Mohd. Abdul Sattar @ Shaik Mahaboob Vs Rahmatunnissa and Others

AS No. 1474 of 1993

Court: Andhra Pradesh High Court

Date of Decision: Dec. 17, 2013

Hon'ble Judges: M. Satyanarayana Murthy, J

Bench: Single Bench

Advocate: M.V. Suresh, for the Appellant; T.S. Anand for Respondent Nos. 9 to 16, for the Respondent

Judgement

M. Satyanarayana Murthy, J.
The unsuccessful plaintiff in O.S. No. 7 of 1985 on the file of Subordinate Judge (Senior Civil Judge),

Machilipatnam, preferred this Appeal against the decree and judgment dated 20.04.1993, whereunder and whereby the Suit filed for declaration

of title and for specific performance of agreement to transfer dated 05.01.1963 in his favour executed by the first defendant was dismissed. The

appellant herein was the plaintiff and the respondents herein were the defendants before the trial Court in O.S. No. 7 of 1985. During the

pendency of this Appeal, first respondent herein died and her legal representatives i.e., respondents 3 to 8 herein were brought on record as per

the order in A.S.M.P. No. 47811 of 2004, dated 10.09.2004; second respondent herein also died and his legal representatives i.e., respondents 9

to 16 were brought on record as per the order in A.S.M.P. No. 545 of 2007, dated 29.03.2007.

2. For the sake of convenience, the parties hereinafter will be referred to as plaintiff and defendants.

3. Plaintiff filed the Suit in O.S. No. 7 of 1985 before Senior Civil Judge, Machilipatnam, seeking the relief of declaration of title and specific

performance of agreement to transfer dated 05.01.1963 and for future profits alleging that the plaintiff and defendants are the nearest relatives and

the plaintiff started Chit Fund business in the year 1962, Second defendant herein was a partner in the said Chit Fund business. In the said Chit

Fund business, the plaintiff sustained huge loss; whereupon the plaintiff was threatened by his creditors to send him to prison foisting false cases

and filed Insolvency Petition to adjudge the plaintiff as insolvent. Thereby, the plaintiff was landed in troubles when his enemies came to know

about purchase of schedule property by the plaintiff. The plaintiff purchased schedule property in an extent of Ac.2.41 cents of land in R.S. No.

625/1 at Kaikaluru from one Panja Suramma which is more fully described in the schedule annexed to the plaint for consideration of Rs. 4,000/-

under an agreement of sale in the year 1963 but, the plaintiff however to avoid litigation and save the schedule land from his enemies, obtained sale

deed in the name of first defendant as benami transaction to the knowledge of second defendant, who is a partner in his Chit Fund business. Thus,

the schedule property was purchased by the plaintiff in the name of first defendant as a benamidar but the property is being managed by the second

defendant leasing out the same to one Pantu Lakshmanna, collecting amount and paying the same to plaintiff. Thus, the defendants are trustees of

the plaintiff managing the schedule property.

4. The first defendant on 05.01.1963 executed an agreement in favour of plaintiff to execute the transfer deed in favour of the plaintiff after litigation

came to an end. Thus, the plaintiff became the purchaser of the schedule property under contract of transfer from the first defendant. Though the

property was purchased in the name of first defendant, the plaintiff alone is in constructive possession and enjoyment of the property.

5. Criminal cases filed against the plaintiff were ended and insolvency proceedings were also annulled in the year 1971 itself by an order of Senior

Civil Judge, Gudivada, the plaint schedule property was got vested in the Official Receiver, so a claim petition was got filed by the first defendant

and the claim was got allowed by the plaintiff. All these proceedings pending against the plaintiff were closed. Then, the plaintiff requested the first

defendant to transfer the plaint schedule property in his favour but the first defendant postponed the same by giving evasive replies; thereupon the

plaintiff got issued a legal notice dated 02.06.1984 demanding the first defendant to execute a sale deed and render account of income derived

from his property, but no reply was issued by the first defendant. The second defendant issued a reply with false allegations and he is not aware of

the proceedings or the acts between plaintiff and first defendant. As the property was leased out at the rate of 40 bags of paddy per acre for both

the crops to one P. Lakshmaiah, both the defendants are liable to render true and correct account of income derived from the schedule property

but the defendants failed to render account. Hence, the plaintiff sought the reliefs of declaration of title, specific performance of agreement to

transfer dated 05.01.1963 and profits.

6. The second defendant filed written statement denying the material allegations of the plaint inter-alia contending that:

1) He was not a partner in Chit Fund business with the plaintiff and the plaintiff was absconding for several years as his creditors filed Insolvency

Petition and prosecuted legal proceedings against him, his creditors not only harassed the plaintiff but even harassed the persons who are having

contact with the plaintiff;

2) Though the property was purchased by the first defendant, the same was included in the schedule of properties in the Insolvency petition.

However the property was excluded in the claim petition filed by the first defendant. Therefore, the schedule property is the absolute property of

the first defendant;

3) The defendants never acted as trustees of the plaintiff and never paid any amount towards the income derived from the schedule property;

4) The first defendant never executed any agreement to transfer deed in favour of the plaintiff and it is a rank forgery;

5) The suit claim is barred by time;

6) The plaintiff is not owner of the property and the transaction is not a benami transaction, thereby he is not entitled to claim declaration of title to

the schedule property as well as the specific performance.

And finally prayed for dismissal of the Suit.

7. The first defendant did not file any written statement

8. Basing on the above pleadings, the trial Court framed the following issues, including one additional issue:

1) Whether the plaintiff is the real owner of the plaint schedule property?

2) Whether the plaintiff is entitled for the declaration, as prayed for?

3) Whether the plaintiff is entitled to the profits, as prayed for?

4) To what relief?

5) Whether the suit is barred in view of the provisions of Benami Transactions (Prohibition) Act?

