(2003) 03 MAD CK 0100

Madras High Court

Case No: O.S.A. No''s. 139 to 141 of 1998

George Thomas		APPELLANT
	Vs	
Smt. Srividya and The Tax Recovery Officer IV(1)		RESPONDENT

Date of Decision: March 4, 2003

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 18 Rule 17, Order 18 Rule 3
- Evidence Act, 1872 - Section 155, 165
- Tamil Nadu Court Fees and Suits Valuation Act, 1955 - Section 19, 30

Citation: AIR 2003 Mad 290 : (2003) 1 CTC 705 : (2003) 1 LW 755 : (2003) 1 MLJ 823

Hon'ble Judges: S. Jagadeesan, J; D. Murugesan, J

Bench: Division Bench

Advocate: G. Vasantha Pai for P.J. George, for the Appellant; G. Subramanian for P.B. Ramanujam and P.B. Balaji, for the Respondent

Final Decision: Dismissed

Judgement

D. Murugesan, J.
All these appeals arise from the common judgment dated 08.06.1998 made in C.S. Nos. 866 of 1994, 485 of 1997

and 1505 of 1995.

2. For the purpose of convenience, Smt. Srividya will be referred to as ""the plaintiff"" and Mr. George Thomas will be referred to as ""the defendant

and the Tax Recovery Officer IV, Madras - 34 will be referred to as the ""second defendant"".

3. The facts leading to the filing of C.S. No. 866 of 1994 and as pleaded in the plaint are as follows:-

The plaintiff by name Smt. Srividya is a film artist. She married the defendant on 19.01.1978. Out of her earnings as an actress in films, she

purchased a vacant land at No. 7, Narayanan Street, Mahalingapuram, Madras 600 034 to an extent of two grounds and 1964 sq.ft., from one

Mrs. R.M. Sarojini by a registered sale deed dated 21.04.1983. After obtaining permission from the Corporation of Madras in the year 1985, she

put up a construction on the said vacant land in the year 1986. The property is assessed in her name and she is paying the property tax. She is also

an income tax and wealth tax assessee. After the construction of the building, both the plaintiff and the defendant lived together in the said house.

Due to misunderstanding that arose between them, the defendant started ill-treating the plaintiff. The defendant, in fact was cruel and indulged in

several acts of cruelty. Since the life was miserable, the plaintiff had to leave the house fearing for her life on 14.06.1987. Since then, the plaintiff is

living separately. The defendant is squatting over the property besides enjoying the luxury articles left by the plaintiff in the house viz., sofa sets

costly furniture, ward robes etc.

4. The plaintiff further alleged that the defendant is also letting out the house for the purpose of film shootings and is collecting the rent for the same.

The plaintiff therefore issued a notice on 01.03.1993 to the defendant, demanding the vacant possession of the land and building. Nevertheless, the

defendant did not hand over the vacant possession of the property to the plaintiff. As the defendant is making use of the building and the luxury

articles worth about Rs.3,00,000/-, the plaintiff claimed the damages from the defendant at Rs.25,000/- per month for the period from 31.01.1990

to 30.04.1993. According to the plaintiff, even if the building is let out on rent, it would fetch not less than Rs.30,000/- per month. On the above

averments, the plaintiff prayed for a judgment and decree

(1) directing the defendant to vacate and hand over vacant possession of the premises to the plaintiff.

(2) directing the defendant to pay Rs.9,00,000/- as damages for use and occupation from 31.01.1990 to 30.04.1993 with a further direction that

the defendant to pay a sum of Rs.1000/- per day from the date of the plaint till the date of actual delivery of vacant possession of the suit property

to the plaintiff.

5. The suit was resisted by the defendant with the following averments in the written statement:-

The marriage between the plaintiff and the defendant was admitted. However, according to the defendant the vacant site was purchased by the

defendant from his own funds and the funds given to him by his brother Samson Thomas who works in Doha, Qatar and his father by way of gifts.

The plaintiff''s contribution for the purchase of the vacant site was only Rs.70,000/-. Since the plaintiff happened to be the wife of the defendant,

the defendant purchased the vacant site in the name of the plaintiff. The averment that the plaintiff put up the construction from her own funds was

denied. The defendant further averred that the contribution of the plaintiff for the construction of the house was only Rs.1,40,000/-. The total

investment and the cost of construction of the house was Rs.12,00,000/-. Except Rs.2,10,000/- contributed by the plaintiff, the remaining cost of

construction was met by the defendant from the funds of his brother. Since the land was registered in the name of the plaintiff, plan for construction

was obtained in the name of the plaintiff. The defendant also denied that he is earning an income of over Rs.30,000/- per month by letting out the

house for shootings. The further averment of the defendant is that the defendant is the owner of the property and the plaintiff is not entitled to have

vacant possession of the property.

6. The facts leading to filing of C.S. No. 485 of 1997 are as follows:

The suit in C.S. No. 485 of 1997 was filed by George Thomas, who is the defendant in C.S. No. 866 of 1994, seeking for a judgment and

decree, declaring him the absolute owner of the property and consequently passing an order of injunction restraining the first defendant, who is the

plaintiff in C.S. No. 866 of 1994 from interfering with the plaintiff''s possession and enjoyment of the suit property or encumbering the same in any

manner either by sale or mortgage and restraining the second defendant from bringing out the suit property to sale for the income tax arrears of the

first defendant. The averments in the plaint are more or less the same made in the written statement filed by George Thomas in the suit filed by Smt.

