a balance of about rupees seventeen thousand due under the decree. The decree-holder was taking steps to recover the balance amount from the Plaintiff's father, who stood surety, by filing a series of execution applications for his arrest. It was at that stage that the Plaintiff's father conveyed the properties to Ponnuswami Nainar not in the ordinary way, but in an exceptional manner. The Plaintiff's father was supposed to have entered into an agreement with Ponnuswami Nainar to sell the suit properties on 31st October 1904. In pursuance of the agreement, Ponnuswami Nainar caused a notice to be served on him asking him to execute a sale-deed on 16th September 1905 (see exhibit A-10). As their father did not comply with his demand he filed a suit O.S. No. 73 of 1905 ON the file of the Sub-Court, Kumbakonam. Their father remained ex parte and allowed the Court to pass a decree against him. In pursuance of the decree, he himself willingly corrected and approved the draft sale-deed and made the Court to convey the suit property to Ponnuswami Nainar on 28th February 1906 (exhibit B-5). The whole transaction was only to make a pretence of the conveyance of the joint

family property to the said Ponnuswamy Nainar only to put the property beyond their reach of the decree-holder. It was not at all the intention of

their father to sell the entire joint family property (lock stock and barrel) including the cattle shed to Ponnuswamy Nainar for a sum of rupees

twelve thousands when the properties"" were really worth much more. Equally with great force the learned Advocate-General put forth the

Plaintiff's case that the Plaintiff's father became indebted to several persons and there was an undischarged mortgage for rupees four thousand five

hundred and not being in a position to discharge the encumbrance or the other debts, V.M. Ramaswami Pillai was forced to sell the properties to

Ponnuswami Nainar. But we are unable to understand the reason why the suit Original Suit No. 73 of 1905, to enforce specific performance of the

agreement to sell the properties should have been filed, when the Plaintiff's father was ready and willing to execute a sale-deed in favour of

Ponnuswami Nainar. It is not possible to visualise what was in the mind of the Plaintiff's father when he conveyed the suit properties to

Ponnuswami Nainar, Bowen L.J., observed in *Edgington v. Fitzmaurice* (1885) 29 Ch.D. 459, 483.

... the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at

a particular time is, but, if it can be ascertained it is as much a fact as anything else.

9. In a later case *Angus v. Clifford* [1891] 2 Ch. 449 the same Lord Justice observed at page 470:

A man may tell a lie about the state of his own mind, just as much as he can tell a lie about the state of the weather, or the state of his own

digestion. It makes, to be sure the enquiry a difficult and complicated one.

10. Therefore, without embarking upon a complicated enquiry about the state OF mind OF the Plaintiff's father at the time when he conveyed the

properties TO Ponnuswami Nainar, we have to examine the subsequent conduct of the alleged purchaser of these properties. The consideration

for the sale-deed was rupees twelve-thousand made up of rupees one thousand paid as advance, lis. 4,829-6-0 to be adjusted in respect of the

amount due under the promissory note in favour of the purchaser, Rs. 5,028-12-0 to be paid in discharge of the mortgage in favour of one

Murugesam Pillai of Tiruppanandal and the balance to be paid in discharge of two promissory note debts in favour of Kanagasabai Pillai of

Karuppur and Doraiswami Pillai of Karaikudi. It is the Defendants' case that their father himself discharged all the debts mentioned in the sale

deed. Subsequently Ponnuswami Nainar purchased properties of the extent of 4 acres 46 cents under exhibit B-7 from Mayilayee (Plaintiff's

father's sister) and her son Rathinaswami Pillai at the instance of the Plaintiff's father. Even here the Defendant's case is that it was their father who

paid the consideration for the sale-deed. A close scrutiny of the further facts disclose that Ponnuswami Nainar subsequently mortgaged the entire

suit properties to one Audi Narayanaswami Iyer on 15th December 1908, for rupees six thousand (exhibit B-8). The object of the mortgage was

to discharge the mortgage debt payable to Murugesam Pillai of Thiruppanandal, which Ponnuswami Nainar was directed to discharge under the

terms of the sale deed exhibit B-5. In the year 1913 Ponnuswami Nainar conveyed the entire suit properties to Nallamuthu Ammal, Plaintiff's

mother, for rupees fifteen thousands (exhibit B-6). The consideration for this sale is made up of rupees eight thousand retained by Nallamuthu

