Sebastian Vs. Mathai

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Court : Kerala

Decided On : Sep-06-2005

Reported in : 2005(4)KLT791

Judge : R. Bhaskaran and; K.P. Balachandran, JJ.

Acts : Foreign Exchange Regulation Act, 1999 - Sections 13, 18(1), 18A, 19(1), 31, 31(2), 31(3), 50, 56 and 63; ;Indian Contract Act, 1872 - Sections 23; ;Transfer of Property Act, 1882 - Sections 6; ;Benami Transactions (Prohibition) Act - Sections 4; ;Citizenship Act, 1955 - Sections 9 and 9(2); ;Specific Relief Act - Sections 20; ;Hyderabad Abkari (Excise) Act; ;Bombay Tenancy and Agricultural Lands Act - Sections 5; ;Evidence Act, 1872 - Sections 116

Appeal No. : A.S. No. 208 of 2003 and F.A.O. Nos. 20 and 60/2003

Appellant : Sebastian

Respondent : Mathai

Advocate for Def. : S.M. Prem,; O. Ramachandran Nambiar, ; P.S. George

Advocate for Pet/Ap. : V. Giri and; M.P. Ramnath, Advs.

Disposition : Appeal dismissed

Judgement :

R. Bhaskaran, J.

1. The defendants in O.S.No. 103 of 2000 on the file of the Principal Sub Court, Ernakulam, are the appellants in the appeal. The basic facts stated in the plaint are as follows.

2. The plaintiff is a native of Meenachil Taluk. He was working as lecturer in St.Thomas College, Palai, from 1959 to 1961. In 1961, he went to Canada for higher studies. He took his master degree in Mathematics from the University of Toronto and took his Ph.D. He joined as Assistant Professor in Mathematics and Statistics in Mcgill University, Montreal in Canada and now he is the senior most Professor in that University. The defendants 2 to 4 are the wife and children of the 1st defendant who was working as attender in St.Thomas College, Palai. The 2nd defendant is a distant relative of the plaintiff and defendant also belong to Meenachil Taluk. The plaintiff used to come to India every year and in 1985 he accepted the post of Director of Centre for Mathematical Sciences, Thiruvananthapuram, and from 1985 onwards he used to be in India for six months.

3. In 1981 the plaintiff purchased an extent of 13.413 cents of land in Edappally for constructing a residential building. After getting permission from the Corporation of Cochin, construction was started in 1984. He also purchased the adjacent land of 1.023 cents in 1985. After a difference of opinion with the contractor the plaintiff directly engaged workers and supplied the materials for such construction work.

4. The 1st defendant after his retirement was finding it difficult to make both ends meet and whenever the plaintiff used to meet his native place the defendant used to express his grievances and that he was residing in a rented house. The plaintiff thought of allowing the defendants to occupy a portion of the house constructed by the plaintiff with a view to help them and he wrote to them informing of his willingness and in 1986 they shifted their residence to a portion of the house constructed by the plaintiff. It was without any remuneration till he demanded to vacate the same.

5. The defendants assured that the plaintiff would find out some other alternate accommodation as and when the plaintiff wanted possession of the rooms they were allowed to occupy. As and when the plaintiff used to come to India he used to occupy the entire remaining portion of the building and take food with the defendants for which the plaintiff used to pay lavishly. The relationship with the plaintiff and defendants went on very cordial. In 1992, the marriage of the 3rd defendant took place with a Canadian Citizen. The entire expenses of the marriage were met by the plaintiff. However, from 1996 onwards there was a change in the attitude of the defendants and the plaintiff requested for surrendering possession of the rooms occupied by the defendants. After the change of the attitude, the defendants have declared that they will teach a lesson to the plaintiff and that the plaintiff will not be permitted to live in the building. The plaintiff has been paying building tax, property tax, land tax and other charges. The plaintiff had executed a power-of-attorney in favour of the 4th defendant to enable him to look after the plaint schedule property. The plaintiff has a telephone connection in the house. He has also an Ambassador car bearing registration No. KL-7 A 3136. The defendants have been using the same for their emergency purposes. The plaintiff used to give the necessary amounts for payment of property tax, water tax, electricity charges etc. The originals of the receipts are with the defendants. The plaintiff has cancelled the power-of-attorney in favour of the 4th defendant on 13-2-2000. After permission to occupy the building is withdrawn, the defendants have no right to continue to occupy the premises. Since the permission is withdrawn the defendants are liable to give compensation for use and occupation for the portion of the building in their possession at the rate of Rs. 5,000/- per month. The plaintiff transferred an extent of 8.5 cents in Sy.No. 82-/3A1 to the third defendant for a nominal value to enable her to construct a house for the requirement of the defendants. The plaintiff therefore prayed for a mandatory injunction. Subsequently the plaint was amended incorporating a prayer for recovery of possession of the portions of the plaint schedule building occupied by the defendants.

