

SANTAKUMARI AND ORS.

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v.

LAKSHMI AMMA JANAKI AMMA (D) BY LRS. AND ORS.

AUGUST 10, 2000

[V.N. KHARE AND S.N. VARIAVA, JJ.]

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Benami Transaction :

Execution proceedings against plaintiff—In order to deposit decretal amount plaintiff sold suit property and simultaneously got a document executed by purchaser to sell the property to one of his relations—Held, High Court has rightly concluded that the transaction was a mortgage by conditional sale—Even if the sale deed was executed, vendor had no intention to permanently dispose of the property—The second transaction was a benami transaction and heirs of plaintiff-vendor entitled to a decree of declaration as owner of the property and for recovery of possession.

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Code of Civil Procedure, 1908 :

S.100—Second appeal—Substantial question of law—Construction of documents upon which claim to property is based—Held, is a substantial question of law.

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The suit property belonging to the father of the plaintiff-respondent, namely, 'KN' was attached in execution proceedings. However, he was allowed to get back the property provided he deposited the decretal amount. In order to raise funds, 'KN' executed a sale deed (Ext.A-5) in favour of one 'KC' and on the same day 'KC' executed another agreement (Ext.A-6) in favour of 'KKN', a relation of 'KN', stipulating that 'KC' would sell the suit property to 'KKN' after 10 years but before expiry of 11 years. 'KKN' further assigned his rights under Ext.A-6 to predecessor of the appellant by a deed of assignment (Ext.A-7). Later, when the assignee got a sale deed in respect of suit property executed in his favour as stipulated in Ext.A-6, the plaintiff-respondent filed a suit against the said assignee for declaration that she was owner of the property, and for possession. The trial court decreed the suit holding Ext.A-5 to be a genuine document and Ext.A-6 and Ext.A-7 as benami transactions entered into on behalf of 'KN' and that predecessor of appellant was merely a trustee of 'KN'. It further held

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A that the defendant had spent considerable amounts and it was necessary to take accounts between the parties, and since there was no prayer to render accounts, the suit could not be decreed. Both the parties filed appeals. The appellate court held that once the trial court held Ext.A-5 to be genuine, it followed that Exts.A-6 and A-7 were not genuine, and, therefore, predecessor of the appellant had a right to the suit property. The plaintiff filed a second appeal. The High Court held that taken as a whole, the transactions were in the nature of mortgage by conditional sale, and passed a preliminary decree for redemption and directed taking of accounts. Aggrieved, the defendant filed the present appeal.

C It was contended for the appellant that the High Court without formulating any question of law decided the second appeal and erred in holding that the transaction was a mortgage by conditional sale even though there was no such pleading, nor was there any prayer to that effect.

Dismissing the appeal, the Court

D HELD : 1. It cannot be said that the second appellate court, i.e., the High Court, has not formulated the question of law. The High Court has categorically stated that there is a substantial question of law between the parties inasmuch as the construction of documents under which the claim to property is made is a substantial question of law. [358-G-H]

E *Kochukaskkada Aboobacker v. Attam Kasim*, [1996] 7 SCC 389; *Guran Ditta v. T. Ram Ditta*, AIR (1928) P.C. 172 and *Neelu Narayani v. Lakshmanan*, [1999] 9 SCC 237, relied on.

F 1.2. The suit was for a declaration that the plaintiff is owner of the property and for recovery of possession. The claim to ownership and possession was on the basis of interpretation of the documents Exts.A-5, A-6 and A-7. In effect the trial court, on the interpretation of the three documents, said that the transaction was in the nature of mortgage by conditional sale. The first appellate court erred in interfering merely on the ground that if Ext.A-5 was found to be a genuine document, it necessarily followed that Exts. A-6 and A-7 were also genuine transactions and not benami transactions. [358-D-F]

H 1.3. The facts leading to the execution of Exts.A-5 to A-7, and the manner in which these documents are executed are all very relevant. The property had been sold in execution of a decree. At the relevant time the