Ammal for discharging the mortgage in favour of Audi Narayanaswami Iyer and rupees seven thousand said to have been paid to the vendor for

his rice mill business. Subsequently Nallamuthu Ammal discharged the debt due to Audi Narayanaswami Iyer by disposing small extents of

property through her husband in 1920 and 1921 (exhibits B-21, B-22 and A-21). Thus, though under the sale-deed exhibit B-5 Ponnuswami

Nainar was directed to discharge the amount under the mortgage of 1904 in favour of Murugesam Pillai of Tiruppanandal from and out of the

consideration for the sale, he did not pay any money towards the mortgage; but he subsequently mortgaged the entire suit properties to Audi

Narayanaswami Iyer and this mortgage was discharged by Nallamuthu Ammal through her husband after she purchased the properties from

Ponnuswami Nainar.

11. The sale-deed exhibit B-6 in favour of Nallamuthu Ammal was attested by all the brothers of Ponnuswami Nainar. There is nothing on record

to show that Ponnuswami Nainar took possession of the suit properties soon after the sale-deed was executed in his favour through Court or that

he or any one of his brothers was in possession and management of the properties. Ponnuswami Nainar did not also take any steps to change the patta in respect of the suit properties in his name. Kist has been paid in respect of these properties by the Plaintiff's father. Ponnuswami Nainar's brother has given evidence as D.W. 2. He deposed that Ponnuswami Nainar is his elder brother, that they are five brothers and they never enjoyed the suit properties at any time, but the properties were enjoyed by the Plaintiff's father, that the recital in exhibit B-6 that Rupees seven thousand was paid to his brother Ponnuswami Nainar for his rice mill business is not true and that the properties purchased by his brother under exhibit B-5 were never treated at the time of partition as joint family properties. On the other hand, he supports the case of the Defendants that the sale-deed exhibit B-5 was executed in the name of his brother Ponnuswami Nainar nominally in order to save the properties from being proceeded against in execution of the decree in Original Suit No. 36 of 1905. Thus though the properties were conveyed first to Ponnuswami Nainar and subsequently reconveyed to Nallamuthu Ammal, possession of the properties continued to be with the Plaintiff's father till he died in 1922.

12. It was also contended before us that the considerations for the sale-deeds exhibits B-5 and B-6 were nominal. Evidence has been adduced during the trial to prove that these properties were worth more in value at the time of the conveyance in favour of Ponnuswami Nainar and Nallamuthu Ammal. The learned Subordinate Judge dealt with the evidence elaborately and came to the conclusions that the prices mentioned in the sale-deeds were inadequate. We agree with the conclusion arrived at by him.

13. Much comment has been made about the reconveyance of the properties in the name of Nallamuthu Ammal. It was argued that if really the conveyance to Ponnuswami Nainar was nominal, there was no need to take a conveyance in favour of Nallamuthu Ammal instead of Ramaswami Pillai himself. It was pointed out that by that time the principal debtor Nagambadi Ramaswami Pillai had paid the entire amount due under the decree in Original Suit No. 36 of 1905, and there was no impediment for the Plaintiff's father to take a reconveyance in his favour. But there is evidence to show that Ramaswami Pillai had still not come out the woods. He was indebted to various persons and there was a suit Original Suit

No. 171 of 1920, against him and his sons at that time. Therefore, he must have thought it prudent to get a reconveyance of the properties in the name of his wife for the benefit of the joint family consisting of himself and his sons. It must be noted that he never handed over the management or control of the properties to his wife during his lifetime. On the other hand, he exercised personal control and enjoyed the entire suit properties during his lifetime.