6. The defendants filed a written statement with a counterclaim. In the written statement, it is stated that the marriage of the 3rd defendant with a Canadian Citizen was conducted at the instance of the plaintiff. It is also stated that the

plaintiff wanted the relationship of the 3rd defendant and her husband severed 'so that the plaintiff could achieve his long nurtured desire of having a sexual relationship with the young third defendant'. The third defendant who treated the plaintiff like her father never suspected his unholy evil intentions. The plaintiff went to the extent of demanding to the third defendant that she must give birth to his child. The relationship between the third defendant and her husband has irretrievably broke down. The plaintiff instigated the third defendant to file a complaint against her husband in the Kalamassery Police Station and before the Canadian High Commission in New Delhi. It was then that the plaintiff started to threaten the defendants to evict them from the plaint schedule property. The averment in the plaint that the plaintiff had purchased 13.413 cents as per sale deed dated 7-3-1981 is incorrect. So also the averment that he wanted to start construction of a residential building is also false. The building plan and proposal was submitted and permission to construct the building was made by the plaintiff. But the plaintiff and defendants had spent their money for the construction though the documents were taken in the name of the plaintiff. The purchase of 1.023 cents of land was also by the plaintiff and the 1st defendants using both their funds. The sale deeds were executed in the name of the plaintiff as requested by him to the defendants. It was for administrative convenience. The plaintiff was a trustee standing in a fiduciary relationship with the defendant. The title of the plaintiff, if any, is lost by adverse possession and limitation. The defendants have become owners of the entire plaint schedule property.

7. The plaintiff was related to the 2nd defendant. The defendants belonged to highly popular family and were engaged in agricultural activities. They had plantation gardens and dairy farm. They were doing agricultural activities in 3 acres of properties taken on oral lease from one K.K. John. The plaintiff put forward the idea of purchasing jointly with the defendants some land in Ernakulam for putting up a residential building. The plaintiff suggested that if defendants can shift to Ernakulam defendants 3 and 4 will have a bright future. The 1st defendant agreed. The plaintiff also took Rs. 15,000/-from the 1st defendant for buying a property in Ernakulam. Using the funds of the defendants, the plaintiff purchased the property. The plaintiff has also invested a part of his funds. The property was purchased in the name of the plaintiff for the benefit of the defendants and the

plaintiff was only a trustee for them. The plaintiff again took Rs. 5,000/- from the 1st defendant for purchasing 1.23 cents adjacent to the land already purchased. The defendants have already invested a total of Rs. 20,000/-. The plaintiff and defendants are co-owners of the plaint schedule property. The cost of construction of the building was jointly met by the plaintiff and defendants. The defendants sold their property at Palai and gave up their business and moved to the plaint schedule building. The expenses for wood work, electrification, plumbing work etc. were met by the defendants only. The defendants have also got their ration card transferred from Palai to the plaint schedule property. At the request of the plaintiff his name was also added in the ration card to obtain a driving licence and for showing proof of address of the plaintiff. The plaintiff and 1st defendant have executed an agreement on 20-4-1997. The plaintiff has relinquished all his rights if any over the plaint schedule property in favour of the defendants and he had retained only a permission to occupy the building whenever he comes to India from Canada.

8. The plaintiff is a Canadian Citizen at the time of purchase of the plaint schedule property. The purchase of the property by the plaintiff is in violation of the Foreign Exchange Regulation Act and no rights accrued to the plaintiff under the said purchase. No permission of the Reserve Bank of India was obtained before such purchase. It is hit by Section 23 of the Indian Contract Act and it is void ab initio. The plaintiff was permitted only to use a portion of the building by the defendants. The permission so granted was terminated and he is liable to be restrained by injunction from trespassing into the plaint schedule property. The building would fetch an amount of Rs. 25,000/-per month as rent and the portion used by the plaintiff will fetch Rs. 10,000/- per month. The defendants are entitled to recover the same from the plaintiff and his assets. In the alternative, it was also pleaded that the plaintiff and defendants are in the position of co-owners and the plaint schedule property may be allotted to them.

9. If the relationship between the parties is that the defendants are in the position of licensees, they have acted upon the licence and constructed a house. The licence has become irrevocable.

10. After the dispute with the contractor, the plaintiff and defendants decided to stop the entrustment of work to the contractor. The defendants shifted from Palai and completed the work directly under their supervision and using their own funds and took possession of the same entirely. The defendants are in possession of the property as of right and not on the basis of any gratuitous permission by the plaintiff. There was no assurance on the part of defendants 1 and 2 that they would find out some alternate accommodation as and when the plaintiff wanted the defendants to vacate the building. The plaintiff used to occupy one room when he came to India as permitted by defendants. He was also provided with food by the defendants free of cost purely out of sympathy, affection and care for the plaintiff. The averment that the plaintiff was paying building tax, property tax, land tax and other charges is incorrect. The defendants have been paying the same. Receipts are in the name of the plaintiff only because title deeds of the property remained in his name. No power of attorney was executed by the plaintiff in favour of the 4th defendant to look after the affairs in relation to the plaint schedule property. The averment that the plaintiff was giving money to the defendants for payment of property tax etc. is also incorrect. There was no grant or permission by the plaintiff to the defendants and there was no necessity for the defendants to trespass into the plaint schedule building. The averment that the plaintiff transferred some property in the name of the 3rd defendant for nominal value is false. It was purchased by the 3rd defendant. The suit is barred by limitation. The plaintiff had cut off electric supply and other facilities for which he had no right. The plaintiff prevented the use of the defendants' living room and the 4th defendant who is a business man was seriously prejudiced. An Advocate Commissioner had inspected the building and found that the case of the defendants that the plaintiff had unnecessarily restricted the use of the building by the defendants was true. The plaintiff is only a trustee in respect of the half share of the plaint schedule property and the building therein to which the 1st defendant and through him the other defendants are owners of the said share. The defendants are entitled to injunctions, both prohibitory and mandatory. The defendants are not liable to be evicted from the plaint schedule property. The defendants are entitled for realisation of damages for the agony, pain and suffering caused to them by the illegal acts of the plaintiff with 12% interest. The relief claimed in the counter claim