Srividya.

7. Mr. George Thomas also filed another suit in C.S. No. 1505 of 1995 for a judgment and decree to set aside the order dated 09.11.1994 made

in T.R.34/89-90 passed by the Tax Recovery Officer IV(1), Madras is illegal and null and void and for a consequential order of permanent

injunction restraining the Tax Recovery Officer from proceeding against the suit property. The suit came to be filed challenging the order of the Tax

Recovery Officer dated 09.11.1994, dismissing the claim petitions filed by the plaintiff.

8. Written statements were also filed by Smt. Srividya disputing the claim of the plaintiff viz., George Thomas. The Tax Recovery Officer also filed

a written statement justifying the right of the department to order attachment over the property for the income tax dues.

9. Based on the above pleadings learned Judge framed the following issues:-

C.S. No. 866 of 1994:

1. Whether the suit property was purchased and construction with contributions of the defendant as alleged?

2. Whether the plaintiff is entitled to vacant possession of the same?

3. Whether the plaintiff is entitled for damages for use and occupation? If so, to what extent?

4. Whether the furniture available in the suit property belongs to the defendant?

5. To what reliefs the parties are entitled ?

C.S. No. 1505 of 1995:

1. Whether the order of Recovery Officer of the Income Tax Department dated 09.11.1994 rejecting the claim of the plaintiff is liable to be set

aside?

2. Whether the suit property site was purchased by the plaintiff Benami?

3. Whether the plaintiff built the superstructure on the suit property site with his funds?

4. Whether the plaintiff is entitled to the declaration which he has prayed for?

5. Whether there is collusion between the defendants 1 and 2 in setting up title on the second defendant?

6. Whether the second defendant had no sufficient funds to build up construction on the suit land?

C.S. NO. 485 of 1997:-

1. Whether the suit property was purchased benami by the plaintiff George Thomas in the name of the first defendant Srividya?

2. Whether the construction was done by the plaintiff George Thomas and whether he is the owner of the same?

3. Whether the Income Tax Department is entitled to proceed against the suit property for the arrears due by the first defendant Srividya?

4. Whether the plaintiff is entitled to any relief? If so, to what relief?

5. Is the suit barred by limitation?

10. Since the parties are the same in all the suits and the issues in the suits are common, all the suits were tried jointly and common evidence was

recorded in C.S. No. 866 of 1994. The plaintiff examined herself as P.W.1 besides P.Ws.2 to 7. The defendant examined himself as D.W.1

besides D.W.2 his brother Samson Thomas. The father of the defendant was examined by the Commissioner as C.W.1. Exs.A-1 to A-36 were

marked on behalf of the plaintiff and Exs.B-1 to B-70 were marked on behalf of the defendant.

11. On considering the evidence, oral and documentary, learned Judge negatived the contention of the defendant and did not find that the suit

property was purchased and the construction was made from the funds of the defendant. Learned Judge also found that the plaintiff is entitled to

the suit property and she is also entitled for damages from the defendant for use and occupation of the premises at the rate of Rs.10,940/- per

month for the period of three years prior to the suit and also in future, and that the plaintiff is not entitled to recovery of furniture. Learned Judge

has negatived the claim of the defendant that the property was purchased in benami in the name of the plaintiff. The learned Judge also held that the

order of Tax Recovery Officer dated 09.11.1994, rejecting the claim petition filed by the defendant was in accordance with law and hence, the

Income Tax Department is entitled to proceed against the property for the arrears due and payable by the plaintiff and the learned Judge decreed

the suit for recovery of possession of the suit property from the defendant.

12. Mr .G. Vasantha Pai, learned Senior Counsel appearing for the appellant/defendant would challenge the judgment and decree of the learned

Judge mainly on the following grounds:-

(i) that the suit filed by the plaintiff should be dismissed as it is undervalued on the basis of the annual rental value, whereas it ought to have been

valued on the basis of market value and court fee should have been paid thereon.

(ii) that the vacant site was purchased by the defendant in the name of the plaintiff in order to avoid the income tax and the plaintiff was only a

benami. Further, the property was purchased in the name of Smt. Srividya as she happened to be the wife of the defendant and the motive for such

registration of the sale deed in the name of the wife of the defendant was bona fide. Except a sum of Rs.70,000/- and a further sum of

Rs.1,40,000/- contributed by the plaintiff towards the purchase of the vacant site and construction of the house respectively, the entire remaining

amount towards purchase of the vacant site and the construction of the house viz., Rs.12,00,000/- was borne by the defendant from his funds and

the fund of his brother Samson Thomas and from the gifts of his father. The plaintiff did not have sufficient funds either to purchase the vacant site

or to put up construction as she was getting only a very nominal amount for her performance in the films and in fact, her bank balance as on the

date of the purchase of the vacant site was only Rs.15.87/-. There are sufficient evidence to show that a sum of Rs.3,00,000/- was sent by the

brother of the defendant Samson Thomas in the name of Srividya and the father of the defendant has also contributed money from the sale of the

plots at Bombay only for the use of construction.