Transfer of Property Act did not operate in the State of Travancore and only the general principles of that Act, based on justice, equity and good conscience, were applicable. It is clear that even though the sale deed was executed, the vendor had no intention to permanently dispose of the property. Simultaneously with the execution of Ext.A-5 the purchaser, i.e. 'KC' executed a second agreement to sell the property after 10 years. The two documents were executed immediately one after the other and were also registered simultaneously. The proposed purchaser, in Ext.A-6, was a close relative of the vendor and was already 72 years of age. This makes it clear that Ext.A-6 was for and on behalf of 'KN', the father of the plaintiff. [359-B-G]

1.4. It cannot be said that the findings of the trial court and the second appellate court, i.e., the High Court that the documents Exts.A-5, A-6 and A-7 are not what they purport to be and that they had been executed with the intention that the property would be re-conveyed to plaintiff's father, are perverse and/or illogical. Nor can it be said that such an interpretation of these documents, could never have been arrived at. The High Court was confirming the findings of the trial court. Therefore it cannot be said that it has reversed concurrent findings of fact. The High Court by stating that the transaction is a mortgage by conditional sale has merely put a form to the said transaction. Taken as a whole, the transaction appears to be a mortgage by conditional sale. The High Court is not making out any new case but is merely interpreting the documents and putting a form to the nature of the transactions. [360-B-C; D]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1365 of 1990.

From the Judgment and Order dated 7.8.87 of the Kerala High Court in S.A. No. 313 of 1981.

T.L.V. Iyer and Ms. Malini Poduval for the Appellants.

Sanjay Sen and S. Sukumaran and Ramesh Babu for the Respondents.

The Judgment of the Court was delivered by

S. N. VARIAVA, J. This Appeal is against a Judgment dated 7th August, 1987 in Second Appeal No. 313 of 1981.

Briefly stated the facts are as follows:

A In 1939 the suit property came to the share of one Krishnan Nair by virtue of a partition in his family. As the family of Krishnan Nair had been conducting several chit funds a number of debts had been incurred in that business, several suits had been instituted and several decrees had been passed against the said Krishnan Nair. Krishnan Nair, therefore, executed a Sale Deed
B in 1940 selling the land to his brother-in-law, one Parameswaran Nair. One of the decree holders got this property attached in execution of his decree. Parameswaran Nair filed objection claiming to be owner of the property by virtue of Sale Deed executed in his favour. The Executing Court held that the Sale Deed was sham and bogus and that the same was a benami transaction. The Executing Court held that the property continued to remain vested in
C Krishnan Nair. The property was thus sold in execution. Thereafter, Krishnan Nair filed a Petition to set aside the sale. That Petition was dismissed. However, Krishnan Nair was allowed to get back the property, provided he deposited the decretal amount, interest and commission.

D In order to raise money to so deposit Krishnan Nair then executed a Sale Deed in favour of one Kesavan Channar for Rs. 1,200. The Sale Deed provided that Krishnan Nair was to receive a consideration of Rs. 1,200 and the purchaser was to pay off the creditors. This Sale Deed was registered and Kesavan Channar was put in possession of the land. On the same day and simultaneously with the execution of this Sale Deed another Agreement was executed by
E Kesavan Channar in favour of Kochu Kunja Nair. That Agreement was also registered simultaneously and immediately after the above mentioned Sale Deed. This Agreement provided that Kesavan Channar would sell the suit property to Kochu Kunja Nair for a sum of Rs. 1,400 after a period of 10 years, but before 11 years were over. It must immediately be mentioned that the said
F Kochu Kunja Nair was a relative of Krishnan Nair. For the sake of convenience hereinafter the Sale Deed in favour of Kesavan Channar will be referred to as Exhibit A-5 and the Agreement to Sell in favour of Kochu Kunja Nair will be referred to as Exhibit A-6.

G Before the period of 10 years had expired Kesavan Channar expired and there was a partition in his family. The suit property came to the share of his daughter, one Lakshmikutty. On 14th February, 1952 Kochu Kunja Nair assigned his rights under Ext. A-6 to the predecessor of the present Appellant. For the sake of convenience this Deed of Assignment will hereinafter be referred to as Exhibit A-7.