9. During the course of trial, on behalf of the plaintiff, P.Ws. 1 to 4 were examined and Exs. A-1 to A-31 were marked; on behalf of the

defendants D.W. 1 and 2 were examined and Exs. B-1 to B-28 were marked respectively.

10. Upon hearing arguments of both the counsel and perusing the oral and documentary evidence, the trial Court dismissed the suit declining both

the reliefs claimed by plaintiff holding that the first defendant is not a benamidar of the plaintiff and that both the claims are barred by limitation.

11. Aggrieved by the impugned decree and judgment dated 20.04.1993, the present Appeal is preferred by the plaintiff on the following grounds:

1) The first defendant did not file any written statement controverting the allegations made in the plaint, which amounts to admission of the

allegations made in the plaint and remained undisputed, but the same was not considered in proper perspective by the trial Court;

2) The second defendant has no locus-standi to deny title of the plaintiff but the trial Court on erroneous appreciation accepted the contentions of

the second defendant who filed written statement;

3) Ex. A-11 agreement to transfer is true and correct, since its execution was not denied by the first defendant and the trial Court ought to have

granted a decree for specific performance at least but on erroneous appreciation declined to pass a decree for specific performance of agreement

to transfer;

4) Time is not the essence of contract in sale of immovable properties and apart from that no such plea was raised by the defendants but the trial

Court concluded that time is the essence of contract and erroneously held that claims of plaintiffs are barred by limitation.

12. Finally prayed to allow the Appeal setting-aside the impugned decree and judgment dated 20.04.1993, and declare that the plaintiff is the

absolute owner of the property by directing the first defendant to execute registered transfer deed and render true and correct account of income

derived from the schedule property.

13. During the course of arguments, learned counsel for the appellant reiterated the contentions raised before the trial Court, as well as in the

grounds of Appeal and drawn the attention of this Court to certain parts of oral evidence including the documentary evidence and the same will be

referred wherever necessary. Whereas learned counsel for the respondents argued totally in support of the findings and contended that Ex. A-11,

alleged agreement of transfer deed is a forged document not supported by any consideration, which is void and the object under Ex. A-11 is

opposed to public policy and thereby it is not enforceable under law and prayed to dismiss the Appeal confirming the impugned decree and

judgment of the trial Court.

14. Considering rival contentions and perusing the material available on record, the points that arise for consideration in this Appeal are:

1) Whether the appellant-plaintiff purchased the schedule property in the name of the first defendant, and whether it is a benami transaction? If so,

whether the plaintiff is entitled for declaration of title to the property?

2) Whether agreement to transfer the schedule property under Ex. A-11 is enforceable under law?

3) Whether the Suit claims of the plaintiff are barred by limitation?

15. In re. Point No. 3: In view of the specific plea raised by the second defendant in the written statement at para 8, I feel that it is better to take

up the issue of limitation before deciding the other issues.

16. The suit is filed for declaration of title and for specific performance of agreement to transfer besides recovery of future profits. The alleged

transaction of purchase under Ex. A-4 was executed on 07.02.1963 by Suramma and Rama Rao in favour of Rahamatunnisa and the plaint was

presented before the trial Court on 21.08.1985 i.e., almost after 22 years 6 months. In fact, there were several proceedings including filing of

Insolvency Petition by the Creditors of the plaintiff before the Senior Civil Judge, Gudivada, and the schedule property was vested in the Official

Receiver for administration. Ex. A-27 is the certified copy of order in I.P. No. 3 of 1963; Ex. A-28 is the certified copy of I.P. Register extract,

Ex. A-29 is the certified copy of the petition in I.P. No. 3 of 1963 and Ex. A-30 is the certified copy of I.A. No. 61 of 1966 in I.P. No. 3 of 1963

and they are relevant for deciding the real controversy between the parties. In Ex. A-27, certified copy of I.P. No. 3 of 1963, filed by Chaluvadi

Narasimha Rao against Mohd. Abdul Sattar, Shaik Zamaluddin and Andhra Chit Fund Company to adjudge the plaintiff as insolvent, in the

schedule of property annexed to the insolvency petition, the suit schedule property was shown as Item No. 3, as the plaintiffs property herein and

the same B-Schedule property was vested in the Official Receiver for administration. Ex. A-29 is the certified copy of order adjudging the plaintiff

herein as insolvent and vesting the properties including the schedule property in Official Receiver, Krishna for administration. Thus, the schedule

property was vested on the Official Receiver for administration and later the adjudication was annulled by the Senior Civil Judge, Gudivada by

order dated 07.12.1971 i.e. Ex. A-29 itself. However, the first defendant filed a petition before the Official Receiver, Krishna at Machilipatnam,

claiming that she is the owner of the property and requested to exempt the property from sale. In the said I.A. No. 61 of 1966 in I.P. No. 3 of

1963, the third respondent Chaluvadi Narasimha Rao filed counter denying the claim of the first defendant herein but conveniently the plaintiff

avoided to file certified copy of the counter filed by him in the petition. However, the objection of Chaluvadi Narasimha Rao was turned down by

the Official Receiver Krishna at Machilipatnam, passed an order marked as Ex. A-30 exempting the schedule property from administration and

held that the schedule property i.e., Item No. 3 of the B Schedule property in the Insolvency Petition, as the property of first defendant. Thus, the

first defendant denied the title of plaintiff herein by filing I.A. No. 61 of 1966 in I.P. No. 3 of 1963 as early as in the year 1966 itself claiming

absolute ownership over the schedule property and her plea was accepted by the Official Receiver in the year 1967 itself by order dated

27.11.1967 under the original of Ex. A-30. Thus, the title of the plaintiff was denied in the year 1967 itself by the first defendant claiming absolute

ownership over the property.