(iii) that the evidence of P.W.1, P.Ws.4 to 7 recorded after the closure of the evidence of D.Ws cannot at all be taken into consideration as the

plaintiff cannot be allowed to fill up the lacuna in her earlier evidence. Therefore, the evidence of P.Ws.1, 4 to 7 cannot be relied upon by the

plaintiff under the provisions of Order XVIII Rule 17 of the Civil Procedure Code.

13. To substantiate the above contentions, learned Senior Counsel took us through the evidence let in both on behalf of the plaintiff and the

defendant as well the various documents marked.

14. Mr. G. Subramanian, learned Senior Counsel for the plaintiff, on the other hand, would contend that the suit is valued correctly on the basis of

the annual rental value of the building and the Court fee also has been correctly paid. Learned Senior Counsel would further submit that merely

because the suit is undervalued, the same cannot be dismissed on that ground alone as the Courts are empowered to decree the suit with a

direction to the plaintiff to deposit the deficit court fee for the entitlement of the fruits of the decree.

15. Insofar as the submissions of the learned Senior Counsel for the defendant on merits, he submitted that when admittedly, the suit property is in

the name of the plaintiff and the same has been assessed to property tax in her name, and the defendant plead the ground of ""benami"", the burden

to prove the benami transaction is on the defendant. He would also submit that the question of benami transaction does not arise in a transaction

when the relationship of the parties is taken into consideration more particularly, between the husband and wife. Learned Senior Counsel would

further submit that on the date when the vacant site was purchased and the construction was made, cordial relationship existed between the plaintiff

and the defendant. Misunderstanding arose only in the year 1986 and the motive that the vacant site was purchased in the name of the plaintiff only

to avoid income tax is far from acceptance more particularly, it was the specific case of the defendant that he was not an income tax assessee at

the relevant point of time and had no income or savings as admittedly, the only film by name ""Theekkanal"" which was produced by him was a flap

resulting in heavy loss.

16. Learned Senior Counsel would also submit that the suit filed by George Thomas was hopelessly barred by limitation as the dispute between the

plaintiff and the defendant arose in the year 1987, the suit was filed only in 1997. Learned Senior Counsel also took us extensively to the

pleadings, evidence of P.Ws as well as the evidence let in by the defendant.

17. Learned Senior Counsel would also submit that the evidence of P.Ws.1, 4 to 7 taken after the closure of evidence of the defendant can very

well be taken into consideration inasmuch as an Application No. 3877 of 1997 was taken by the plaintiff for permission to the plaintiff to let in

evidence later after the evidence of C.S. No. 1505 of 1995 and C.S. No. 485 of 1997 were over. The said application was not objected to by

the defendant and in fact, an endorsement of ""no objection"" was also made on 27.11.1997 and consequently, the petition was allowed. Hence, it is

not open to the defendant to raise the said question. The plaintiff is therefore entitled to rely upon the evidence let in after the closure of evidence of

defence witnesses.

18. Both the learned Senior Counsel for the plaintiff and the defendant also relied upon various pronouncements of the High Courts and the Apex

Court to sustain their respective submissions and those judgments would be referred to by us in the appropriate places in this judgment.

19. In view of the pleadings and the rival contentions raised, basically the following points arise for our consideration:-

(1) Whether the plaintiff has correctly valued the suit in C.S. No. 866 of 1994?

(2) Whether the evidence of P.Ws.1, 4 to 7 recorded and the exhibits marked after the closure of the evidence of the defendant could be taken

into consideration for the disposal of the appeals?

(3) Whether the plea of benami as pleaded by the defendant is established?

(4) Whether the plaintiff is entitled to damages from the defendant for use and occupation of the premises and furniture like sofa etc?

(5) To what relief both the plaintiff and the defendants are entitled to?

20. Point No. 1: The first contention of Mr. G. Vasantha Pai, learned Senior Counsel appearing for the defendant is that the suit is under valued.

The valuation has been made on the basis of annual rental value multiplied by 20 times and the Court fee has been paid thereon. The valuation

ought to have been made u/s 30 of the Tamil Nadu Court Fees and Suits valuation Act, 1955 and consequently, the court fee should have been

paid on the basis of the market value of the property. In this context, learned Senior Counsel would draw our attention to the observation of this

Court made in the judgment reported in D. PATTAMMAL ..VS.. K. KALYANASUNDARAM 1988 (2) L.W. 161 defining the term ""Market

value"".

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21. Section 30 of the Tamil Nadu Court Fees and Suits Valuation Act, 1955 reads as under:-

Suits for possession not otherwise provided for:- In a suit for possession of immovable property not otherwise provided for, fee shall be

computed on the market value of the property or on rupees four hundred, whichever is higher"".

22. It is the contention of Mr. Vasantha Pai, learned Senior Counsel for the defendant that the suit property is worth more than Rs. One crore

whereas, the plaintiff has valued the suit only for a sum of Rs.2,18,420/- while seeking a relief of recovery of possession of the property. The

proper valuation must be on the basis of market value and the correct Court fee to be paid is u/s 30 of the Tamil Nadu Court Fees and Suits

Valuation Act, 1955. In the absence of proper valuation of the suit, the plaint ought to have been returned under Order VII Rule 10(1) of C.P.C

read with Order II Rule 3 of the Original Side Rules.

23. In the written statement filed by the defendant, the question as to the under valuation of the suit was not raised and for the said reason, the

learned Judge did not frame any issue as to the same for a decision.

