

Bathula Anasuya and anr. Vs. Bathula Rayudu and ors.

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Court : Andhra Pradesh

Decided On : Aug-26-1988

Reported in : AIR1989AP290; [1990]182ITR45(AP)

Judge : Kodandaramayya, J.

Acts : Benami Transactions (Prohibition of Right to Recover Property) Ordinance, 1988 - Sections 2; [Trusts Act, 1882](#) - Sections 4, 81 and 82

Appeal No. : Appeal No. 191 of 1982

Appellant : Bathula Anasuya and anr.

Respondent : Bathula Rayudu and ors.

Advocate for Def. : L.N.G.K. Murthy, Adv. for ;C. Poornaiah, Adv.

Advocate for Pet/Ap. : Ananda Reddy, Adv.

Disposition : Appeal partly allowed

Judgement :

1. The plaintiffs are the appellants. The suit was laid for partition of plaint A and B schedule properties and for separate possession of one-sixth share. The plaint case is that the first plaintiff is the wife of one Devallu who is the brother of defendants 3 and 4 and son of the first defendant. He died in the year 1972 intestate. During his life time he executed a nominal document on 22-12-1965

relinquishing the property in favour of the first defendant. Nonetheless, he lived as a member of the joint family and died as a member of the said family. The said document was never intended to be acted upon but was executed to protect the property against his wayward life. After the death of Devallu, the defendants did not heed to the request of the first plaintiff to perform the marriage of the second plaintiff. Hence the suit for recovery of shares in the plaint A and B schedule properties.

2. The defendants contested the claim stating that the relinquishment deed executed by Devallu (Ex.A.1) is true, valid and binding on the plaintiffs since the date of the execution and Devallu lived separately and he had nothing to do with the joint family and the present suit is not maintainable. On this controversy, the Court below framed issues as found in para 7 of the judgment and held that the execution of Ex. A.1 is true, valid and binding on the plaintiffs and the plaintiffs are not entitled to claim any share in the suit properties and consequently dismissed the suit. Against the said judgment and decree, the present appeal is filed.

3. Learned counsel for the plaintiffs urged that Ex.A. 1 is a nominal one and the finding of the Court below to the contra is vitiated. Besides refuting this contention, the learned counsel for the defendants contended that this plea besides being incorrect cannot be entertained in view of the provisions of Benami Transactions (Prohibition of the Right to Recover Property) Ordinance 2 of 1988.

Thus, it is seen two questions arise for consideration: (1) Whether the plea of benami is hit by the Ordi. 2 of 1988?

(2) Whether Ex.A.1 is true and binding on the plaintiff?

4. On the first question, we must look to the provisions of Ordi. 2 of 1988. The preamble says : 'An Ordinance to prohibit the right to recover property held benami and for matters connected therewith of incidental thereto.' Section 2 prohibits the right to recover property held benami. Whether the Ordinance has retrospective operation or not is a matter of some debate. In fact, I referred this question to a Division Bench. Assuming that the Ordinance is retrospective in operation, the true effect of Section 2 is to prohibit a suit, claim or action to enforce any right in

respect of any property held benami. Section 2 bars the enforcement whether a person figures as a plaintiff or a defendant. The question now for the purpose of this appeal is, whether the word 'benami' occurring in Section 2 includes the plea that transaction is a nominal one. The word 'benami' is used to denote two classes of transactions which differ from each other in their legal character and incidents. In *Shree Meenakshi Mills Ltd. v. C.I.T.*, 0044/1956 : [1956]1SCR691, it was held by the Supreme Court thus (at Pp. 66-67) :

'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.'