is for an injunction restraining the plaintiff and his men from trespassing into any portion of the plaint schedule property or in the alternative for a partition of the plaint schedule property into two equal halves and allotment of one such share to the defendants and for a mandatory injunction directing the plaintiff to return the KASCA 500 V inverter and 12 V tubular battery to the defendants and on failure to recover the cost estimated at Rs. 12,740/- with 12% interest from the date of decree till realisation. There is also a prayer for future damages at the rate of Rs. 10,000/- per month for wrongful use and occupation of the first floor of the building in the plaint schedule property by the plaintiff.

11. The written statement runs into 41 pages with 35 paragraphs. The only essential portions of the pleadings are indicated in this appeal judgment as most of the other averments are with regard to evidence.

12. The trial court framed as many as 17 issues. The trial court found that it was very difficult to hold that fiduciary relationship between the parties existed at the time of purchase of the property in the name of the plaintiff. After noting the legal position that in India the owner of the land need not necessarily be the owner of the building standing on the land, the trial court found that in this case there was nothing to show that the plaintiff who was the owner of the land was also not the owner of the building. The agreement alleged to have been executed between the plaintiff and the defendants was found to be not genuine. The contention of the defendants that they were co-owners along with the plaintiff was also found to be not correct. The trial court found that merely because the plaintiff is a Canadian passport holder it could not be said that he has ceased to be an Indian Citizen and the authority to decide citizenship is only the Central Government. The plaintiff is not a foreigner and he was born and brought up in India. The defendants are in possession of three bed rooms, bath room, kitchen, work area and store room on the ground floor in the plaint schedule property. Though the 4th defendant had disputed the existence of a power-of-attorney executed by the plaintiff in his favour at the time of evidence he admitted the same. It was found that there was nothing on record to show that defendants put up a structure in the plaint schedule property and that defendants are only licensees. The plaintiff was entitled for recovery of possession of the building. The case of adverse possession and

limitation was also found against the defendants. The trial court also found that it was not a fit case for award of damages for use and occupation of the rooms in the building. It was found that the defendants are not co-owners and they could not claim partition. The claim for damages at the instance of the defendants was also turned down. The suit was decreed in part allowing the plaintiff to recover the portions of the building, viz, three bed rooms and bath rooms on the ground floor, kitchen, work area and store room in the plaint schedule property on the strength of title. Damages for use and occupation of the building was disallowed.

13. In this appeal, the learned Counsel for the appellants contended that the plaintiff after obtaining Canadian Citizenship has ceased to be an Indian Citizen. As per the provisions of the Foreign Exchange Regulation Act, a non-Indian citizen was not entitled to purchase any property in India without the previous permission of the Reserve Bank of India. If any, purchase was made against the provisions contained in the Act, it was violative of Section 23 of the Indian Contract Act and was not enforceable under Section 6(h) of the Transfer of Property Act. Therefore, the plaintiff was not entitled to enforce his alleged ownership or possession of the plaint schedule property. He also contended that the property was purchased with the joint funds of the plaintiff and defendants and therefore the plaintiff is only in the position of a co-owner and he cannot seek eviction of the defendants from the property. The further contention is that the provisions of the Benami Transactions (Prohibition) Act are not applicable as the plaintiff was in the position of a trustee, with regard to the possession of the property it was contended that the plaint did not contain any averment as to when the defendants came into possession of the property. They pleaded that they have perfected title by adverse possession and limitation. The appellants also contended that they are entitled for damages as claimed in the counter claim.

14. The learned Counsel for the respondent on the other hand contended that the plaintiff has not ceased to be an Indian Citizen. He also contended that even if there is violation of the provisions of the Foreign Exchange Regulation Act, the sale deed obtained by the plaintiff will not be null and void. He further contended that at any rate the defendants who are only licensees are estopped from disputing the title of the plaintiff and they are liable to be evicted irrespective of the

finding on the validity of the sale deed in favour of the plaintiff. He also contended that the defendants have not contributed any amount for the purchase of the property or for the construction of the building and even if it is found that any amount is contributed by them they are only entitled for that amount and not for any right in the property as co-owners.