24. As to the sustainability of the submission of the learned Senior Counsel for the defendant in regard to the valuation of the suit, Mr. G.

Subramanian, learned Senior Counsel for the plaintiff submitted that the Court fee is a matter between the plaintiff and the State and in the absence

of any objection raised in the written statement, the defendant cannot be now allowed to raise the same in the appeal. For the said proposition,

learned Senior Counsel relied upon the judgment of the Supreme Court reported in Sri Ratnavaramaraja Vs. Smt. Vimla, : The Supreme Court in

the said judgment has held as follows:-

The Court fees Act was enacted to collect revenue for the benefit of the State and not to arm a contesting party with a weapon of defence to

obstruct the trial of an action. By recognising that the defendant was entitled to contest the valuation of the properties in dispute as if it were a

matter in issue between him and the plaintiff and by entertaining petitions preferred by the defendant to the High Court in exercise of its revisional

jurisdiction against the order adjudging court fee payable on the plaint, all progress in the suit for the trial of the dispute on the merits has been

effectively frustrated for nearly five years. We fail to appreciate what grievance the defendant can make by seeking to invoke the revisional

jurisdiction of the High Court on the question whether the plaintiff has paid adequate court fee on his plaint. Whether proper court fee is paid on a

plaint is primarily a question between the plaintiff and the State. How by an order relating to the adequacy of the court fee paid by the plaintiff, the

defendant may feel aggrieved, it is difficult to appreciate. Again, the jurisdiction in revision exercised by the High Court u/s 115 of the CPC is

strictly conditioned by cls.(a) to (c) thereof and may be invoked on the ground of refusal to exercise jurisdiction vested in the Subordinate Court or

assumption of jurisdiction which the court does not possess or on the ground that the Court has acted illegally or with material irregularity in the

exercise of its jurisdiction. The defendant who may believe and even honestly that proper court fee has not been paid by the plaintiff has still no

right to move the superior courts by appeal or in revision against the order adjudging payment of court fee payable on the plaint.

But, this section only enables the defendant to raise a contention as to the proper court fee payable on a plaint and to assist the Court in arriving at

a just decision on that question. Our attention has not been invited to any provision of the Madras Court Fees Act or any other statute which

enables the defendant to move the High Court in revision against the decision of the Court of first instance on the matter of court fee payable in a

plaint. The Act, it is true by Section 19 provides that for the purpose of deciding whether the subject matter of the suit or other proceeding has

been properly valued or whether the fee paid sufficient, the Court may hold such enquiry as it considers proper and issue a commission to any

other person directing him to make such local or other investigation as may be necessary and report thereon. The anxiety of the Legislature to

collect court fee due from the litigant is manifest from the detailed provisions made in Chapter III of the Act, but those provisions do not arm the

defendant with a weapon of technicality to obstruct the progress of the suit by approaching the High Court in revision against an order determining

the Court fee payable. In our view, the High Court grievously erred in entertaining revision applications on questions of court fee at the instance of

the defendant, when no question of jurisdiction was involved.

25. As per the law laid down by the Supreme Court, it is seen that the question as to whether the proper Court fee is paid on the plaint is primarily

a matter between the Court and the State and the defendant cannot stall the proceedings of the suit by raising the said question. Factually also, in

our case, before the Court below no question was raised, no issue was framed and no adjudication was made. Hence, we hold that the defendant

is disentitled from raising the said question at the appellate stage.

26. However, the disentitlement of the defendant to raise the plea of under valuation will not absolve the liability of the plaintiff to pay proper Court

fee. In the event, on facts, this Court comes to the conclusion that the suit is undervalued, even in the absence of any plea, it can direct the plaintiff

to pay the deficit court fee. Such exercise of power is on the basis of the settled principle of law that the Court fee is a matter between the Court

and the State. On the materials available, if the Court is satisfied that the suit is undervalued and consequently the plaint is liable to be rejected,

nevertheless, the plaintiff may be called upon to pay the deficit court fee, as it is the obligation of the plaintiff to take care that the valuation of the

suit is as per the provisions of the Tamil Nadu Court Fees and Suits Valuation Act, 1955. In this case, from the materials we find that in a suit for

recovery of possession, the proper court fee ought to have been paid is only u/s 30 of the Tamil Nadu Court Fees and Suits Valuation Act and

such court fee shall be only on the basis of the market value of the property. The direction for payment of the court fee is made by the Courts only

to prevent a plaintiff to deliberately undervalue the suit. In fact, the Apex Court in the judgment in Tara Devi Vs. Sri Thakur Radha Krishna

Maharaj, through Sebaits Chandeshwar Prasad and Meshwar Prasad and Another, : while considering the conduct of the plaintiff in valuing the

relief and paying deficit court fee has held as follows:-

The plaintiff however, has not been given the absolute right or option to place any valuation whatever on such relief and where the plaintiff

manifestly and deliberately underestimates the relief, the court is entitled to examine the correctness of the valuation given by the plaintiff and to

revise the same, if it is patently arbitrary and unreasonable.

The relief sought for by the plaintiff in O.S. No. 866 of 1994 is for a judgment and decree directing the defendant to vacate and handover vacant

possession of the premises. Such a relief should be valued only u/s 30 of the Tamil Nadu Court Fees and Suits Valuation Act, 1955. Hence, we

hold that the suit is undervalued and for the said purpose, neither the plaint can be rejected at this stage nor the suit can be dismissed and to meet

the ends of justice, it would be only proper that the plaintiff should be directed to pay the deficit court fee in the event the judgment and decree

made in O.S. No. 866 of 1994 is confirmed on merits by this Court.