5. Thus, it is seen that generally benami transactions are cases where property is purchased by a person in the name of another after paying consideration by himself. In the case of nominal transactions, no title is passed and the title is never intended to be passed. The question is whether Section 2 of the Ordinance governs nominal transactions also. No doubt, in one unreported case, I took the view that Section 2 covers both the transactions. But in that case, we overlooked Section 4 repealing Section 82 of the Trusts Act, keeping Section 81. It is well-known that Section 82 of the Trusts Act (2 of 1982) governs the cases of benami transactions where a person furnishes funds purchasing the property in the name

of a third party. But in the case of Section 81, where the owner of a property transfers or bequeathes the property but never intended to dispose of the beneficial interest therein, the transferee or legatee must hold the property for the benefit of the owner or his legal representative. The transferee must hold the property in trust and a resulting trust will arise. In the case of Section 82 also, the benamidar holds the property for the benefit of the real owner, though there is a clear distinction between a trustee and a benamidar. In the case of a trust, the legal title vests in the trustee. But in the case of a benamidar, the legal title vests in the real owner; but the benamidar is only a name-lender. He holds the property only apparently. From the very fact that Section 82 alone was repealed by the Ordinance keeping Section 81 on the statute book, I am clearly of the opinion that the cases governed by Section 81 are not governed by the Ordinance.

6. Learned counsel for the defendants argues that in the case of nominal transactions, there is no transfer of title as such as contemplated by Section 81 of the Act and the non-repeal of Section 81 would not make any difference and the word 'benami' once includes nominal transactions also Section 2 must be held to cover those transactions also, I am not prepared to give effect to this argument. The Court is always free to examine the attendant circumstances and find whether under the transaction in question the title was intended to be passed. Both the cases coming under Sections 81 and 82 of the Trusts Act are cases of resulting trusts. According to Section 81, a person to whomsoever the property is transferred must hold the same as a trustee, if the attendant circumstances disclose that the beneficial interest is never intended to be passed. In the context of keeping Section 81 on the statute book, I am clearly of the opinion that the nominal transactions are not intended to be covered by the Ordinance in question. Hence I hold that the present plea of nominal nature of transaction is not hit by Ordinance 2 of 1988, The Court is free to examine the question on merits and find out whether the transaction in question is a nominal one or not.

Now I proceed to examine the question on merits.

6A. We have already seen that the first defendant Rayudu is the father and the second defendant is his wife and Devallu, who is the son of the first defendant is

the husband of the first plaintiff. The second plaintiff is their daughter. The third defendant is another son of the first defendant. The fourth defendant is another son. The fifth defendant is the wife of the third defendant. The sixth defendant is the daughter of the third defendant.

7. In support of the contention that Ext.A.I was executed nominally, the first plaintiff examined herself as P.W. 1, the maternal uncle of the first defendant as P. W. 2 and her brother, an advocate, as P.W. 3. On behalf of the defendants, the first defendant was examined as D. W. 1 and another witness as D.W. 2, who deposed about the conduct of Devallu.

7A. It is the case of the first plaintiff that Devallu, her husband was leading a wayward life and was addicted to drinking and other vices and a deed of relinquishment was taken in the name of the first defendant. Infact, the relinquishment deed recites that it was executed in favour of not only the first defendant but for the benefit of other persons. The first plaintiff as P.W. 1 states that by the date of death of her husband, the joint family had gold jewellery mentioned in 'B' schedule and her husband was taken, to vices like drinking, gambling and debauchery and he had taken away the gold from the house and spent the same on vices and that he was beating her and that he contracted debts for his vices and the father-in-law and mother-in-law of P.W. 1 told Devallu that he will have no share in the property and he cannot spoil the same for his vices. The second plaintiff was born after the execution of the relinquishment deed. P.W. 1 also stated that no money was paid as recited in Ex. A. 1 deed. She also stated that she spent Rs. 4,000/- for the marriage of the second plaintiff and the first defendant did not give any money even though she approached him. P.W. 1 denied that her husband was having any business during his lifetime and she also denied the suggestion that she and her brother pressed her husband to go away from the joint family and live separately.