15. Therefore the points for consideration are (1) whether the plaintiff has ceased to be an Indian Citizen and-whether the purchase of property by him is to be treated as void and unenforceable in law, (2) whether the defendants have made any contribution for the purchase of the property or for construction of the building and even if they have contributed, are they entitled for partition of the property? (3) whether the defendants are not estopped from challenging the title of the plaintiff in case they are found to be only licensees, (4) whether the defendants have succeeded in establishing adverse possession and limitation, and (5) whether the contention of the defendants that the plaintiff is in the position of a trustee and the provisions of the Benami Transactions (Prohibition) Act are not applicable is correct.

Point No. 1

16. The plaintiff was admittedly born and brought up in India as an Indian Citizen. He has gone abroad for higher studies and for employment. While examined as Pw.1, he deposed that he was not a Canadian Citizen and he was an Indian Citizen. But he admitted that he was having a Canadian passport. He further stated that Canadian Citizenship can be obtained without loosing Indian Citizenship. In further cross-examination, he has stated that it was incorrect to say that he acquired Canadian Citizenship voluntarily. He acquired Canadian Citizenship for his own requirements. The learned Counsel for the appellants Mr. Ramnath strenuously contended that the moment the plaintiff acquired Canadian Citizenship, he ceased to be an Indian Citizen by force of Section 9 of the Citizenship Act, 1955. Section 9 says that if any citizen of India who by naturalisation, registration or otherwise voluntarily acquires or has at any time between the 26th January, 1950 and the commencement of the Act voluntarily acquired, the citizenship of another country shall, upon such acquisition or, as the

case may be, such commencement, cease to be a citizen of India. Sub-section (2) of Section 9 says that if any question arises as to whether, when or how any person has acquired the citizenship of another country, it shall be determined by such authority, in such manner, and having regard to such rules of evidence, as may be prescribed in that behalf. Therefore, the question whether the plaintiff has ceased to be an Indian citizen and whether he has voluntarily acquired the citizenship of another country is to be primarily decided by the competent authority. In what all circumstances there is voluntary acquisition of the citizenship of another country whereby an Indian citizen is deprived of his citizenship is also to be decided by the Central Government. As held by the Supreme Court in Md. Ayub Khan v. Commr. of Police, : [1965]2SCR884 obtaining of passport from another country does not necessarily imply exercise of free volition. In the said decision, the Supreme Court has also held that such enquiry can be made by the Central Government only and not by the courts. Again in Bhagwati Prasad v. Rajeev Gandhi, : [1986]2SCR823 and State of Madhya Pradesh v. Peer Mohd, : AIR 1963 SC645 , the Supreme Court has categorically stated that except the Central Government no other court or authority has the power to decide as to when or how an Indian citizen has acquired the citizenship of another country. Therefore it would be hazardous to come to the conclusion that merely because the plaintiff possessed a Canadian passport he has ceased to be an Indian citizen. Whether the Canadian law permits dual citizenship and thereby entitle such persons to have Canadian passport is also a matter which can be taken into account by the competent authority while deciding whether the plaintiff has ceased to be an Indian citizen. According to the learned Counsel for the appellants, there is a clear statement in the written statement of the defendants that the plaintiff is a Canadian citizen and the plaintiff has not filed any rejoinder on this aspect. He also brought to our notice Ext.B3 deposition of the plaintiff in O.S.No. 5 of 1990 on the file of the Sub Court, Ernakulam, wherein he admitted that he came to India as a Canadian citizen in 1970. But there also, he has stated that he has not lost his Indian citizenship. Therefore, it is not possible for this Court in this case to proceed as if the plaintiff has ceased to be an Indian citizen. As held by the Supreme Court the proper authority to take a decision on the issue is the Central Government.

17. The learned Counsel for the appellants also contended that in case the plaintiff has ceased to be an Indian citizen, he is not entitled to purchase any property in India without the permission of the Reserve Bank. He brought to our notice Section 31 of the Foreign Exchange Regulation Act. Under Section 31 of the Act, no person who is not a citizen of India shall except with the previous permission of the Reserve Bank acquire or hold any immovable property situate in India. Sub-section (2) of Section 31 contemplates an application to the Reserve Bank in such form and containing such particulars as may be specified by the Reserve Bank. Under Sub-section (3) of Section 31, the Reserve Bank may grant or refuse to grant permission after making such enquiry as it deems fit. Permission shall be refused only after affording a reasonable opportunity for making a representation. If the Reserve Bank does not communicate within ninety days to the applicant that the permission applied for has been refused it shall be presumed that the Reserve Bank has granted such permission. Under Section 50 of the Act, if any person contravenes any of the provisions of the Act (other than Section 13, cause (a) of Sub-section (1) of Section 18, Section 18A and Clause (1) of Sub-section (1) of Section 19) or of any rule, direction or order made thereunder shall be liable to pay a penalty not exceeding five times the amount or value involved in any such contravention or Rs. 5000/- which is more as may be adjudged by the Director of Enforcement. When the statute itself provides for the consequence of the violation of the provisions of the Act and when it is not provided that the violation will result in the transaction becoming void, it is difficult to hold that such transfers are void in law and no right was obtained by the plaintiff by reason of such provisions.