14. No doubt there is evidence to show that after the death of Velathotti Ramaswami Pillai. Nallamuthu Ammal was exercising control over his sons with regard to the management of the properties and her sons out of respect for their mother took her advice and followed her directions concerning the management of the properties. Several letters such as exhibits A-4, A-20, A-7, A-6, A-9, A-5, A-11 and A-15 were filed on behalf of the Plaintiff to prove that Nallamuthu Ammal was conscious of the fact that she was absolute owner of the properties and as such was in management of the properties through her sons. These letters show that Nallamuthu Ammal was giving directions to her son Srinivasan (third Defendant) in regard to harvesting of the paddy, payment of kist and storing of paddy in the family house soon after the harvest. It may be that she was issuing instructions regarding the management of the properties because at that time her sons were all young and inexperienced and her sons also looked to their mother for advice and directions in this regard. But the entire suit properties were actually in the management of the Defendants themselves. Nallamuthu Ammal never enjoyed the income of the properties, nor prevented her sons from taking the income of the properties. No doubt she was calling upon her sons to account for the income and expenditure in respect of these properties. From this it cannot be inferred that she was the absolute owner of the properties. But this again would not be enough to cloth her with legal title to this properties.

15. In support of the Plaintiff's case that her mother was the absolute owner of the properties strong reliance was also made on exhibit A-12, letter written by the first Defendant to his mother, wherein he said that 99 per cent of the properties kept by her would go without any use to her sons. It is contended that this is an admission on the part of the first Defendant himself with regard to his mother's title to the properties. Really, this will not

help the Plaintiff very much because we must take all the letters passed between Nallamuthu Ammal and her sons together into consideration. After going through the correspondence between her and her sons it is evident that Nallamutrm Ammal was exercising control over her sons in regard to the management of the properties. We must emphasise that mere control over the management of the properties would not give her title to the suit properties.

16. It is also doubtful whether Nallamuthu Ammal could have paid the consideration for the conveyance of the suit properties under exhibit B-6

from her funds. The Plaintiff adduced oral and documentary evidence to prove that her mother purchased the properties from the amount she got

by the sale of her jewels and supplemented it with the money belonging to her brothers (Plaintiff's uncle). The Plaintiff was not personally aware

that her uncles supplemented her mother's funds to enable her to purchase the properties. She says she was told of this fact by her mother during

her lifetime. In order to rebut this evidence the Defendants have filed the ledgers of the Plaintiff's uncles, exhibits B-52 and B-53, to show that they

could not have given large amounts to their sister for the purchase under exhibit B-6. There is no acceptable or legal evidence to prove that the

consideration for the sale-deed exhibit B-6 was paid by Nallamuthu Ammal. We entirely agree with the finding of the learned Subordinate Judge

on this point, namely, that the Plaintiff failed to prove that her mother paid the consideration for the purchase under exhibit B-6.

17. Nallamuthu Ammal died in the year 1936. Soon after her death patta was transferred in the name of the first Defendant. In the year 1939 the

Plaintiff's eldest sister Jagadambal issued a notice exhibit B-12 to the Defendants-asserting that the suit properties belonged to her mother

Nallamuthu Ammal who purchased them from and out of her funds and she and her sisters including the Plaintiff are the heirs of Nallamuthu Ammal

entitled TO possession and enjoyment of the properties. By that notice Jagadambal called upon the Defendants to deliver possession of the suit

properties to her. But beyond issuing a mere threat in the notice given by her, she did not take any steps to give effect to her intention of filing a suit

as mentioned in the notice. The Defendants continued to be in possession of the suit properties, but in 1950 on account of intensive kisan agitation,

the first Defendant as joint family manager handed over the suit lands to the Agricultural Co-operative Society of Velathotti (Koottu Pannai) and received the income on behalf of the joint family.