27. Point No. 2: As to the reliance placed by the learned Judge over the evidence of P.Ws.1, 4 to 7 and Exs.B-22 to B-70, Mr. G. Vasantha Pai,

learned Senior Counsel submitted that in terms of Order XVIII Rule 17 of C.P.C., the Court alone is empowered to recall any witness who has

been examined and may put such questions to him as the Court thinks fit. Learned Senior Counsel also relied upon Section 165 of the Evidence

Act, which empowers the Judge to ask any questions he pleases of any witnesses or parties about the fact relevant or irrelevant and may also

order the production of any document or thing and neither the parties nor their agent shall be entitled to make any objection to any question or

order and further the parties cannot cross-examine any witnesses without the leave of the Court. Placing reliance on the above provisions, learned

Senior Counsel would contend that there is no provision empowering the plaintiff to re-examine a witness after the evidence of the defendants are

over and also produce additional witnesses. To appreciate the above submission, it would be relevant to extract the relevant provisions.

Order XVIII Rule 17 of C.P.C: Court may recall and examine witness:- The Court may at any stage of a suit recall any witness who has been

examined and may (subject to the law of evidence for the time being in force) put such questions to him as the Court thinks fit.

Section 165 of the Indian Evidence Act: Judge''s power to put questions or order production: The Judge may, in order to discover or to obtain

proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties about any fact relevant or

irrelevant, and may order the production of any document or thing; and neither the parties nor their agent shall be entitled to make any objection to

any such question or order, nor without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question.

28. Of course, Order XVIII Rule 17 of C.P.C empowers the Court to recall any witness who has been examined and may put questions to him as

the Court thinks fit. Such witnesses are amenable for cross-examination with the leave of the Court as contemplated u/s 165 of the Evidence Act.

Those provisions relate to the suo motu power of the Court in either recalling the witnesses or directing the production of any document or the

thing and further empowering the parties to cross-examine any witness so recalled with the leave of the Court. However, in the case on hand, an

application for recalling of witnesses was filed under Order XIV Rule 8 of the Original Side Rules read with Order XVIII Rule 3 of C.P.C and the

same was allowed by the Court. The provisions of Order XVIII Rule 17 and Section 165 of the Evidence Act are not applicable to the facts of the

present case and consequently the reliance placed on the above provisions cannot be accepted. Hence, we are constrained to hold so in view of

the peculiar facts and circumstances of the case, which we narrate hereunder.

29. It is to be seen that the Chief examination of P.W.1, Smt. Srividya commenced on 03.11.1997 and the cross examination was over on

27.11.1997. The chief and cross examination of P.W.2 were over on 03.12.1997. Likewise, the chief and cross examination of P.W.3 were over

on 05.12.1997. The defendant Mr. George Thomas was examined in chief on 09.12.1997 and his examination continued and the same was

completed on 23.01.1998. Even before P.W.2 was examined on 03.12.1997 and immediately after completion of evidence of P.W.1 on

27.11.1997, an Application No. 3877 of 1997 was filed on 26.11.1997 under Order XIV Rule 8 of Original Side Rules read with Order XVIII

Rule 3 of CPC for a direction to permit the plaintiff to let in evidence later, after the evidence of the plaintiff in C.S. No. 1505 of 1995 and C.S.

No. 485 of 1997 are over. A copy of the said application was served on the learned counsel appearing for the defendant on 26.11.1997 itself.

When the application was taken up for hearing on the next day viz., 27.11.1997, no objection endorsement was made by the learned counsel

appearing for the defendant. Hence, the petition was allowed on 27.11.1997. Only after the said order, P.Ws.2 and 3, D.Ws 1 and 2 and C.W.1

were examined. In terms of the said order, P.Ws.4 to 7 were all examined from 04.08.1998 and P.W.1 was again examined on 23.02.1998.

From the evidence, it is seen that all the witnesses viz., from P.Ws.4 to 7 and P.W.1 after recall were cross-examined by the counsel for the

defendant and Exs.A-22 onwards were marked. The defendant has effectively participated in the cross-examination and in fact, had relied upon

those evidence before the learned Judge at the time of hearing of the appeals. Only at the appellate stage, an argument is advanced that the

evidence of P.W.1 after recall and the evidence of P.Ws 4 to 7 and exhibits marked after the closure of the evidence of D.Ws. cannot be taken

into consideration. Such a plea, in our considered view, is totally unreasonable as the same is unacceptable and it cannot lie in the mouth of the

defendant to raise such a plea after having effectively participated in the cross-examination of those witnesses and allowed the learned trial Judge to

rely upon those evidence for the disposal of the suit. Our attention is also not drawn as to whether the defendant has ever challenged the order

dated 27.11.1997, permitting the plaintiff to lead evidence after the closure of the evidence of the defendant. In the absence of such challenge, it

must be held that the defendant accepted for re-examination of the plaintiff more particularly, by making an endorsement of ''no objection'' and has

taken such a plea only as a new invented route to prosecute his claim. Such a new invented route is not available in view of the above conduct of

the defendant, which we discussed above in detail. Hence, the contention of Mr. G. Vasantha Pai, learned Senior Counsel that the evidence of

P.Ws.1, 4 to 7 and the exhibits marked after the closure of the evidence of the defendant cannot be relied upon by the plaintiff is not acceptable.