17. Limitation to claim declaration is governed by Article 58 of Schedule under the Limitation Act, the limitation to obtain any other declaration is 3

years from the date when the ''right to sue first accrues'', the word right to sue first accrues means when the title of the plaintiff was denied

unequivocally. In the instant case on hand, the title of the plaintiff was denied by the first defendant in the year 1966 itself by filing I.A. No. 61 of

1966 in I.P. No. 3 of 1963 and obtained an order under the original of Ex. A-30 whereunder she was declared as prima-facie owner of the

property and the schedule property herein which is Item No. 3 of B schedule in I.P. No. 3 of 1963 was deleted from the schedule for

administration. Therefore, the title of the plaintiff was denied in the year 1966 and thereby the right to sue first accrued only in the year 1966.

Hence, the limitation starts from the date when I.A. No. 61 of 1966 was filed by the first defendant before the Official Receiver Krishna at

Machilipatnam when she claimed absolute title over the schedule property and thereby denied the title of the plaintiff herein directly but, strangely

the plaintiff herein did not file any counter in I.A. No. 61 of 1966 in I.P. No. 3 of 1963 which indirectly amounts to admission of her title but the

Suit is filed after 18 years from the date of accrual of right to sue for the first time. The plaintiffs main contention both in the plaint and evidence is

that he himself got filed claim petition and got it allowed but the same is not supported by any material.

18. In para 8 of the plaint, the plaintiff pleaded that he got vested the property with Official Receiver and a claim petition was got filed by the first

defendant and got allowed by the plaintiff. Thus, it appears from the pleadings that the plaintiff managed everything before the Official Receiver,

who passed the order in I.A. No. 61 of 1966 in I.P. No. 3 of 1963. Unfortunately, the same Advocate who was the then Official Receiver filed

the present suit on behalf of the plaintiff. Even taking into consideration all facts pleaded in Para 8 of the plaint, it is clear that the title of the plaintiff

was denied unequivocally in the year 1966 by filing I.A. No. 61 of 1966 in I.P. No. 3 of 1963.

19. When I adverted to the evidence there are clear admissions in the examination in chief of P.W. 1, dated 01.10.1992, where the plaintiff

admitted as follows:

During the pendency of I.P. at my instance D-1 filed claim petition. I sent the title deeds etc., to her. The claim petition was allowed.

20. This piece of evidence clearly shows that denial of title of the plaintiff claiming absolute title over the property by the first defendant is within the

knowledge of the plaintiff herein in the year 1966-67 when claim petition was filed and order was passed by the Official Receiver Krishna at

Machilipatnam, under the original of Ex. A-30. The plaintiff also made certain admissions in his cross-examination dated 19-11-1992, which are as

follows:

I requested Rahamatunnisa (D-1) through 2nd defendant to file claim petition contending that the property cannot be sold as she was appointed as

trustee for my property. I do not know what was contended by Rahamatunnisa in the claim petition. I do not remember whether I filed the copy of

the claim petition in this Suit. I saw the order passed in the petition. I filed copy application for obtaining the certified copy of the order.

21. This piece of evidence i.e., evidentiary admission as well as judicial admission in the pleadings are sufficient to conclude that the first defendant

denied the title of the plaintiff in the year 1966 when I.A. No. 61 of 1966 in I.P. No. 31 of 1966 was filed and passed an order under the original

of Ex. A-30. Thus, the right to sue first accrued to the plaintiff in the year 1966 itself but the suit was filed in the year 1985 and thereby the claim of

the plaintiff for declaration of title is hopelessly barred by limitation.

22. It is contended by the plaintiff that the first defendant executed an agreement to transfer, marked as Ex. A-11 agreeing to transfer the property

as it was purchased in her name to avoid sale of the property in the insolvency proceedings. A bare look at Ex. A-11 dated 05.01.1963, both the

defendants agreed to transfer the property in favour of the plaintiff after termination of Criminal and Civil proceedings pending against him and the

schedule property was purchased by the plaintiff in the name of first defendant to protect the property. The execution of Ex. A-11 was denied.

However, assuming for a moment that execution of Ex. A-11 is proved, the defendants have to transfer the property by executing the registered

transfer deed immediately after termination of both Criminal and Civil proceedings, according to the admissions in plaint, which is a judicial

admission. The proceedings in various Courts including discharge of the plaintiff, annulment of the insolvency proceedings took place as early as in

the year 1971, and Criminal cases were also ended prior to that on account of failure of the complainant''s to prove the guilt of the plaintiff in the

Criminal cases. So, it is evident from the judicial admission in para 8 of the plaint that all the proceedings, both Criminal and Civil, were terminated

by 1971 itself. The said fact was admitted in the cross-examination of P.W. 1, which is as follows:

The insolvency proceedings came to an end in the year 1971. From 1971 till 1984 D-1 paying money derived from the land.

23. Even from this admission it is clear that both civil and Criminal proceedings were terminated in the year 1971. As per the terms of Ex. A-11,

the first defendant has to execute transfer deed immediately after Insolvency proceedings and Criminal cases came to an end or terminated and the

same is admitted by the plaintiff both in his pleadings and evidence accepting the same. The trial Court concluded that the suit is barred by

limitation. During the course of arguments, learned counsel for the appellant mainly contended that in case of sale of immovable property, time is

not the essence of the contract. There is no dispute about it, but the suit shall be filed within three years when such a condition is specified in the

agreement or contract. In a judgment reported in Ramzan Vs. Hussaini, the Supreme Court held as follows:

The date fixed for the performance under Article 53 does not require that a particular date from the calendar must be mentioned in the document.

It is suffice if the basis of calculating the date fixed for performance is found in the document. The doctrine of id certum est quod certum reddi

potest, which means that certainty need not be ascertained at the time for if, in the fluctuation of time, a day will arrive which will make it certain

that is sufficient is applicable.