18. The learned Counsel for the appellants contended that under Section 23 of the Indian Contract Act, consideration or object of an agreement is lawful, unless it is forbidden by law or is of such a nature that if permitted it would defeat the provisions of any law or is fraudulent or involves or implies injury to the person or property of another, or the court regards it as immoral or opposed to public policy. It also provides that every agreement of which the object or consideration is unlawful is void.

19. Since we have already found that it is impossible to proceed on the basis that the plaintiff has ceased to be an Indian citizen, this point is not required to be

decided in this appeal. Since, however, the learned Counsel for the appellants has advanced detailed arguments on this aspect, we will advert to the same in fairness to the counsel and also for completeness of dealing with the contentions of the counsel. The learned Counsel for the appellants relied on the decision of the Madras High Court in Shoba Viswanathan v. Kingsley, 1996 (2) MLJ 96 and two Full Bench decisions of the Hyderabad High Court in Fakirchand v. Bansilal AIR 1955 Hyd.28 and Babiah v. Md. Abdus Subhan, AIR 1954 Hyd. 156. He also relied on the decision of the Calcutta High Court in Pranballa v. Tulsibala Dasi, AIR 1958 Cal.713. The question before the Madras High Court arose out of a suit for specific performance of the agreement for sale. The defendant in the case was admittedly a foreign national and the permission of the Reserve Bank was not obtained for transfer of the property of the foreign national. The Madras High Court held that in such case the Court will not exercise its discretion in favour of the plaintiff under Section 20 of the Specific Relief Act as the enforcement of the agreement will be in violation of the provisions of the Foreign Exchange Regulation Act. The Full Bench decision in Fakirchand's case (AIR 1955 Hyd.28) related to the validity of a contract set up by the plaintiff against the provisions of the Hyderabad Abkari (Excise) Act. It was not in dispute that the defendant was the licensee of the Abkari shop and it could not be transferred without the permission of the Collector or Deputy Excise Commissioner. According to the plaintiff, he had licence of the shop in the name of the defendant and he filed the suit for a declaration that he is the owner of the shop and for rendition of accounts. It was held that the provisions in the Abkari Act was enacted as a matter of public order and any contravention of the said provisions will vitiate the contract, or agreement which may be calculated to defeat its provisions. It was found that the defendant had obtained licence in his name from the Government. The plaintiff's claim is based on agreement which contravenes the rules under the Act which being against public policy was illegal and should not be decreed. Similarly, the Full Bench decision in Babiah's case (AIR 1954 Hyd.156) was also a case of contravention of Hyderabad Abkari Ad. It was held that the purpose of imposing conditions under Sections 14 and 15 of the Hyderabad. Abkari Act was not merely for the convenient collection of revenue but also to control the sale of liquor and Sendhi. An excise contract which is in contravention of the provisions of Sections 14 and 15 is therefore against public

policy and hence void. The case decided by the Calcutta High Court in Pranballav's case : AIR1958 Cal713 was a clear case where Section 23 of the Contract Act was directly involved. The plaintiff was the executor and trustee of the Will of one Ranubala Dassi. The plaintiff alleged that the premises were let out to Ranubala Dassi for running a brothel. After obtaining probate, the plaintiff issued notice to the defendant to vacate the premises. The defendant contended that the property let for immoral purpose is irrecoverable in a court of law. The trial court dismissed the suit. The appellate court found that the premises was let out to the defendant for the purpose of running a brothel as alleged in the plaint. It was held by the Division Bench that the effect of Section 6(h)(2) of the Transfer of Property Act and Section 23 of the Contract Act is that no transfer of the property has taken place in law because the object or consideration was immoral. No estate passed under such an attempt of transfer. The lessee was not a lessee at all in law. It was held that the plaintiff was entitled for a decree for possession as the lessee's possession was wrongful. It was held by Bachawat, J. in a concurring judgment that no rule of law or equity or public policy preclude the plaintiff from obtaining relief. Public interest and public welfare demand discontinuance of the brothel and of the user of the premises as brothel and the lease for immoral purposes should not be allowed to stand for reasons of public policy. This decision will not in any way help the appellants.

20. In Kedar Nath v. Prahlad Rai, : [1960]1SCR861 , the Supreme Court held that if the illegality be trivial or venial, and the plaintiff is not required to rest his case upon that illegality, then public policy demands that the defendant should not be allowed to take advantage of the position. It was further held that if the matter is clear and the illegality is not required to be pleaded or proved as part of the cause of action and the plaintiff recanted before the illegal purpose was achieved, then, unless it be of such a gross nature as to outrage the conscience of the Court the plea of the defendant should not prevail.

21. In Satappa v. Appayya, : [1968]3SCR706 , the suit was for specific performance of an agreement to sell. The defence was that if the suit was decreed, the plaintiff will be having excess land and Section 5 of the Bombay Tenancy and Agricultural Lands Act prohibits holdings of lands in excess of ceiling

limits, the contention was that enforcement of the agreement will result in helping the plaintiff to violate the law. The Supreme Court held that an agreement to sell does not under the Transfer of Property Act create any interest in the land. By agreeing to purchase land, a person cannot be said in law to hold that land. The Act does not contain any general restriction of such transfers. The consideration of the agreement per se was not unlawful, Nor is the object of the agreement to defeat any provision of the law. The Supreme Court therefore held that Section 23 has no application and the plaintiff was entitled to get a decree for specific performance of the agreement.