18. The Plaintiff is residing in the family house in the village and some times in Mayuram. The first and third Defendants married sisters in a rich family in Tirukkadayur. After the death of their father-in-law there were misunderstandings between the brothers in connection with inheritance to the properties left by their father-in-law. The first Defendant set up a will which was in his favour, and equally third Defendant set up a will through his wife under which he would derive benefit. There was a litigation in respect of these two wills, Original Suit No. 3 of 1949, on the file of the Sub-Court, Mayuram. While there were misunderstandings between the brothers (first Defendant and third Defendant) the first Defendant gave a, formal hard letter (exhibit B-42), dated 7th February 1950, and exhibit B-44 in the year 1951 to Chinnappa Pillai, the President, Velathotti Agricultural Co-operative Society requesting him to register in the name of his sister Plaintiff N. Padmavathi Ammal the share value registered in the Koottu Pannai in THE first Defendant's name with patta No. 83 and pay the share of the income to the Plaintiff Padmavathi Ammal. Within a few months thereafter the first Defendant made Kaveri Thevar and Rathna Thevar to execute lease-deeds exhibits A-25 and A-26 in respect of the. coconut topes for the years 1950 and 1951 in favour of the Plaintiff. The object of writing the letter exhibits B-42 and B-44 and taking two lease-deeds mentioned above in favour of the Plaintiff was only to spite the third Defendant on account of the disputes between Defendants 1 and 3 with regard to their father-in-law's properties. Within two months of the letter to the President, Koottu Pannai, the third Defendant through his Counsel issued a notice exhibit B-51 to the President stating that the Plaintiff has no right to any portion of the properties which belong to the joint family of the Defendants, that the first Defendant as family manager is not rendering any account in respect of the income of these properties, that the transfer of the interests of the family to the Plaintiff is fraudulent, that Padmavathi Ammal cannot be substituted for the family manager first Defendant and requesting the President not to pay any portion of the income from the suit lands to the Plaintiff and further stating that if any amount

is paid to the Plaintiff inspite of the notice, the third Defendant will hold the President responsible therefor. The second Defendant V.R.

Balakrishnan Pillai also issued a notice exhibit B-58 to the President of the Co-operative Farm, Velathotti, stating that the suit properties belong to

the joins family and calling upon him to divide the income from the properties among the brothers according to the shares mentioned in the notice.

The notice also contained a warning that in case the President acted contrary to the instructions given in the notice, he would be held liable for all

the loss and expenses that might be caused to the members of the family. Equally in regards to thope, the second Defendant gave notice to Ratna

Thevar (the lessee) calling upon him to pay the lease amount to him and his brother, as the thope belongs to the joint family and warned him if he

pays the lease amount to any other individual he would be held responsible. Seeing this unexpected turn of events the first Defendant wrote a letter

exhibit B-18 on 15th September 1955, to the President of the Co-operative Farm stating that the authorisation made by him already for payment

of the income from the lands to his sister Padmavathi Ammal as his nominee was given for certain reasons and since those reasons ceased to exist,

he was cancelling the authorisation given already and that no amount or paddy need be paid to his sister thereafter. The reasons referred to in that

letter must have reference only to the quarrels and disputes between the first and third Defendants. It may be mentioned that by that time the suit

filed by the first Defendant's wife against the third Defendant's wife had been disposed of. Thus it will be seen that the first Defendant's himself on

account of the misunderstandings between himself and his brother authorised the Plaintiff to receive the income from the lands as his nominee from

the President of the Koottu Pannai and also created two lease-deeds in her favour in respect of the coconut topes. Now the Plaintiff taking

advantage of the letters exhibits B-42 to B-44 to the President of the Koottu Pannai authorising him to pay the income from the lands to her and

the lease-deeds executed in her favour exhibits A-25 and A-26 has come forward with this suit for declaration and injunction as aforesaid. Her

mother died in the year 1936. The Plaintiff filed the suit in 1956. She never claimed any title to the suit properties soon after the death of her

mother. She could not give the details of the description of the suit properties. She was not also aware of the income from the properties during all

these years. She neither called upon her brothers to pay the income of the properties nor asked them to render an account when they were in management of the suit properties. She has herself stated in her deposition that her brothers were in possession of the suit properties till the share in Koottu Pannai transferred in her name as the nominee of the first Defendant and the lease-deeds were executed in her favour in respect of the coconut topes. She never took any steps to change the patta in her name. On the other hand, she has herself admitted that patta was changed in the name of the first Defendant soon after her mother's death. She was writing letters to her brother Muthuswami Pillai requesting him to send small sums of money for her expenses. In exhibit B-35 she requested him to send something to enable her to attend the Mahamakam festival. In exhibit B-39 she appealed to her brother to send small sums of rupees ten and twelve for the purchase of medicines. sarees and even eggs and also requested him to give her an increased sum for Deepavali of that year. Really if she was conscious of the fact that she was the owner of the suit properties and the legal heir to the stridhanam properties of her mother, she would have asserted her title to the properties, called upon her brothers to pay her the income from the properties and demanded an account for such income instead of writing letters requesting them to send small sums of money for meeting her immediate needs in day to day life. It is difficult for us to believe that the Plaintiff would have failed to assert her title, if really she became entitled to the properties immediately after her mother's death.