24. In the facts of the decision cited supra, the contract of sale was in respect of a house and it was under mortgage. The defendant - seller under

the contract had agreed to execute a deed of sale on the day when the purchaser redeemed the mortgage. The suit for specific performance of

contract was filed by the purchaser some time after 14 years after redemption of mortgage, held as follows:

That under the agreement the date for the defendant - seller to execute the sale was fixed, although not by mentioning a certain date but by a

reference to the happening of a certain event, namely, the redemption of the mortgage, and, immediately after the redemption by the plaintiff

purchaser, the defendant became liable to execute the sale deed which the plaintiff was entitled to enforce. The period of limitation thus started

running on that date. The case was therefore, covered by the first part of Article 54 of the Limitation Act.

25. If the principle laid down in the decision cited supra is applied to the present facts of the case, the first defendant has to execute a transfer deed

immediately after closure or termination of the insolvency proceedings and Criminal cases, which admittedly, ended in the year 1971, both as per

the pleadings and evidence. Therefore, suit shall be filed before 1974 under any circumstances, but the present suit was filed after 14 years after

termination of insolvency proceedings and other Criminal cases.

26. Constitutional Bench of the Apex Court in Smt. Chand Rani (dead) by LRs. Vs. Smt. Kamal Rani (dead) by LRs., , held as follows:

In case of immovable property, there is no presumption as to time being the essence of the contract. Even if it is not of the essence of the contract

the court may infer that it is to be performed in a reasonable time if the conditions are [1] from the express terms of the contract [2] from the nature

of property and [3] from the surrounding circumstances.

Where in an agreement to sell the immovable property it was stipulated that amount in part was to be paid within 10 days of the execution of the

agreement and the balance has to be paid at the time of registration of deed and it was agreed that the vendor would redeem the property which

was mortgaged and also obtain the Income tax clearance certificate and the word ''only'' was used twice i.e. To qualify the amount and to qualify

the period of payment of such amount i.e. Ten days it was held that the intention of the parties was to make time as essence of contract and in such

case, when the purchaser was not ready and willing to pay the amount in part as agreed, before delivery of possession and income tax clearance

certificate and redemption of property, it was contrary to the conditions of the agreement and the purchaser was not entitled to the specific

performance of contract

27. Similar view was expressed by the Hon''ble Apex Court in K.S. Vidyanadam and Others Vs. Vairavan, , wherein it was held as follows:

We are inclined to think that the rigor of the rule evolved by courts that time is not of the essence of the contract in the case of immovable

properties evolved in times when prices and values were stable and inflation was unknown requires to be relaxed, if not modified, particularly in the

case of urban immovable properties. It is high time, we do so. Learned Counsel for the plaintiff says that when the parties entered into the contract,

they knew that prices are rising; hence, he says, rise in prices cannot be a ground for denying specific performance. May be, the parties knew of

the said circumstance but they have also specified six months as the period within which the transaction should be completed. The said time limit

may not amount to making time the essence of the contract but it must yet have some meaning. Not for nothing could such time limit would have

been prescribed. Can it be stated as a rule of law or rule of prudence that where time is not made the essence of the contract, all stipulations of

time provided in the contract have no significance or meaning or that they are as good as non-existent? All this only means that while exercising its

discretion, the court should also bear in mind that when the parties prescribe certain time limit for taking steps by one or the other party, it must

have some significance and that the said time limit cannot be ignored altogether on the ground that time has not been made the essence of the

contract.

28. In a recent judgment of the Apex Court in Mrs. Saradamani Kandappan Vs. Mrs. S. Rajalakshmi and Others, it was held as follows:

The order of performance of reciprocal promises does not depend upon the order in which the terms of the agreement are reduced into writing.

The order of performance should be expressly stated or provided, that is, the agreement should say only after performance of obligations of

vendors, the purchaser will have to perform her obligations. In the present case the agreement of sale expressly provided that the purchaser shall

pay the balance sale consideration within time schedule as specified. The payment of sale price was delinked from execution of sale deed. The

purchaser had to fulfill her obligation in regard to payment of price and thereafter vendors were required to perform their reciprocal promise of

executing the sale deed, whenever required by the purchaser. The agreement provided specifically that having paid the balance price, if the

purchaser is not satisfied about the title and on being intimated about the same if the vendors fail to satisfy the purchaser about their title, all

amounts paid towards the price should be refunded to purchaser. This clearly demonstrates that the payment of balance of sale price in terms of

the contract was not postponed nor made conditional upon the purchaser being satisfied about the title, but that payment of the balance price

should be made to the vendors as agreed unconditionally. In such circumstances the plea of purchaser that since clause providing that execution of

the sale deed shall depend upon the purchaser getting satisfied regarding title to the lands and that properly is not subject of any encumbrance;

precedes clause requiring payment of balance consideration in three installments, the satisfaction of the purchaser in regard to the vendor''s title to

the land and encumbrance, was a condition precedent for payment of the balance consideration cannot be accepted. Since section 52 cannot

come in aid of purchaser to save his non-payment of balance consideration within time fixed when time was essence of contract. Therefore, the

failure of the appellant purchaser to pay the balance sale consideration within time fixed, clearly amounted to breach of contract. As the time for

payment was, the essence of the contract, the respondents were justified in determining the agreement of sale. The rejection of the prayer for

specific performance was, therefore, proper.

29. In view of the principles laid down in the decisions cited supra, the Suit shall be filed within reasonable time at least within three years from the

date when a condition is specified but the plaintiff did not file the Suit within three years from the date of happening of such event i.e., closure of

Insolvency and Criminal proceedings, as admitted by the plaintiff.

30. The main endeavour of the learned counsel for the appellant is that the limitation starts from the date when the defendant refused to execute

registered transfer deed, which took place in the year 1984 vide Ex. A-20 dated 02.06.1984, but this contention cannot be accepted for the

reason that the first defendant allegedly agreed to execute transfer deed in favour of the plaintiff immediately after termination of Insolvency and

Criminal proceedings and the principle laid down by the Apex Court in Ramjan (supra) is directly applicable to the present facts of the case.