22. In Nair Service Society v. K.C. Alexander, : [1968]3SCR163 , the contention was that the plaintiff was not entitled for any assistance as his possession was unlawful and by such assistance an illegality would be condoned and perpetuated. It was pointed out that under Regulation IV of 1094 it was unlawful for any one to occupy Government land and a punishment of fine in addition to eviction was prescribed and all crops and other products were liable to confiscation. The Supreme Court rejected these contentions. It was held that the plaintiff was not required to rely upon any illegality which is the consideration which makes the court to deny their assistance to a party. The contention of the N.S.S. based on the principle 'Ex dolo malo non oritur actio (No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act) was not accepted and it was held that if the plaintiff does not have to rely upon any illegality then though the possession was taken on trespass a suit can be maintained for restoration for possession as otherwise the opposite party can make unjust enrichment although its own possession was wrongful against the claimant.

23. Even assuming that all the case put forward by the defendants under the Citizenship Act, the Foreign Exchange Regulation Act, Contract Act and the Transfer of Property Act are to be accepted, we are of opinion that the defendants are not entitled to resist the suit in view of Section 116 of the Evidence Act. In the preceding paragraphs, we have already found that the defendants cannot be treated as co-owners of the property. There is no case of lease of the portion of the property either for the plaintiff or for the defendants. Therefore, their possession can only be as licensee whose possession is permissive in nature.

Section 116 of the Evidence Act states that no tenant of immovable property, or person claiming through such tenant, shall during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and no person who came upon any immovable property by the licence of the person in possession thereof, shall be permitted to deny that such person had a title to such possession at the time when such licence was given. In fact, the Supreme Court in N.S.S's case : [1968]3SCR163 , also refers to this aspect. In Veerraju v. Venkanna, : [1966]1SCR831 , the plaintiff's suit was for recovery of possession on behalf of a trust under an arrangement between the defendants and the then de facto trustee. The defendants were put in possession of the property on certain conditions. The defendants resisted the suit contending that they have become full owners of the property. The first defendant died pending suit and the legal heirs contended that they have become the owners of the property. They also denied title of the deity on whose behalf the trustee filed the suit. It was held by the Supreme Court that having regard to Section 116 of the Indian Evidence Act, during the continuance of the tenancy, a tenant will not be permitted to deny the title of the deity at the beginning of the tenancy. It was also held that the tenant cannot acquire by prescription a permanent right of occupancy in derogation of the landlord's title by mere assertion of such a right to the knowledge of the landlord. In the case of licensee also, the same principle is applicable. The same view was taken by the Supreme Court in Joginder Singh v. Jogindero, AIR 1996 SC 1654. In Arjan Dev v. Om Parkash, AIR 1992 Delhi 202, a Division Bench of the Delhi High Court held that it was not necessary that for the purpose of creation of licence any instrument be written. The grant of licence can be express or implied. In that case, the defendant was the younger brother of the plaintiff living in the house with their mother as a family member. Then he got married and started a kitchen separately in the same house. Such permission did not give any right or interest to the defendant and he was not entitled to put forward a plea of adverse possession. In Balasubramania v. Saraboji, : AIR1973 Mad305 , it was held that a tenant in order to claim title by adverse possession must first establish that he had surrendered the tenancy to the landlord. It is not open to him to deny the title of the landlord until he proves surrender. In Tej Bhan Madan v. II Addl. District Judge, : AIR 1988

SC1413 it was held that the tenant was precluded from denying title of the landlord.

24. The Punjab and Haryana High Court in Piara Singh v. Jagatar Singh, has held that Section 31 of the Foreign Exchange Regulation Act does not provide that if some one purchases any property in violation of the Act the title does not pass to him. What the Act provides is that if a person contravenes Section 31 he can be penalised under Section 50 and can also be prosecuted under Section 56. Section 63 contains a provision regarding confiscation of certain properties but it does not contain any provision for confiscation if there is breach of the provisions of Sub-section (1) of Section 31. Therefore, the property purchased in contravention of Sub-section (1) of Section 31 is also not liable to confiscation. In the circumstances, it cannot therefore be held that the person who purchases the property is not entitled to claim possession of the property. It may also be noticed that subsequent to the commencement of the Foreign Exchange Management Act, 1999, the Foreign Exchange Regulation Act is already repealed. The plaintiff filed a declaration before the Reserve Bank of India by letter dated 15-3-2001 and by Ext.A23 dated 4-4-2001 he was informed that non-resident persons of Indian origin have got general permission to acquire and transfer immovable property within the country. As no specific permission was required for purchase of an immovable property, the declaration submitted by the plaintiff was returned to him. This also will indicate that the purchase of property by the plaintiff could not be termed as a void transaction and unenforceable in law.

25. For the above reasons, we are of opinion that the plaintiff cannot be nonsuited if he is otherwise entitled for a decree for the reason that there is violation of Section 23 of the Contract Act or Section 6(h)(2) of the Transfer of Property Act and this point is found in favour of the plaintiff/respondent.