19. Thus there is overwhelming evidence on the side of the Defendants to prove that possession of the properties continued to remain in the joint family of Velathotti Ramaswami Pillai and his sons Defendants 1 to 5. The brothers (Defendants 1 to 5) never parted with actual possession of the suit properties either to the Plaintiff or to any body. The brothers were doing pannai cultivation in turns and during their management they were maintaining accounts in respect of the paddy income from the suit properties from 1922 to 1948. The karnam of Velathotti, P.W. 2 deposed that the Defendants were doing pannai cultivation IN the suit properties and the coconut thope was under their control and management- P.W. 3, the President of the Valathotti Koottu Pannai, deposed that the suit lands were being enjoyed by the Plaintiff's father under pannai, that the thopes

were also under pannai, that after the Plaintiff's father Defendant 1 was managing for some time and then Defendant 2 and they both managed for 15 years under pannai and enjoyed the lands, cultivated, harvested and sold the paddy, that after Defendant 2 the management was with Defendant 3 for six or seven years and he was also having pannai and realising the income from the suit lands, that after that for five or six years Defendant 4 was managing as above, that when the lands were entrusted to the Co-operative Society they were in Defendant's management and that the first Defendant was giving directions to P.W. 3 for sending paddy not only to him but also to other members of the joint family. The first Defendant handed over the suit properties to the Koottu Pannai as the manager of the joint family. Notwithstanding the conveyance in favour of Ponnuswami Nainar in 1906 and the reconveyance in favour of Nallaniutlm Ammal in 1913, Velathotti Ramaswami Pillai and his sons who constituted the joint family continued to be in possession of the suit properties. They were never disturbed from possession of the suit properties either by Ponnuswami Nainar or by any other person. They retained possession throughout in any event from the date of conveyance to Ponnuswami Nainar till the Plaintiff came forward to file the present suit. They had physical control of the entire suit properties and they were in possession of the properties by the exercise of acts of ownership. It is difficult to believe that possession of the properties was parted with to anybody much less to Ponnuswami Nainar. When once we come to the conclusion that Velathotti Ramaswami Pillai did not part with the possession of the suit properties when he conveyed the properties to Ponnuswami Nainar, it follows that the sale-deed in favour of Ponnuswami Nainar was only a sham document and there was no intention to transfer the legal title or part with possession of the properties by the exercise of acts of ownership. It is difficult to believe that he conveyed the properties to Nallamuthu Ammal, he could not have intended to convey legal title to Nallamuthu Ammal when he himself got no title to the suit properties under the conveyance in his favour. The conveyance to Nallamuthu Ammal is also a nominal or sham transaction. The documents exhibits B-5 and B-6 were not intended to be acted upon but were only put nominally in the name of the persons just to avert the apprehended sale of the suit properties in pursuance of the decree passed against the Plaintiff's father and

Nagambadi Ramaswami Pillai.

20. But the learned Advocate-General strenuously contended that in defence to the suit filed by the Plaintiff for declaration of her title to the suit

properties the Defendants should not be allowed to plead fraud to support their title, as they themselves had set up the case in their written

statement that AS there were pressure from creditors on the advice of some important persons interested in the family, their father Ramaswami

Pillai transferred the properties in favour of Ponnuswami Nainar. In support of his contention, he relied on the decision of the Supreme Court in

Immani Appa Rao and Others Vs. Gollapalli Ramalingamurthi and Others, . The facts in that case are the following the joint family consisting of the

father and four sons conveyed the suit properties to the Plaintiff in the suit. The sale was made at a time when the father was heavily indebted to

various creditors. It was contended on behalf of the joint family that the mortgage and transfer deed in favour of the Plaintiff were nominal and

collusive and were not supported by any consideration. The Plaintiff contended that the Defendants should not be allowed to plead their own

fraud. On the facts it was found that both the vendors and the vendee were parties to the fraud. The Supreme Court had to consider whether the

following doctrine was applicable to the case, namely, where each party is equally in fraud, the law favours him who is actually in possession, or

where both parties are equally guilty, the estate will lie where it falls. While dealing with this point, the Supreme Court observed at page 750:

If it is found that both the parties are equally guilty and that the fraud intended by them has been carried out the position would be that the party

raising the defence is not asking the Court's assistance in any active manner; all that the defence suggests is that a confederate in fraud should not

be permitted to obtain a decree from the Court because the document of title on which the claim is based really conveys no title at all. It is true that

as a result of permitting Respondent 2 and the Appellants (joint family) to prove their plea they would incidentally be assisted in retaining their

possession; but this assistance is of a purely passive character and all that the Court is doing in effect is that on the facts proved it proposes to

allow possession to rest where it lies. It appears to us that this latter course is less injurious to public interest than the former.

We are afraid that the principle laid down in this case may not be applicable to the facts of the present case. the learned Advocate-general wants

to impress upon us that as the Defendants themselves pleaded fraud, they should not be allowed to raise the defence that the sale-deeds are

nominal in character.

21. Here there is no question of cheating or playing a fraud on any creditor. None of the creditors or decree-holders were cheated. On the other

hand, the decree in Original Suit No. 36 of 1905, was fully satisfied by payment made by the principal debtor Nagambadi Ramaswami Pillai

himself. There is also no suggestion that any other creditor of Velathotti Ramaswami Pillai was not paid the amount due to him or cheated by these

transactions. All that the Defendants pleaded in the written statement is that due to the apprehension of their father that the family properties might

be proceeded with in execution of the joint decree against him and Nagambadi Ramaswami Pillai, the properties were put in the name of

Ponnuswami Nainar nominally. Ponnuswami Nainar was not a party to any scheme of fraud. On the evidence we are satisfied that exhibits B-5 and

B-6 were only sham and nominal transactions.

22. Though we do not agree with the view taken by the learned Subordinate Judge that the sale exhibit B-6 in favour of Nallamuthu Ammal was

benami for the joint family, the decree passed by him dismissing the suit has to be confirmed in the view we have taken that exhibits B-5 and B-6

are sham and nominal transactions.

23. The appeal, therefore, fails and is accordingly dismissed with costs.

Jagadisan, J.

24. I entirely agree with the judgment of my learned brother, but I wish to add a few words, out of deference to the arguments of the learned

Advocate-General, on the question whether the Defendants are under any legal disability in maintaining the possession of the suit properties,

because of their plea in the written statement, stating that Ramaswami Pillai intended to screen the properties from his creditors fraudulently. The

facts giving rise to this plea have been fully set out in the judgment of my learned brother, ""and I do not wish to recapitulate them. The suit

properties originally belonged to the family of Ramaswami Pillai, of which the contesting Defendants were members. There was, however, a

conveyance by Ramaswami Pillai in favour of a certain Ponnuswami Nainar, A stranger unrelated to the family as a result of a decree for specific performance instituted by the said Nainar against Ramaswami Pillai. The decree was passed in the suit, Original Suit No. 73 of 1905. on the file of the Sub-Court, Kumbakonam. Having regard to the circumstances surrounding the institution of the said suit and the course of its proceedings, I have no doubt that it was a collusive decree brought about at the instance of Ramaswami with some ulterior motive. The motive that is now alleged is that Ramaswami was afraid that the family properties would be sold away in execution of a money decree obtained by a third party against him and another Nagambadi Bamaswami Pillai in Original Suit No. 36 of 1905, on the file of the Sub-Court, Kumbakonam. This might have been the motive which impelled Ramaswami to make a show of his having parted with all his family properties, as otherwise there was no reason why the entire assets of the joint family were under colour of a decree of court, transferred to A third party. Ponnuswami Nainar, however, purported to transfer the property in favour of Nallamuthu Ammal, the wife of Ramaswamy subsequently. The reason given for this transfer is that there was a division among the members of Ponnuswami Nainar's family, that Ponnuswami Nainar did not think it desirable to continue to hold the apparent title in the properties of Ramaswami, and that, therefore, he willingly conveyed the property in favour of the original vendor's wife. It is again alleged that the reconveyance was not taken in the name of Ramaswami or any co-parcener of his family, but in the name of Ramaswami's wife, Nallamuthu, as the apprehension of the creditors walking away with the property was even at that stage present in a real form. But it must be noted that the decree in Original Suit No. 36 of 1905, which, it was alleged, was the root-cause of a chain of alienations, was satisfied by Nagambadi Ramaswami Pillai himself, who was, in fact, the principal debtor liable to pay the decree amount. But even at the stage of the conveyance by Ponnuswami in favour of Nallamuthu, there appears to have been some claim for recovery of money against Ramaswami. I shall, therefore, assume that Ramaswami indulged in certain transactions, with a view to defraud his creditors and screen the properties from being made available to them. I shall also assume that Ramaswami did so in his capacity as the joint family manager and that whatever disability would attach to Ramaswami Pillai