Therefore, the relief of specific performance is hopelessly barred by limitation and at any stretch of imagination by applying the principles laid down

by the Apex Court in the decisions cited supra, the suit is beyond limitation. Hence, I find that the Suit is barred by limitation. Accordingly, the

point is held in favour of defendants and against the plaintiff.

31. POINT No. 2: As seen from the contents of Ex. A-11, the first defendant agreed to transfer the property in favour of the plaintiff immediately

after termination of insolvency proceedings and Criminal cases, pending against the plaintiff. Even according to the pleadings, the plaintiff purchased

the property allegedly to save from the insolvency proceedings. Therefore, it is clear that a condition is imposed to determine the interest on

insolvency proceedings came to an end, agreed to transfer the property on termination of insolvency proceedings.

32. According to Section 12 of the Transfer of Property Act, 1882, whether the property is transferred subject to condition or limitation making

any interest therein reserved or given to or for the benefit of any person, to cease on his becoming insolvent or endeavouring to transfer or dispose

of the same, such condition or limitation is void.

33. Therefore, the purpose of transfer to avoid insolvency proceedings on condition to transfer the property after termination of insolvency

proceedings is void, in view of section 12 of the Transfer of Property Act. This section is an exception to the general principle embodied in

Sections 31 and 32 which provide that an interest may be created with the conditions superadded that it shall cease to exist on the happening of an

uncertain event. The reason is that it is manifestly unjust that the grantee should enjoy and possess all the indicia of absolute dominion over the

property, and yet be deprived of the right of alienation incident to such ownership; and it is equally unjust that creditors who may have made

advances on the strength of the property should be deprived of its security on account of a clause in the transfer, which none but the grantor and

grantee may know anything about. Under this section, if the grant is subject to such a condition, it will be void and the property will pass over to

the official receiver in case of insolvency, or to the alienee in case of voluntary alienation.

34. In Shiba Prosad Singha Vs. Lekhraj Shewakaram and Co. and Others, when the same issue came up before High Court of Patna, it held as

follows:

The object of this Section is to protect the creditors of the transferee who would otherwise be prevented from having recourse to the property

transferred for satisfaction of their debts.

Section 12 refers to the transferee "becoming insolvent", not being adjudicated an insolvent, and consequently it cannot be restricted to conditions

which would take effect only on adjudication.

35. If the principle laid down in the decision cited supra, is applied to the present facts of the case, when a condition is imposed in the document on

happening of certain event i.e., termination of both Criminal and Civil proceedings (insolvency proceedings) to re-convey the property, such

condition is void and it is only to defeat the genuine claims of the creditors and the property shall pass to the Official Receiver or to the alienee, in

case of voluntary alienations. Even basing on this principle, the plaintiff is not entitled to claim any relief in this Suit.

36. Learned counsel for the respondents mainly contended that the object of transfer is against the public policy and that the agreement to transfer,

marked as Ex. A-11 is not supported by consideration and thereby the agreement is hit by Sections 23 and 25 of Indian Contract Act, 1872,

which is unenforceable under law.

37. According to Section 23 of Indian Contract Act, consideration or object of the contract is lawful unless it is forbidden by law; or is of such

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. In each of these cases, the consideration or object of an agreement is said

to be unlawful. Every agreement of which the object or consideration is unlawful is void.

38. Here the object of retransfer is to defeat the genuine claims of creditors in the insolvency proceedings, which is a fraudulent one. Therefore, the

agreement to transfer the schedule property under Ex. A-11 is hit by Section 23 of Indian Contract Act directly since the object is unlawful and it

is a fraudulent transaction. Hence, the contention of the learned counsel for the defendants can be sustained.

39. The other ground urged by the learned counsel for the respondents is that the agreement Ex. A-11 is not supported by consideration. As seen

from the contents of Ex. A-11, no consideration is agreed to be paid, and according to Section 25 of Indian Contract Act, an agreement without

consideration is void unless such agreement comes within the exceptions contained therein, but in the instant case on hand, the agreement was

executed to transfer the property since it was allegedly purchased in the name of first defendant by the plaintiff. Hence, the contention that Ex. A-

11 is not supported by consideration cannot be sustained.

40. An agreement in restraint of legal proceedings is void u/s 28 of the Indian Contract Act. Every agreement by which any party thereto is

''restricted absolutely from enforcing his rights'' under or in respect of any contract by the usually legal proceedings in the ordinary Tribunals or

which limit the time within which thus enforce the rights is void to that extent. In the present case on hand, on account of obtaining alleged sale deed

in the name of first defendant by the plaintiff, the genuine creditors of the plaintiff were deprived to enforce their rights to recover the amount due to

them and, therefore, the transfer if any is for illegal purpose to defraud the creditors. In such a case, the agreement is void. Hence, the agreement

marked as Ex. A-11 is not enforceable under law and it is thus void for the above reasons.

41. The main contention of learned counsel for the appellant is that both the defendants executed Ex. A-11 to transfer the property on termination

of civil (insolvency) proceedings and Criminal cases, pending against the plaintiff. Ex. A-11 is the agreement to transfer dated 05.01.1963, Ex. A-4

is the sale deed dated 07.02.1963 obtained by first defendant from Suramma and Rama Rao. The contents of Ex. A-11 are as follows:

That Rahamathunnisa, wife of Younus, resident of Chinapandraka executed ekrarnama in vernacular i.e., agreement to transfer deed in favour of

Mohd. Abdul Sattar, agreeing to re-convey the schedule property immediately after termination of his civil and criminal cases pending by then since

the land in Survey No. 625/1 in an extent of Ac.2.41 cents is situated in Kaikaluru village, was purchased by plaintiff from Panja Suramma, wife of

Panja Laxmaiah and Bellamkonda Rama Rao, S/o. Bellamkonda Rattaiah for Rs. 4,000/- in the name of first defendant due to pendency of civil

and criminal cases.