H At the end of a period of 10 years Lakshmikutty did not sell the property

as envisaged by the Agreement Ext. A-6. Therefore, the predecessor in title of the Appellant filed Suit No. 198 of 1957 for specific performance of Ext. A-6. It must be mentioned that Krishnan Nair was made a party defendant to that Suit. He was Defendant No. 15. That Suit came to be decreed and the Appeal filed by Lakshmikutty was dismissed. Second Appeal filed by Lakshmikutty was also dismissed. Therefore, Lakshmikutty executed a Sale Deed in favour of the predecessor of the Appellant on 9th July, 1964. The predecessor in title took possession of the property through the Court on 18th July, 1967.

On 27th January, 1976 the daughter of Krishnan Nair filed Suit No. 128 of 1976 for declaration that she was the owner of the property and for recovery of possession. This Suit was filed against the predecessor in title of the Appellant herein. The other heirs of Krishnan Nair were Defendants Nos. 2 to 6 in that Suit. Those heirs did not actively participate in that Suit. Thus the real fight was between the daughter of Krishnan Nair and the predecessor in title of the Appellant. On 7th March, 1977 the Suit was decreed by the trial Court. The trial Court held that the Sale Deed, Ext. A-5 was a genuine document and that it was not a sham document. The trial Court held that Exts. A-6 and A-7 were benami documents, which had been entered into on behalf of Krishnan Nair. The trial Court held that the predecessor of the Appellant was merely a trustee of Krishnan Nair. The trial Court, however, found that the predecessor had spent considerable amounts and that it was necessary to take accounts between the parties. The trial Court held that as there was no prayer to render accounts the Suit could not be decreed until accounts were taken and the predecessor of the Appellant was paid the amounts spent by him. Therefore, the trial Court refused to give possession to the daughter of Krishnan Nair.

Both parties went in Appeal. The Appellate Court disposed of both the Appeals by a common Judgment dated 19th April, 1980. The Appellate Court held that once the trial Court had concluded that Ext. A-5 was genuine it automatically followed that Exts. A-6 and A-7 were also genuine. On this basis the Appellate Court held that Exts. A-6 and A-7 were not benami transactions and the predecessor of the Appellant had a right to the suit property. The Appellate Court, therefore, dismissed the Suit.

The daughter of Krishnan Nair filed a Second Appeal in which the impugned Judgment dated 7th August, 1987 has been passed. By the impugned Judgment the High Court has held that the nature of the transactions clearly indicated that Krishnan Nair had no intention of selling of the property and that in order to meet his debts a device had been formulated by which there was

A a notional sale to Kesavan Channar with a condition that the property would be sold back after a period of 10 years. The High Court held that taken as a whole the transactions were in the nature of mortgage by conditional sale. The High Court, therefore, passed preliminary decree for redemption and directed taking of accounts. It is this Judgment which has been assailed before us.

B It has been seriously contended by Mr. Iyer that the High Court without formulating any question of law had disposed of the Second Appeal and arrived at a conclusion that the transaction was mortgage by conditional sale even though there was no pleading to this effect, no prayer to this effect and neither the trial Court nor the first Appellate court had come to any such conclusion.

C It was submitted that the High Court had interfered with the concurrent findings of fact by the two Courts below and that, therefore, the Judgment of the High Court should be set aside and the Appeal be made absolute.

D We have heard counsel for the parties. We have read the Judgments of the Courts below and all relevant documents. It is to be seen that the suit was for a declaration that the daughter of Krishnan Nair is owner of the property and for recovery of possession. The claim to ownership and possession was on the basis of interpretation of the documents Exts. A-5, A-6 and A-7. On an interpretation of the documents the trial Court has held that there was a sale in favour of Kesavan Channar but the subsequent Agreements Exts. A-6 and A-7 were merely benami transactions. In effect the trial Court was also saying, on the interpretation of the three documents, that the transaction was in the nature of mortgage by conditional sale. The first Appellate Court interfered merely on the ground that if Ext. A-5 was found to be a genuine document it necessarily followed that Exts. A-6 and A-7 were also genuine transactions and not benami transactions. No reason appears to have been given by the first Appellate Court for coming to this conclusion. We fail to understand as to how merely because Ext. A-5 was held to be genuine it necessarily followed that Exts. A-6 and A-7 were not benami transactions. In our view, the Judgment of the first Appellate Court appears to be erroneous and has rightly been set aside by the impugned Judgment.