Accordingly, we reject the said contention.

30. Point No. 3: Coming to the submission of the Mr. Vasantha Pai, learned Senior Counsel as to the ""benami transaction"", it is to be seen that the

consideration as to the plea of benami transaction is not new to the Courts. As early as in the year 1917, Sir Lawrence Jeankins, in the judgment in

MINAKUMARI BIBI Vs. BEJOY SINGH 1917 ILR 44 observed thus:-

though in cases of alleged benami transactions, there may be a ground for suspicion yet a Court''s decision must rest not on suspicion or

conjecture, but upon legal grounds established by legal testimony. In cases of this character, the determination of the question depends not only on

direct oral evidence, but also upon circumstances and surroundings of the case concerned. It has been held repeatedly that the burden of proof lies

heavily on the person who claims against the tenor of the deed, that is, the alleged beneficiary, to show that the ostensible vendee was a mere

name-lender and the property was in fact purchased only for his benefit. Such burden would be discharged by such a plaintiff by satisfying the

well-known criteria viz.: (1) the source of purchase money relating to the transaction; (2) possession of the property; (3) the position of the parties

and their relationship to one another; (4) the circumstances, pecuniary or otherwise, of the alleged transferee; (5) the motive for the transaction; (6)

the custody and production of the title deeds; and (7) the previous and subsequent conduct of the parties. Each of the above said circumstances,

taken by itself, is of no particular value and affords no conclusive proof of the intention to transfer the ownership from one person to the other. But

a combination of some or all of them and a proper weighing and appreciation of their value would go a long way towards indicating whether the

ownership has been really transferred or where the real title lies. In every benami transaction, the intention of the parties is the essence. The true

test to determine whether the transaction is benami or not is to look to the intention of the parties viz., whether it was intended to operate as such

or whether it was only meant to be colourable; if colourable, the transaction is benami, otherwise the transaction is not benami. On the other hand,

if the parties intended that it should take effect, the transaction cannot be said to be benami.

31. The Federal Court in the Judgment in AIR 1949 88 (Federal Court) while considering the onus to establish the benami transaction held as

follows:-

It is settled law that the onus of establishing that a transaction is benami is on the plaintiff and it must be strictly made out. The decision of the

Court cannot rest on mere suspicion, but must rest on legal grounds and legal testimony. In the absence of evidence, the apparent title must prevail.

It is also well established that in a case where it is asserted that an assignment in the name of one person is in reality for the benefit of another, the

real test is the source when the consideration came and that when it is not possible to obtain evidence which conclusively establishes or rebuts the

allegation, the case must be dealt with on reasonable probabilities and legal inference arising from proved or admitted facts.

32. A Constitution Bench of the Apex Court in the judgment in Smt. Surasaibalini Debi Vs. Phanindra Mohan Majumdar, : reiterated the

proposition of law as to the onus to establish the benami transaction shall lie only on the person who pleads the same. In the above decision, the

Apex Court has held as follows:-

Learned counsel for the respondent submitted that the English decision just now referred to as well as 1959 Ch 410, proceeded upon the

peculiarity of the English law in which there is a presumption of an advancement but that as there was no such presumption in India, the position

would be different where the Court has to deal with the effect of benami transactions brought about in order to effectuate a fraud or to evade the

provisions of a statute. I do not, however, think that could make any material difference. We start with the position that the Court will presume an

ostensible title to be the real title unless a plaintiff who seeks to assert the contrary pleads and proves that the ostensible owner is not the real

owner. In other words, the onus is on the person who alleges a transaction to be benami to make it out. Of course, the source of the funds from

which the purchase is made coupled with the manner of its enjoyment would be a very material factor for establishing the case of benami, but the

mere proof of the source of the purchase money would not finally establish the benami nature of the defendant''s title.

33. In the subsequent judgment in Jaydayal Poddar (Deceased) through L.Rs. and Another Vs. Mst. Bibi Hazra and Others, : the Apex Court

once again reiterated the same principle, which is as follows:-

It is well settled that the burden of proving that a particular sale is benami and the apparent purchaser is not the real owner, always rests on the

person asserting it to be so. This burden has to be strictly discharged by adducing legal evidence of a definite character which would either directly

prove the fact of benami or establish circumstances unerringly and reasonably raising an interference of that fact. The essence of a benami is the

intention of the party or parties concerned; and not unoften such intention is shrouded in a thick veil which cannot be easily pierced through. But

such difficulties do not relieve the person asserting the transaction to be benami of any part of the serious onus that rests on him; nor justify the

acceptance of mere conjectures or surmises, as a substitute for proof. The reason is that a deed is a solemn document prepared and executed after

considerable deliberation, and the person expressly shown as the purchaser or transferee in the deed, starts with the initial presumption in his

favour that the apparent state of affairs is the real state of affairs.