42. From the contents it is evident that the property was purchased in the name of first defendant by the plaintiff from Panja Suramma and

Bellamkonda Rama Rao for Rs. 4,000/-. In fact, Ex. A-4 was obtained on 07.02.1963. Thus, by the date of execution of Ex. A-11, the property

was not purchased by the plaintiff in the name of first defendant. On the other hand, the recitals of Ex. A-4 clearly shows that an amount of Rs.

3,690/- was paid on 05.01.1963 when the agreement was executed in favour of first defendant and later paid balance of consideration on the date

of execution of Ex. A-4. Absolutely, there was no reference about execution of any agreement in favour of plaintiff by Panja Suramma and

Bellamkonda Rama Rao. Even otherwise, the evidence and pleadings goes to show that the plaintiff obtained an agreement of sale in his favour

from Panja Suramma though the property jointly belongs to Panja Suramma and Bellamkonda Rama Rao and the alleged agreement was torn out,

obtaining another agreement in favour of first defendant and got executed Ex. A-11, but this pleading and evidence of the plaintiff is not supported

by any material. On the other hand, the conduct of the plaintiff from the beginning is suspicious and appears to have invented different stories some

how to get the property and even if the pleas raised by the plaintiff are accepted, he committed fraud on the Court colluding with the Official

Receiver and defrauded his genuine creditors. In such a case the relief of specific performance cannot be granted.

43. When I adverted to the evidence on record, in the examination in chief of P.W. 1 dated 17.09.1992, admitted as follows:

I obtained an agreement of sale in the year 1962 (wrongly typed as 1992) when I purchased the plaint schedule land. I also obtained the delivery

of the land. I cultivated the land. On 14.02.1963, I.P. No. 3 of 1963 was filed on the file of Sub Court, Gudivada against me.

44. From this, it is clear that he obtained an agreement of sale in the year 1962 itself but as per the admissions in his examination-in-chief, he

obtained documents Exs. A-4 and A-11 only to avoid payment of debts to the creditors. P.W. 1 admitted in his further examination-in-chief as

follows:

Some of the subscribers of the chit fund company filed a I.P. against me in I.P. 3/63 on the file of Sub-Court, Gudivada. They also filed Criminal

cases against me. In the I.P., the plaint schedule property was shown in B Schedule. Since the property was attached, I executed a registered sale

deed in favour of D-1. Ex. A-4 is the registration extract of the sale deed executed by me in favour of D-1. But the property was in my

possession.

45. Even if this piece of evidence is taken into consideration, in the examination-in-chief coupled with the pleadings in the plaint, the intention in

obtaining Ex. A-4 is to avoid payment of debts to the genuine creditors, which means the document was obtained to defraud the creditors in I.P.

No. 3 of 1963. The object of agreeing to re-convey schedule property under the original of Ex. A-11 is illegal and thereby it is not enforceable

under law.

46. On overall consideration of entire material available on record, Ex. A-11 is unenforceable under law in view of my foregoing discussion. Even

otherwise, the claim for specific performance is barred by limitation, as per my finding at Point No. 3 above. Hence, the plaintiff is not entitled to

the relief of specific performance of agreement to transfer the schedule property dated 05.01.1963, marked as Ex. A-11.

47. Further, as seen from Para 17(a) of the plaint, prayer is a cumulative one which includes both declaration and specific performance; though

they are distinct reliefs under different provisions of specific relief Act, but no Court fees was paid for the relief of specific performance separately,

either before the trial Court or before this Court. In such a case, the plaintiff is not entitled to claim the relief of specific performance. However,

under A. P. Court Fees and Suits Valuation Act, 1956 (For short, ''the Court Fees Act'') Court can direct the plaintiff to pay Court fee and pass a

decree, if he is otherwise entitled, but in the instant case on hand, this Court also concluded that the plaintiff is not entitled to claim the relief of

specific performance basing on Ex. A-11, however, still he is bound to pay the Court fees. Therefore by exercising power u/s 11 of the Court

Fees Act, the plaintiff is hereby directed to pay Court fees for claiming the relief of specific performance both in the trial Court and before this

appellate Court. Registry of this Court and the Senior Civil Judge, Machilipatnan, are directed to take necessary steps to recover the Court Fees

payable for specific performance on receipt of a copy of this judgment.

48. On over all consideration of the entire material, after discerning the evidence on record coupled with the findings recorded by the trial Court, I

find no illegality in the finding recorded by the trial Court, calling for interference of this Court. Hence, the finding of the trial Court is hereby

confirmed holding this point in favour of defendants and against the plaintiff.

49. POINT No. 1: The plaintiff filed the suit for declaration of title to the property as the property was purchased in the name of first defendant as

benami to avoid payment of debts due to his creditors in I.P. No. 3 of 1963 and it is evident from his pleadings and oral evidence, that means both

judicial and evidentiary admissions. The trial Court did not accept this contention on the ground that the transaction is hit by Benami Transactions

(Prohibition) Act, 1988 (For short, ''Benami Transactions Act''), following the principle laid down by the Apex Court and other High Courts. In a

decision of the Apex Court in Om Prakash and another Vs. Jai Prakash, that provisions of Benami Transactions Act, is retrospective but in the

later judgment reported in R. Rajagopal Reddy and Others (deceased by legal representatives) Vs. Padmini Chandrasekharan (deceased by legal

representatives), the Supreme Court held that the provisions of the Act are only prospective. Hence, the trial Court committed an error in

concluding that the transaction is hit by Benami Transactions Act to that extent the finding of the trial Court is reversed.