7B. P.W. 2 is related to the first defendant, he being his maternal uncle. He deposed that Devallu was playing cards, was addicted to drinking and gambling and was going with women and was accustomed to vices after his marriage and he lived like that till his death. He also stated that Devallu relinquished his right in

the property and to save the property Ex.A. 1 relinquishment deed was executed in favour , of the first defendant and Satyanarayana, Purohit said that if the settlement deed is executed in favour of the plaintiff it would be costly and so it was taken in the name of the first defendant. P.W. 2 also deposed that even after the execution of the document till his death Devallu lived with his wife in the family house and that he was present at the time of the execution of Ex. A. 1. No enmity was suggested to this witness except stating that he was not present at the time of the execution of Ex.A. 1. He asserted in the cross-examination that he was present at the time of writing Ex. A.1, though he did not attest it. This witness also deposed that it is not true that after the execution of Ex.A. 1, Devallu left the family house and lived separately.

8. P.W. 3, the brother of the first plaintiff is an advocate. He deposed that as per the suggestion of elders the relinquishment deed was taken in the name of the first defendant. He also deposed that his brother-in-law, Devallu was addicted to vices and lived with the first plaintiff during his lifetime. This witness also deposed about the wayward life of the first plaintiffs husband during his lifetime. He also deposed that he had to perform the marriage of the second plaintiff and the first defendant did not co-operate. After the death of the first plaintiffs husband, she demanded of the first defendant to give the share of the first plaintiff but the first defendant refused. P.W. 3 is a practising advocate since 1963. No doubt, at the time of the marriage of the second plaintiff and the execution of Ex.A. 1, he was young. Suggestions regarding the non-execution of Ex.A.1 in favour of the first plaintiff and the execution in favour of the first defendant were satisfactorily answered by this witness. No doubt, he stated that he was not present at the time of the execution of Ex.A.1. He also denied the suggestion that Devallu received the consideration under Ex. A. 1. He deposed that Devallu died in the family house at Tuni and he underwent treatment at Tuni itself and stated that till his death Devallu did not give up bad ways and also did not give up drinking. P.W. 3 deposed that the first defendant said in the first instance that he would give money for the marriage of the second plaintiff in the month of Feb. but refused to give the same in March. This witness also deposed that Devallu was convicted for his bad ways in a criminal case, as evidenced by Ex.A.14. though he cannot give the details of the criminal case. He also stated that the first plaintiff lived along with her husband till

his death.

9. When we come to the evidence of the defendants, the evidence of the first defendant is very crucial. He was examined as D.W. 1. No one connected with the execution of Ex.A.I was examined. No independent evidence of payment of consideration is also forthcoming. In the first place, D.W. 1 deposed that his family never owned the gold articles shown in the plaint 'B' schedule. But in his cross-examination, he stated that he pledged the gold articles, raised money and paid the same to Devatlu. He also deposed that the first plaintiff was married in 1952. He admitted that P.W. 2 is his sisters son. It is also in the evidence of D.W. 1 that they were having business at Tuni and they did the same till the year 1958. He also stated that he used to maintain accounts for the business. But no such books were produced by him. His statement that his son was carrying on separate business at the place of his mother-in-law, Chebrolu, is not evidenced by any evidence -- either documentary or oral. Though D.W. 1 did not raise any plea in the written statement about the outstanding debts for the first time in the evidence, he stated that 'By the date of Ex.A.1 our family was indebted to the tune of Rs. 8,000/- to Rs. 10,000/-'. At another place, he gives the figure as 'Rs. 15,000/- to Rs. 20,000/-'. D.W. 1 denied the suggestion that the document was nominally executed. He admitted having written the letters Exs.A.8 to A.10. To the suggestion that at the instance of the first plaintiff, he was convicted, he says that he could not remember. Under Ex. A. 11, he sold specified property and realised about Rs. 14,000/-.

10. It is seen that the family holds four items -- three houses and one vacant site and D.W. 1 sold two houses and one vacant site. The valuation of 'A' schedule house property alone comes to Rs. 8,000/-. But the first plaintiff's husband was said to have received under Ex.A.I only Rs. 2,000/-. On the question of payment of consideration representing the share of the first plaintiff's husband, I am clearly of the opinion that it does not represent the correct share. Learned counsel for the defendants contended that it is strictly not a relinquishment deed and it is an out and out partition, in which event the right of the first plaintiff to claim maintenance also would not arise,