G As is seen the question is of interpretation of the three documents. It is not correct to say that the second Appellate Court has not formulated the question of law. The second Appellate Court has categorically stated that there is a substantial question of law between the parties inasmuch as the construction of the documents under which the claim to property is made is a substantial question of law. That construction of documents would be a substantial ques-

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tion of law is now a well settled proposition. This proposition has been settled as far back as the Judgment of the Privy Council in the case of *Guran Ditta v. T. Ram Ditta*, reported in AIR (1928) P.C. 172. It has since been re-affirmed by this Court in the case of *Kochukaskkada Aboobacker v. Attam Kasim*, reported in [1996] 7 S.C.C. 389 and the case of *Neelu Narayani v. Lakshmanan*, reported in [1999] 9 S.C.C. 237. Thus we see no substance in the contention that no question of law had been formulated.

Let us then see whether the interpretation placed by the trial Court and the High Court on Exts A-5, A-6 and A-7 is correct. The facts leading to the execution of these documents, the manner in which these documents are executed are all very relevant. As stated above, the property had been sold in execution of a decree. Krishnan Nair was, however, given an opportunity to get back the property provided he deposited the decretal amount, interest and the commission. Krishnan Nair being heavily debted did not have the money. It is clear that he, therefore, devised a method of executing a Sale Deed in favour of Kesavan Channar, i.e. Ext. A-5 with a condition that the property be resold after 10 years. It is to be remembered that at that time the Transfer of Property Act did not operate in the State of Travancore and only the general principles of that Act, based on justice, equity and good conscience, were applicable. It is clear that even though the Sale Deed was executed Krishnan Nair had no intention to permanently dispose of the property. It is clear from the fact that simultaneously with the execution of Ext. A-5 the purchaser, i.e. Kesavan Channar, executed a second Agreement Ext. A-6. Unless there was no intention to re-convey there would be no question of a purchaser simultaneously executing the Agreement to Sell the property after 10 years. The two documents were executed immediately one after the other and were also registered simultaneously one after the other. There would not be two such documents executed simultaneously unless the intention was that the property was to be reconveyed to the vendor i.e. Krishnan Nair. It is significant that the proposed purchaser, in Ext. A-6, was a close relative of Krishnan Nair. It is also relevant that Kochu Kunja Nair at the time of execution of Ext. A-6 was already 72 years of age. This makes it clear that Ext. A-6 was for and on behalf of Krishnan Nair. This Deed of assignment in favour of the predecessor in title of the Appellant, i.e. Ext. A-7, by Kochu Kunja Nair shows that Ext. A-6 had been executed at the instance of the predecessor of the Appellant. This further indicates that the predecessor of the Appellant was aware of the fact that the property was being sold to Kesavan Channar under Ext. A-5 with a condition that the same would be sold back after a period of 10 years to Kochu Kunja

A Nair who was acting on behalf of Krishnan Nair. The predecessor of the Appellant was aware that the property had been taken on behalf of Krishnan Nair and he himself took the property on behalf of Krishnan Nair probably due to the old age of Kochu Kunja Nair. In our view, it cannot be said that the findings of the trial Court and the second Appellate Court that the documents

B Exts. A-5, A-6 and A-7 are not what they purport to be and that they had been executed with the intention that the property would be re-conveyed to Krishnan Nair is perverse and/or illogical. In our view it cannot be said that such an interpretation, of these documents, could never have been arrived at. The second Appellate Court was confirming the findings of the trial Court. Therefore it cannot be said that the second Appellate Court has reversed concurrent

C findings of fact. The second Appellate Court by stating that this is a mortgage by conditional sale has merely put a form to the transaction. Taken as a whole the transaction appears to be a mortgage by conditional sale. The second Appellate Court is not making out any new case but is merely interpreting the documents and putting a form to the nature of the transactions.

D We, therefore, find no reason to interfere. The Appeal stands dismissed. There will be no order as to costs.

R.P.

Appeal dismissed.