would also attach to the member of his family, the present contesting Defendants. It is not unlikely that Ponnuswami Nainar himself was a privy to his fraud conceived by Ramaswami, as otherwise he would not have lent his name to the first alienation. It is not also unlikely that Nallamuthu herself knew the reason for the properties being conveyed in her name. Whatever disability would attach to Nallamuthu might also attach to the present Plaintiff, who is undoubtedly claiming title through her mother Nallamuthu. On the assumption that the Plaintiff and Defendants are equal parties to a fraud, the question that arises is, whether the Defendants can resist the title put forward by the Plaintiff through her mother, Nallamuthu, on the ground that the title to the properties never went out of the family, and also on the ground that they, being in possession of the suit properties ought not to be disturbed.

25. This takes me to the vexed question of the Cognisability of fraud by a Court where a party pleads it to out forward a claim or sustain a defence. A party cannot, of course, plead his own fraud to get reliefs in a Court of law, founding himself on that very fraud. The Court will not lend its assistance to help a man out of the evil consequences of his fraud. The Court is deaf to a plea of fraud, whether it is used as a weapon or shield, urged by a party in respect of his rights in the subject-matter of the suit. Can it be said that the Defendants are putting forward a plea of fraud to resist eviction from the suit properties. It must be noted that no fraud has been achieved, as it is not the case of either side that the creditors of Ramaswami remained unpaid or were successfully hoodwinked by the alienations referred to above. This is, therefore, a case where the worse that can be said against Ramaswami Pillai is that he attempted a fraud. But I shall consider this question from both the points of view, namely, (i) the fraud was not accomplished, and (ii) the fraud was achieved.

26. The recent decision of the Supreme Court in Immani Appa Rao v. Ramalingamurthi [1962] 3 S.C.R. 379, if I may say so with respect, considered the question very elaborately. Their Lordships of the Supreme Court have referred to the decisions of this Court in Venkataramanna v. Viramma ILR (1886) Mad. 17, Yaramati Krishnayya v. Chundru Papayya ILR (1897) Mad. 326 and Raghavalu Chetty v. Adtnarayana Chetty ILR (1908) Mad. 323. These decisions are in a line with the course of the

decisions of the Bombay High Court, where it had been held that, in a contest between two participants in fraud, possession should be allowed to remain where it rests. In other words, where parties are equal in fraud, the Court will not aid any of them and the properties should lie where they are, at the time of the institution of the suit. If, after having committed a fraud, the transferor still retains possession, transferee cannot take advantage of title in his favour, seeking to recover possession, as he cannot get possession unless he effectively and successfully pleads and proves the fraud, of which he was a party equally with the transferor. Nor can the transferor, after having parted with possession of the property to the transferee, come to the Court and plead that he never intended to convey title to the transferee, that he did so only to perpetrate a fraud, that the fraud had been effected, and that, therefore, he should get back the property.

This much seems to be quite clear. Their Lordships of the Supreme Court, however, point out as follows at page 752:

In the case of *Kemayya v. Mamayya* (1916) 38 M.L.J. 484, however, a Division Bench of the Madras High Court upheld the view that a person

who has conveyed property benami to another for the purpose of effecting a fraud on his creditors cannot, where the fraud has been effected, set

up the benami character of the transaction by way of defence in a suit by the transferee for possession under the conveyance. Since then this view

has prevailed in the Madras High Court (vide: *Kotayya v. Mahalakshamma* ILR (1933) Mad. 646 and *Arunachalam v. Rangaawami* ILR (1935)

Mad. 289. In our opinion, the view taken by these subsequent decisions of the Madras High Court does not represent the true and correct

approach to the question.