Point No. 2

26. Plaint schedule property admittedly stands in the name of the plaintiff. Ext.A1 is the registration copy of the sale deed in favour of the plaintiff with respect to 13.413 cents. Ext.A2 is the registration copy of the sale deed with respect to the balance extent of 1 cent 23 sq.links. Exts.A3 to A4(d) counterfoils of the cheque

book of the plaintiff in the State Bank of India, NRI Branch show various payments made to defendants 3 and 4 by the plaintiff. Ext.A5 is Copy of the plan approved by the Corporation of Cochin for construction of the building and Ext.A6 is the permit granted by the Cochin Corporation for construction of the building. Exts.A7 and A8 are copy of the passbook of the plaintiff in the State Bank of India. It shows that large amounts were in deposit in his account and there were withdrawals of the amount from the account. Exts.A11, A11(a) to A11(1) contain invoices evidencing hardware items from Excellent Sanitary Wares by the plaintiff. Ext.A11(p) is cash bill from Jose Sanitary Equipments and Ext.A11(q) is a receipt from A.G. Krishna Shenoy Hardware and Paints. Exts.A11(s) to A11(x) are cash bills from Appollo Electrical Home Appliances in the name of the plaintiff. Ext.A11(y) is a cash bill in the name of the plaintiff issued by Poduval Engineers, Ernakulam. Ext.A11(z) is a cash bill in the name of the plaintiff by Guru Associates for purchase of 3/4 HP Motor Pump Set. There are several other receipts also produced to show that the entire purchase of materials for the construction of the building were made by the plaintiff and plaintiff only. It is unnecessary to discuss the oral and documentary evidence with regard to this aspect as nothing was brought to our notice to hold that the plaintiff had no capacity to spend for the construction of the building. The documents produced by the defendants are only the ration cards and some of the originals of the revenue receipts. Ext.86 is photocopy of the agreement alleged to have been executed by the plaintiff and the 1st defendant. The plaintiff has denied execution of any such agreement. Dw.5 is the Notary Public who is said to have attested the photocopy and he stated that the original was not notarised by him. He also admitted that Ext.B6 will not show that it was ascertained from the original about its correctness. He also admitted that it was not possible to know as to who introduced the executants and how the executants were identified. He also admitted that he has acted only as a witness to the document and not as a notary. He kept mum when he was asked whether it was not a misconduct to act as a witness. When the signature in Ext.B6 was denied no attempt was made to establish the genuineness of the signature and from the contents of Ext.B6 it is clear that the same was concocted by defendants to misappropriate the entire property belonging to the plaintiff. The production of the originals of the title deeds by defendants only strengthens the case of the

plaintiff that they took custody of the documents from the house in the absence of the plaintiff from the house. None of the other documents produced by the defendants will in any way support their case that it was their money that was used either for purchase of the property or construction of the building. The building was constructed by the plaintiff after obtaining permission from the Cochin Corporation. The plan and licence for such construction were obtained by the plaintiff. Admittedly the property tax and other taxes were all paid in the name of the plaintiff. The contention of the defendants is that they have also contributed for the purchase of the land and for construction of the building. The learned Counsel for the appellants contended that the plaintiff has not produced any document to show that he had invested any amount either for the purchase of the property or for construction of the building. The plaintiff has produced Exts.A1 to A8, A10 to All series, A12 series, A13 series and A15 to A20 to substantiate his case that it was he who spent the entire money for the purchase of the land as well as the construction of the building. We are of opinion that the property admittedly is purchased in his name and permission was obtained by him for construction of the building he has no further burden to establish the source of income to claim ownership of property and the building. The building is having a plinth area of 6000 sq.ft with 30 rooms. The plaintiff was employed abroad. The 1st defendant, a Class IV employee without any other known source of income could not have contributed anything for the purchase of the property or construction of the building. It is for the defendants who claim to have contributed for such purchase and construction to prove the same. The learned Counsel for the appellants relied on Ext.B4(d) letter to the 3rd defendant wherein the plaintiff has stated as follows. 'I am sorry to note that you had taken Rs. 20,000/- from the fixed deposit and gave him. That was a foolish thing to do. At this rate any one can come with any story and you give all the life savings to them. Whatever money is given Dayanandan is not going to give to the workers or the shops'. Further it is stated as follows. 'If any worker or any one comes there asking for money just tell that whatever was promised to Dayanandan was plus more was already given. If there is any disagreement, they have to wait and talk to me when I come in December'. We have gone through the letters produced by the defendants. They show that the plaintiff did not treat the defendants as strangers at all but as members of his

family. That is why it is stated in one of the letters that as soon as the building is complete the defendants should shift as otherwise the building will be spoiled by non-use and there will be trespass. The letters also indicate that the main purpose of the plaintiff was that in his absence for most of the years, there will be somebody to look after the building and whenever he comes to India they will be of help to him for his food and other comforts. Though the defendants have stated that they were having agricultural operations and other sources of income, nothing has been produced to substantiate them. The first defendant was a low paid employee of a private college. The property is purchased and the building is constructed in Cochin city. It is seen that the building contains 30 rooms and the plaintiff constructed the same with many ideas in his mind. The contention of the defendants that they were having agricultural operation from 3 acres of land orally taken on lease from somebody else has not been substantiated. Even if the defendants were helping the plaintiff in supervising the construction and taking some amount from their pocket for immediate expenses which was only to be reimbursed by the plaintiff, it was never meant to be spent as co-owner of the property.