The Apex Court in the said judgment also held that though the question whether a particular sale is a benami or not, is largely one of fact and for

determining the said question, no absolute formulae or acid test, uniformally applicable in all situations, can be laid down. Therefore, the Apex

Court went on to add that in weighing the probabilities and for gathering the relevant indicia, the Courts are usually guided by the circumstances

namely,

(i) sources from which the purchase money came;

(ii) nature of possession of the property after the purchase;

(iii) Motive, if any for giving transaction a benami colour;

(iv) Position of the parties and their relationships, if any, between the claimant and the alleged benamidar;

(v) Custody of title deeds after the sale; and

(vi) The conduct of parties concerned in dealing with the property after the sale.

34. A Division Bench of this Court in the judgment in PONNUSWAMY NADAR Vs. NARAYANAN NADAR 1976 I MLJ 1 also had an

occasion to consider the same question. In the said judgment, the Division Bench held as follows:-

In order to determine the benami nature of a transaction, reliance must not only be placed on the surrounding circumstances and the position of the

parties and their relations to one another, but also on the motive which governs their actions and subsequent conduct. In fact, the absence of

motive does not decisively negative the benami nature; but it plays an important role.

35. An analysis of the judgments referred to above will lead us to the following conclusion:-

(i) The burden of proof to establish the benami transaction shall lie only on the person who pleads the same;

(ii) The determination of the plea of benami must rest on legal grounds established by legal testimony;

(iii) What are the legal grounds established by legal testimony shall be based on the following:-

(a) the source of purchase money relating to the transaction.

(b) possession of the property after the purchase.

(c) the relationship of the parties at the time of purchase and thereafter.

(d) motive for such benami transaction.

(e) previous and subsequent conduct of the parties.

36. Let us apply the above principles to the facts of the present case. The defendant has come with a specific case of benami transaction and has

also specifically averred in the plaint in C.S. No. 485 of 1997 that he purchased the vacant site in the name of his wife namely, Smt. Srividya, to

avoid Income Tax. It is not in dispute that the defendant was not an assessee when the sale transaction was made during the year 1976. There is

no evidence to the fact as to any correspondence between the defendant and the Income Tax Department prior to the transaction in question. How

far the said reason could be accepted would depend upon the other facts and circumstances of the case. On the date of purchase of vacant site,

there was no misunderstanding between the plaintiff and the defendant, as admittedly, both of them were living together. Exs.A-28, 29 (series)

would show that the plaintiff was acting in Tamil, Malayalam, Kannada and Hindi movies numbering more than 200. On the contrary, no evidence

is let in on behalf of the defendant to show that he possessed funds for the purchase of the vacant site. In fact, the defendant sought to rely upon

the funds received from his brother Samson Thomson and his father. The amount said to have been sent by Samson Thomson and father of the

defendant were in fact paid to the plaintiff and there are no indications to show that this amount was sent to her only for the purpose of purchase of

vacant site or for construction of the house on behalf of the defendant. In fact, the total amount so sent by Samson Thomson was Rs.3,00,000/-

only. Admittedly, the total cost of the site and construction was Rs.12,00,000/-.

37. On the contrary, it is the admitted case of the defendant himself that the plaintiff had contributed a sum of Rs.70,000/- for purchase of vacant

site and a further sum of Rs. 1,40,000/- towards construction of house. When the onus is on the defendant to establish that he had also contributed

funds both for purchase of vacant site and for construction of house, from the facts culled out from the evidence, we are unable to lay our hands on

any of the acceptable evidence to satisfy ourselves that any amount was contributed by the defendant both for purchase of vacant site and for

construction of house. The defendant has miserably failed in discharging the said onus. Hence, in so far as the source of purchase money relating to

the transaction is concerned, we hold that the onus, which heavily lies on the defendant, is not discharged and consequently his plea that he

contributed the sale consideration and construction expenses are liable to be rejected.

38. It is also the specific case of the plaintiff and defendant in their evidence that both of them lived together till July 1987 in the house in question

as husband and wife. When the vacant site was purchased and construction of the house was made, there was no misunderstanding between both

of them. The plaintiff as well as the defendant were residing together in the same house. The evidence of the plaintiff is that after July 1987, and in

view of the fact that she was cruelly treated by the defendant, she was forced to leave the house. Only under the said circumstances, the defendant

continued his possession of the house. Such stay over in the house cannot be construed to hold that the plaintiff handed over possession of the

house to the defendant thereby entitling the defendant to claim that he was in possession of the suit house at the time and after the dispute arose. In

fact, immediately after the purchase, the possession of the site was with the plaintiff, as could be seen from the evidence. Further, the construction

cost was met by both the parties. Therefore, the proof of possession of the property as pleaded was also not established by the defendant. The

Courts should view the benami transaction more carefully, especially when the same is pleaded in the legal proceedings by one of the spouses.

39. The plaintiff and the defendant were living as wife and husband when the alleged benami transaction took place in the year 1976. As pointed

out earlier, there was no misunderstanding between them at the relevant point of time. When the claim of the defendant, the husband, having

purchased the property in the name of his wife by paying his money, it cannot be inferred that the wife is only a ""benami"". The burden is more on

the defendant to establish the benami when the relationship of the parties is that of husband and wife. In this case, the only reason given by the

defendant for the purchase of the property in the name of the plaintiff is to avoid Income Tax. We have earlier pointed out that the defendant was

not an assessee at the time of the transaction and even after that. Hence, the reason given by the defendant, in our considered view, is an invented

and afterthought for the purpose of sustaining the suit. The recital in the sale deed is also relevant. Nowhere in the document, it is stated that the

property is purchased by the defendant for and on behalf of the plaintiff. Similar question came up for consideration before a learned single Judge

of this Court in the judgment in KISTAPPA NAICKER AND OTHERS Vs. ELUMALAI 89 LW 571 and the learned single Judge has held as

follows:-

It has been repeatedly held by this Court that when a husband purchased the property in the name of his wife by paying his own money, from that

alone, no inference can be drawn that the wife was only the benamidar, and having regard to the nature of the relationship between the parties, and

the normal tendency of the husband to benefit the wife either by payment of money or by purchase of property in her name, the allegation of

benami can be established only by proving the motive for such benami purchase.