27. The decision of the Full Bench of this Court in *Venkataramayya v. Pullayya* ILR (1936) Mad. 998 (F.B.) does not appear to have been cited

before their Lordships. The Judgment of the Supreme Court does not refer to this decision. The Full Bench has overruled the decision in *Kamayya*

v. Mamayya (1916) 38 M.L.J. 484. A page 719, Beasley C. J. delivering the judgment of the Full Bench observed as follows:

In *Kotayya v. Mahalakshamma* ILR (1933) Mad. 646 (one of the cases referred to by the Supreme Court), a person conveyed property

benami to another for the purpose of effecting a fraud on his creditors; and such

fraud has been effected; and it was held that he was incapable of setting up the benami character of the transaction by way of defence in a suit by the transferee for possession under the conveyance. In this case *Kamayya v. Mamayya* (1916) 38 M.L.J. 484, was considered and followed. But *Ananthakrishna Iyer J., Sundaram Chetty J., and Varapachartar J.,* have each questioned the correctness of the view expressed by *Coutts Trotter C.J.* in *(Bethu) Venkataratnam and Another Vs. (Satnam) Venkataswami and Others,* .

28. Again at page 1010 it is stated:

It is sufficient to say that *Petherpermal Chetty v. Muniandy Servai* ILR (1908) Cal. 551 lays down the law upon this point and was rightly followed by *Ananthakrishna Iyer J., Sdndaram Chetti J. and Varadachariar J.*

29. Mayne, in his book on Hindu Law, sums up the legal position correctly thus at page 960:

In *Petherpermal Chetty v. Muniandy Servai* ILR (1908) Cal. 551, the Judicial Committee observed "To enable a fraudulent confederate to retain

property transferred to him in order to effect a fraud, the contemplated fraud must, according to the authorities, be effected. Then and then alone,

does the fraudulent grantor or giver, lose the right to claim the aid of the law to recover the property he has parted with." A Full Bench of the

Madras High Court has held, overruling its earlier decisions which took a contrary view, that a mere fraudulent intention evidenced by the

transaction is not sufficient to prevent a person who has been a party to the fraudulent transaction from setting up his own fraud. The intended fraud

must have been effected either entirely or to a substantial extent (*Venkataramayya v. Pullayya*) ILR (1936) Mad. 998 (F.B.)). All the other High

Courts have taken the same view.

30. I may observe that the Supreme Court has referred to the decision in *Petherpermal Chetty v. Muniandy Servai* ILR (1908) Cal. 551

apparently with approval. The ratio of the decision of the Supreme Court, however, is that the paramount consideration, in cases where a litigant

pleads fraud as part of his cause of action, would be grounds of public interest or policy. It is clear from the decision of the Supreme Court that,

where both the transferor and the transferee were equal in fraud in carrying out the transfer to defraud the creditors of the transferor, and the fraud

contemplated has been carried out but possession remains with the transferor, it would be open to the transferor to plead fraud, in a suit by the transferee for possession. In this view of the matter, it would follow that the result will be the same, if the fraud had not been carried out at all but became stifled and abortive. The true rule appears to be this. If persons conspire together and purport to bring about an alienation to defeat a third party, neither of the confederates can approach the Court to enforce the transaction, after succeeding in their fraudulent endeavour. Then the maxim *In pari delicto potior est conditio possidentis* applies, and the estate will be allowed to lie where it falls. If the attempted fraud misfired, the Court cannot deprive a man of his lawful rights, as that would be penalising the very contemplation of fraud, and at the same time conferring a benefit upon another with an equally fraudulent design.

31. I am, therefore, of opinion that, in any view of the matter, the Defendants are not be barred from resisting the suit for eviction or in resisting the title of the Plaintiff, by reason only of their allegation in their written statement that the apparent title stood in the name of non-members of the family because of the move on the part of Ramaswami Pillai to screen the properties from the creditors of the family.

32. I concur with the judgment of my learned brother that the appeal should be dismissed with costs.