11. The recitals in Ex.A. 1 do not support the contention that Ex.A. 1 is a partition deed and it purports to be a relinquishment deed. Learned counsel wants to sustain the claim of the defendants, raising the contention that Ex.A.1 is in the nature of a partition deed. In view of the fact that the first defendant himself stated that the valuation of the plaint 'A' schedule house alone is Rs. 8,000/-, it can be said that Rs. 2,000/- given to the husband of the first plaintiff at that time cannot represent the one-fourth share. Subsequently, three items were sold. The sale of one item is evidenced by Ex.A. 11. Hence I have no hesitation to hold that Ex.A.1 cannot be treated as a partition deed. Assuming it to be true, on the question of the nature of Ex. A.1, I hold that it was executed nominally to protect the interests of Devallu's family. By the date of the execution of Ex.A.1, the first plaintiff was married. No provision was made in Ex.A.1 for the maintenance of the plaintiffs. The apparent tenor of Ex.A.1 is only a relinquishment deed. The evidence discloses that Devallu continued to live in the family house till his death. I have already held that there is no evidence in support of the business at Chebrolu. Further, no evidence is forthcoming about the payment of Rs. 2,000/- made to the first plaintiff's husband, Devallu. The correspondence under Exs.A.8 to A.10 which was of the years 1961 and 1962 shows that the first defendant was making enquiries about the welfare of the first plaintiff and also his child and the first plaintiff was living in the family house. Ex.A.8 was addressed by the first defendant to one Modugula Ramulu, brother of the first plaintiff. It was written on 7-9-1961. Therein, he enquires about the daughter-in-law, the first plaintiff and states that he would come and take the first plaintiff and her daughter on 11-7-1961. In Ex.A.9, the first defendant says that he wanted his daughter-in-law to be sent after Amavasya and also makes a reference to the granddaughter, stating that she was going to school without any difficulty. Again in Ex.A.10, he makes a reference to the marriage proposal of his daughter and wants to inform the same to his daughter-in-law, who happened at that time to be at Turn. This correspondence clearly shows that the second plaintiff was living with the first plaintiff in the family house and the correspondence was very cordial and intended to protect the interests of the plaintiff and her daughter. That the first plaintiff's husband was taken to bad ways is clearly deposed by P.Ws. 2 and 3. which evidence I am inclined to accept. The fact that Devallu was convicted is evidenced by Ex. A. 14. It clearly demonstrates

his character and the necessity of executing the deed in favour of the first defendant to protect the interests of Devallu's family.

12. In view of this discussion, I am inclined to hold that Ex.A.I was executed nominally by Devallu. Learned counsel for the defendants commented that the burden is on the plaintiffs to prove the nominality of the document and the evidence is not sufficient to discharge the said burden. He also emphasised that for all these years, no claim was made and the conduct of the family members is consistent to show that Ex.A.1 was acted upon. He further emphasised on the question that except a vague suggestion about the wayward life of Devallu there is no acceptable clinching evidence about the same. I am not persuaded to accept those counter arguments. No doubt, the burden is on the plaintiffs to prove that the document was nominally executed. But the conduct of the first defendant and also the evidence of P. Ws. 2 and 3 clearly establish that the deed was executed nominally to protect the interests of the family of Devallu. In the absence of any evidence that Devallu had any independent business or that the amount paid to him is sufficient to represent the interests of his share. I cannot hold that Ex.A. 1 is valid and binding on the plaintiffs. Apart from want of proof of the payment of Rs. 2.000/- under Ex.A.I, it does not represent the-correct share of Devallu. Hence I hold that Ex.A.1 does not operate as a partition deed and was intended to save the property from the wayward life of Devallu. Hence, I hold that the first plaintiff is entitled to a one-sixth share in the plaint 'A' schedule properties. The Court below held that the 'B' schedule property is non-existing. Hence the plaintiffs cannot get any share in respect of the same.

13. In the result, the appeal is allowed in part. There shall be a decree for partition of 'A' schedule properties allotting one-sixth share to the plaintiffs with costs here as well as in the court below. The decree of the lower court in respect of 'B' schedule property is confirmed. The defendants shall pay the court-fee payable on the plaint and also on the memo of appeal.