40. The motive, as alleged by the defendant, is to avoid Income Tax. Such reason cannot be considered as an acceptable one as the motive

pleaded is to avoid the legal liability which would not amount to a discharge of the burden of proof of benami. Hence, in our considered view, the

motive as pleaded by the defendant cannot be accepted and in the absence of discharging the onus of proof of motive, we hold that the plaintiff is

not a ""benami"".

41. Coming to the relationship of the parties prior to July 1987 and since July 1987, nowhere it is stated in the evidence that the transaction was

benami and nowhere it is claimed by the defendant that the transaction was on his behalf, prior to July 1987. The said plea was set in motion only

after misunderstanding arose between the parties. The conduct of the parties is also relevant to consider whether a transaction is benami or not.

When the defendant himself has raised the question of benami transaction only after July 1987 after the plaintiff left the house complaining of cruelty

at the hands of the defendant, it would be unreasonable to hold that the defendant has discharged the onus of benami transaction. The evidence on

record reveal that the plaintiff contributed her personal earnings whereas, the defendant''s contribution is through her brother and father. The

amounts were deposited in the name of the plaintiff. Her bank account was operated by the defendant and his father. In such circumstances,

whatever was given to the plaintiff must be treated for her own benefit. For all the above discussions, we hold that the defendant has not

discharged the onus of benami transaction as well as motive for the benami transaction.

42. Point Nos. 4 and 5: Coming to the relief aspect, in view of our finding that the defendant has not established the question of benami by

discharging his burden and in view of the facts that the property was purchased in the name of the plaintiff, the plan was sanctioned in the name of

the plaintiff, both the land and house stand in the name of the plaintiff, the house is assessed for property tax only in the name of the plaintiff, it will

be only reasonable to hold that the plaintiff is the owner of the property viz., both the vacant site and the house constructed at No. 7, Narayanan

Street, Mahalingapuram, Madras-600 034. The evidence of P.W.1 as well D.W.1 would go to show that immediately after the construction, both

of them were living together in the same house. In fact they lived a happy married life at least for sometime. From the evidence, it is also seen that

the bank accounts of the plaintiff were admittedly operated not only by the defendant but also his father. All the cheques were signed by the

plaintiff and the amount and the drawee name were filled up by the defendant which would establish the total surrender of the plaintiff to the

defendant. Being a film artist, the plaintiff did not find any time to look after her bank accounts as well as the construction of the house personally

and therefore, the amount lying in her bank accounts were drawn by the defendant and the construction was made from out of her own funds. Only

after misunderstanding arose during July 1987, the plaintiff had to leave the house fearing her life. This fact has not been controverted by the

defendant. When once we find that the plaintiff is the owner of the house and she was compelled or in fact was forced to leave the house, law

requires that necessary directions should be issued to the defendant to hand over the possession of the house as the plaintiff is entitled to the same.

Accordingly, the suit in C.S. No. 866 of 1994 is decreed in favour of the plaintiff with a direction to the plaintiff to value the relief u/s 30 of the

Tamil Nadu Court Fees and Suits Valuation Act, 1955, and pay the deficit court fee within a period of six weeks from today. Insofar as the claim

of damages, no arguments were advanced by the learned counsel for defendant challenging the decree made by the learned Judge. Hence, we are

not called upon to adjudicate the said claim. Accordingly, we confirm the decree and judgment of the learned Judge holding that the plaintiff is also

entitled for damages from the defendant for use and occupation of the premises at the rate of Rs.10,940/- per month for the period of three years

prior to the suit and also in future. However, the plaintiff is not entitled for the recovery of furniture.

43. Equally, the decree and judgment in C.S. No. 1505 of 1995 holding that the order of the Tax Recovery Officer dated 09.11.1994 rejecting

the claim petition filed by the defendant was correct and the Income Tax Department is entitled to proceed against the property of the plaintiff for

the arrears due and payable by the plaintiff is not challenged before us. Accordingly, we are not inclined to make a detailed discussion on this

aspect. Since it was represented that the defendant paid the plaintiff''s arrears of income tax to avoid the sale of the house, he is entitled to recover

the said amount by establishing the same in separate proceedings.

44. Before we part with the case, we want to record a word of appreciation for the meticulous manner in which the learned Senior Counsel for the

appellant prepared and represented the case. Though he furnished every minute detail of the receipt of the money by plaintiff and the expenses

incurred correspondingly, we do not propose to go into the same as the appeals are disposed of on the plea of benami alone. We place our

appreciation on record for the assistance rendered by the learned Senior Counsel for the appellant to assess the evidence.

45. In the result, the common judgment and decree made in C.S. Nos. 866 of 1994, 485 of 1997 and 1505 of 1995 is confirmed and the appeals

are dismissed with costs.