50. The plaintiff based his claim mainly on Exs. A-4 and A-11 and other documents on the ground that he obtained loan from the Primary

Agricultural Co-operative Society (For short, ''PACS'') and paid loan to the Society and also paid land revenue etc. for the schedule property. As

seen from the material on record, Ex. A-5 to A-10 are land revenue receipts in the name of first defendant paid by plaintiff, but mere payment of

land revenue to the Revenue Department would not confer any title to the property. Hence, Exs. A-5 to A-10 are insufficient to conclude that the

plaintiff is the owner of property. Exs. A-13 to A-15 are the receipts issued by the PACS in favour of plaintiff but those documents did not

disclose anything except that the loan was obtained by mortgaging the schedule property by first defendant. Even assuming for a moment that

plaintiff mortgaged the schedule property and obtained loan with PACS that would not take away the legal right of the first defendant in the

schedule property and confer title on the plaintiff. The receipts marked as Exs. A-13 to A-15 were issued in the name of first defendant but no

endorsement is made on those documents. Similarly, Ex. A-15 to A-17 are in the name of Rahematunnisa, first defendant only. Strangely, a letter

was brought into existence allegedly executed by Kaikalur PACS, marked as Ex. A-19. Even in that document the PACS demanded Mohd.

Abdul Sattar for payment of debt due by Rahematunnisa, first defendant herein under debt No. 43/28.02.1976 for Rs. 1,391/- and thus the

alleged documents marked as Exs. A-13, A-18, A-19 would not confer any title on the plaintiff. The other documents are only Photostat copies of

notices, receipts etc., and those documents would not come to the aid of the plaintiff to prove that he purchased the property as benami transaction

in the name of first defendant.

51. On the other hand, the consistent evidence of D.Ws. 1 and 2 on record is that D.W. 1 purchased the property under the original of Ex. B-1

agreement of sale dated 05.01.1963 and later obtained Ex. B-2 and paying land revenue under the original of Exs. B-3 to B-27 and she is in

possession as owner of the property cultivating the land in view of recitals of Ex. B-28. The oral evidence is totally in support of case of the

defendants. Thus, the first defendant is able to establish that she purchased the property independently. However, the plaintiff has not proved his

claim that he purchased the property as benami in the name of first defendant.

52. Evidence of P.Ws. 1 and 2 is totally discrepant and inspires no confidence. From the beginning it is contended that the plaintiff himself

purchased the property in the year 1962 and obtained an agreement of sale from Panja Suramma and Rama Rao and later on the date of execution

of Ex. A-11, he obtained an agreement of sale in favour of the first defendant and later obtained sale deed under Ex. A-4 in favour of the first

defendant but the agreement allegedly obtained by him was not produced before the trial Court at least to prove that the property was purchased

by him and later registered deed was obtained in the name of first defendant. On the other hand, the clinching evidence on record, Ex. B-1 which

was referred under Ex. A-4 proved that the first defendant herself purchased the property under agreement of sale, paid sale consideration and

obtained sale deed. The plaintiff further contended that he obtained delivery of possession of the schedule property in the year 1962 itself and even

this fact is not proved by any amount of evidence. On the other hand, in his examination-in-chief dated 17.09.1992, he contended that he is in

possession and enjoyment of the property and cultivating the same. When he is cultivating the property, the question of handing over the property

to defendants to manage the property as trustees and in turn their leasing out the same to Pantu Lakshmanna and payment of amount towards

profits from the schedule property is not acceptable. Therefore, the possession of the plaintiff is not supported by any documentary evidence like

cultivation account, No. 2 (old) No. 3 (new) Adangal which discloses various details of cultivation including the name of the pattedar etc.,

53. On the other hand Ex. B-28, established that the first defendant being the pattadar is in possession and enjoyment of the property and she

herself paying land revenue for the schedule property. The documentary evidence produced by defendants falsified the contention of the plaintiff

that he is in possession and cultivating the land. Even otherwise, the relief claimed by the plaintiff for profits is totally inconsistent with the contention

that he is in possession and cultivating the schedule property. If really, he is in possession and cultivating the schedule property, the question of

payment of any profits by the defendants and recovery of profits does not arise. The inconsistent reliefs and pleadings in the plaint are suffice to

conclude that he was never in possession and enjoyment of the property.

54. The main contention of learned counsel for the appellant is that the plaintiff purchased the property as a benami in the name of first defendant

by paying total consideration, but the source of payment of consideration was not proved and purchase of the property by himself under agreement

of sale in the year 1962 is not established by producing the same except his oral evidence. Added to that, the contents of Ex. A-11 creates any

amount of suspicion and it is totally contrary to the human probabilities for the reason that there was a reference in Ex. A-11 that the property was

already purchased by the plaintiff in the name of first defendant and as such first defendant agreed re-convey the property after termination of both

Civil and Criminal proceedings pending by then. In fact, by the date of execution of Ex. A-11, the property was not purchased and the sale was

not complete but Ex. A-4 was executed almost after one month from the date of execution of Ex. A-11. In such a case, the question of agreeing to

re-convey or re-transfer the property in the name of plaintiff is un-usual thing and appears to have invented some how to overcome the difficulties

in proving the nature of transaction. When the plaintiff himself was declared as insolvent due to his inability to pay debts to his creditors by

committing an act of insolvency, in the normal course of events, the question of payment of any amount towards sale consideration is not

believable. Even otherwise, the onus is always on the plaintiff to prove that he paid the sale consideration and obtained the document in the name

of first defendant.

55. The word benami transaction is defined u/s 2(a) of Benami Transactions (Prohibition) Act, 1988, which is as under:

Benami transaction" means any transaction in which property is transferred to one person for a consideration paid or provided by another person.

56. To treat whether a transaction is benami transaction, the prime consideration is payment of sale consideration by the plaintiff and obtaining

document in the name of defendant. Several tests are laid down by various High Courts to find out whether a transaction is a benami transaction or

not. In Nandigam Ramarao and Others Vs. Burugupalli Srikrishnamurthi and Others, this Court laid down the following tests to decide whether a

document is benami or not:

1) Motive for taking the sale deed in the name of another,

2) Custody of the sale deed the connected vouchers,

3) Passing of consideration; and

4) Possession of the property.