27. Even assuming that the plaintiff has made use of any amount belonging to the defendants for purchase of the property, or for construction of the building, we are of opinion that the defendants cannot claim to be co-owners of the property for that reason alone. If at all they have got any right it is only for claiming back the amount spent by them. This question is answered by the decision of the Division Bench of this Court in Parvathi Amma v. Mani Amma, 1975 KLT 197. The Division Bench held as follows:

'Where acquisition is made by a managing co-owner by making use of the funds of the co-ownership property it would not enable the remaining co-owners to demand their shares in the properties thus acquired but would only entitle them to ask for an account of their share of the money invested in the acquisition,'

Therefore even if the case of the defendants is to be believed, they are not entitled for any share in the property. This point is therefore found against the appellants.

Point No. 3

28. The defendants who are not parties to the transaction and who are total strangers to the purchase of the property and who have come into possession of a portion of the building on the permission of the plaintiff are estopped from questioning the title of the plaintiff. In the absence of any provision in the Foreign Exchange Regulation Act enabling forfeiture of the property and in the absence of any such order of forfeiture, the plaintiff will get title to the property and the defendants are not entitled to challenge the same. Therefore, this point is found in favour of plaintiff.

Point No. 4

29. Though the defendants have claimed title by adverse possession and limitation, it is only to be stated to be rejected. The facts of this case discloses that the defendants were allowed to use only three rooms in the building with kitchen and bathroom. The building contains 25 rooms and 5 bath rooms and having a total plinth area of 6000 sq.ft. Merely because the defendants were using three rooms on permission, they cannot claim that they prescribed title by adverse possession. Their possession originated on permission and 12 years did not expire, and immediately after the defendants showed reluctance to move out from the building, the suit was filed. The plaintiff had absolute faith and confidence in the defendants but misusing the same the original document and other receipts were taken by them in their custody when the plaintiff was not in India. The plaintiff has given oral evidence in this respect and there is nothing shown to disbelieve him on this aspect. Mere occupation of some rooms by themselves are insufficient to prove adverse possession. Letters produced by the defendants themselves bear eloquent testimony to the fact that the plaintiff was in complete control of construction of the building and was spending money out of his pocket. The fact that the defendants were permitted to take money entrusted by the plaintiff to be given to the contractor also shows that the plaintiff was spending his own money for the purchase of the land and construction of the building. In fact the defendants had no source of income to spend for such purchase or construction. Nothing was brought to our notice by the learned Counsel for the appellants to show that the appellants have succeeded in establishing the plea of adverse possession and limitation and therefore this point is also found against the appellants.

Point No. 5

30. The contention of the defendants that the plaintiff was in the position of a trustee and the provisions of the Benami Transactions (Prohibition) Act are not applicable is also to be considered as in the case of the plea of adverse possession and limitation. If at all, it was the defendants who were in the position of trustees and there was no occasion for the defendants to treat the plaintiff as a trustee. The contention of the defendants that the property was purchased in the name of the plaintiff for administrative convenience is not at all believable. In fact the plaintiff was mostly out of India. There was no reason for to take the property in his name for administrative convenience as he would not be available in India to dc anything in connection with the property. Therefore, the contention of the defendants that the property was taken in the name of the plaintiff as trustee for the defendants is unbelievable. If he was not in the position of a trustee, even according to the defendants the plea of benami cannot be set up as a defence in view of Section 4 of the Benami Transactions (Prohibition) Act. Therefore, this point is also found against the appellants.

31. In F.A.O.No. 60 of 2003, the defendants are the appellants. The appeal is filed against the order in I.A.No. 1237 of 2001. The application was filed for taking action against the plaintiff for violation of the injunction. The trial court found that the injunction was obtained against the true owner of the property and it was also found that no violation of injunction was brought out and hence the application was dismissed. Nothing was brought to our notice to allow the appeal. The same is dismissed.

32. F.A.O.No. 20 of 2003 was filed against the order in I.A.No. 3113 of 2001 in O.S.No. 103 of 2000. That application was also to enforce the injunction order against the plaintiff. It was dismissed stating that the plaintiff was the true owner and the defendants were in lawful possession. In this appeal also, nothing was brought to our notice to hold that the order of the trial court was in any way wrong and hence the appeal is dismissed.

In the light of the above discussion, we find no merit in any of the contentions raised by the appellants. We find that it is a clear case where the plaintiff who was

trying to help the defendants was deceived and his valuable time and money have been lost in litigation in safeguarding the property which he purchased with his hard earned money. It is therefore a fit case where the appeal should be dismissed with costs and we do so. First Appeals from Orders are dismissed without any order as to costs.