57. The Supreme Court in Kedar Nath Motani and Others Vs. Prahlad Rai and Others, , held as under:

To decide whether a particular transaction is benami or not, the source of money always will be a very valuable test.

58. From the decisions cited supra, the real test is possession of the property, payment of consideration, possession of title deeds etc., in the

instant case on hand, the plaintiff was not in possession of the property in view of the relief claimed in the plaint itself and he was not in possession

of title deed i.e., the original of Ex. A-4, and not proved payment of consideration by himself, since, he himself was adjudged as insolvent in the

insolvency proceedings due to committing default in payment of amount to the Chit Fund subscribers in I.P. No. 3 of 1963. Thus, I find no iota of

evidence to prove any of the requirements to prove the transaction covered under the original of Ex. A-4 is a benami transaction. Added to that,

payment of land revenue and obtaining loan by first defendant also does go to establish that the first defendant is the real owner of the property and

the transaction is not a benami transaction. The plaintiff also produced several receipts issued by the PACS, marked as Exs. A-15, A-18 and A-

19 demanding first defendant to pay Rs. 673/- with interest due under the loan account. Those receipts were not issued in the name of the plaintiff

but in the name of the first defendant and he did not explain how he came into possession of those receipts, similarly, Exs. A-13, A-14 and A-16

also. Even assuming for a moment that those documents are true that would not create any title in the property, merely because he is in possession

of those documents and mortgaged the property to PACS. It is not the case that he mortgaged the property, however, the evidence whatever

adduced by the plaintiff is not sufficient to satisfy the tests laid down by this Court and the Apex Court.

59. P.W. 2 is the scribe on Ex. A-11, he himself stated that Ex. A-11 is true and correct and the sale deed he scribed but he could not give the

details of stamp papers purchased by her obtaining agreement of sale in her name and obtaining old title deed of the property by Panja Suramma

but she was not in possession. The trial Court concluded that the inability of D.W. 1 to disclose the discharge of the debt due to the bank and

possessing the old title deed of Panja Suramma is suffice to conclude that the plaintiff purchased the property in the name of first defendant.

However, the trial Court concluded that the plaintiff cannot be treated as a legal owner of the property unless he obtained re-conveyance since he

is only ostensible owner but this observation in the judgment at para 7 of the impugned judgment is not based on any substantive evidence for the

reason that the plaintiff did not adduce any evidence to satisfy the tests laid down by this Court and the Apex Court cited supra. Therefore, the

plaintiff cannot be declared as owner of the property.

60. Strangely, the plaintiff himself claimed that first defendant is the owner of property and obtained Ex. A-11 where under defendants agreed to

re-convey the property in his name. If really first defendant is not the owner of the property, the question of re-conveying the property on

termination of civil and criminal proceedings does not arise. Obtaining of Ex. A-11 itself indicates that the plaintiff admitted the ownership of first

defendant. Moreover, as per my discussion in the earlier paras, plaintiff miserably failed to establish the requirements to treat the transaction

covered under the original of Ex. A-4 is a benami transaction and the inability of first defendant to disclose certain details regarding discharge of

loan dues by itself would not sufficient to treat the transaction under the original of Ex. A-4 is a benami. Thus, the plaintiff miserably failed to

establish that the transaction covered under the original of Ex. A-4 is a benami transaction and admitted the legal title of first defendant.

61. In a suit for declaration the initial burden heavily lies on the plaintiff to prove to his ownership of the property. Here, the plaintiff miserably failed

to establish that he is the legal owner of the property and also failed to establish that the transaction covered under the original of Ex. A-4 is a

benami transaction, as such, he is not entitled to obtain decree for declaration that he is the lawful owner of the schedule property.

62. The pleadings and evidence on record shows that the alleged transaction covered under the original of Ex. A-4 was obtained only to defraud

the creditors of the plaintiff and avoided payment of debts to the creditors, got managed the then Official Receiver, who filed the present Suit, after

demitting the office of Official Receiver and got allowed the claim petition allegedly filed by the first defendant in I.A. No. 31 of 1963 in I.P. No. 3

of 1963 and the conduct of the plaintiff throughout is fraudulent. The relief of declaration is purely a discretionary relief and when the conduct of the

plaintiff is blameworthy and fraudulent he is not entitled to seek an equitable relief of declaration of title to the property.

63. In any view of the matter, I have recorded finding that the claim for declaration of title is barred by limitation in Point No. 3 above and even on

this ground also the plaintiff is not entitled to claim the relief of declaration. Hence, I find this point against the plaintiff and in favour of the

defendants. In view of my finding on Point Nos. 1 to 3, I came to an inescapable conclusion without any hesitation that the claims of the plaintiff for

declaration and specific performance are hopelessly barred by limitation and apart from that, the plaintiff miserably failed to establish that the

transaction covered under the original of Ex. A-4 is benami transaction and that Ex. A-11 is not enforceable under law. Thereby, the plaintiff is not

entitled to any relief in the Suit. However, the trial Court on different reasoning concluded that the transaction is benami transaction without looking

into the relevant tests laid down by this Court and Apex Court to prove that the transaction covered under the original of Ex. A-4 is a benami

transaction. Hence, the finding of the trial Court is hereby set-aside to that extent that the transaction covered under the original of Ex. A-4 is

benami transaction while confirming the remaining findings.

In view of my discussion, I find no merits in this Appeal and Appeal deserves to be dismissed. In the result, the Appeal Suit is dismissed confirming

the impugned decree and judgment dated 20.04.1993, passed in O.S. No. 7 of 1985 by the learned Senior Civil Judge, Machilipatnam.

In consequence, the Miscellaneous Petitions, if any, pending in this Appeal, shall stand dismissed. No order as to costs.