

* **IN THE HIGH COURT OF DELHI AT NEW DELHI.**

% **RFA NO. 72 of 2008**

+ Date of Decision: 21st February, 2011

D.N. KALIA ...Appellant

! Through: Mr. D.N. Goburdhan, Advocate

Versus

\$ **R.N. KALIA** ...Respondent

^ Through: Mr. Nishant Datta, Advocate

CORAM:

* **HON'BLE MR. JUSTICE P.K.BHASIN**

1. Whether Reporters of local papers may be allowed to see the judgment?(No)
2. To be referred to the Reporter or not?(Yes)
3. Whether the judgment should be reported in the digest?(Yes)

JUDGMENT

P.K.BHASIN, J

The present appeal is filed by the appellant for setting aside the judgment dated 27th October, 2007 passed by the learned Additional District Judge whereby the suit filed against him by his brother(the respondent herein) for a decree of possession and *mesne profits* in respect of one room and a bathroom on the ground floor of house no. E-28, Greater Kailash-II, New Delhi(hereinafter to be referred to as 'the house in dispute' and which house was claimed by the respondent to be his self-acquired property) has been decreed and the counter-claim of the

appellant-defendant for a decree of partition of the house in dispute on the ground that it was a joint family property has been rejected.

2. The respondent-plaintiff(who shall hereinafter be referred to as ‘the plaintiff’) had filed the suit against his brother, the appellant herein and who shall hereinafter be referred to as ‘the defendant’, alleging that he was the owner of the house in dispute having purchased the same vide registered sale deed dated 14.11.1979. Regarding the sale consideration he had pleaded that since he was living abroad he had been remitting money from abroad in the bank account of his mother and with that money the house in dispute was purchased in his name. The plaintiff claimed that he remitted US \$ 10,000, 11000, 31231 and 15000 on 19/12/77, 02/08/78, 07/04/79 and 14/09/79 respectively. Prior to the execution of the sale deed an agreement to sell was executed between the vendor and the defendant on whose behalf that agreement dated 5th September,1979 was signed by the defendant as the attorney of the plaintiff. After the purchase of the house in dispute the plaintiff had allowed the defendant to live in one portion of that house comprising of one room and a bath room on the ground floor temporarily as a bare licensee without claiming any charges. The defendant was married in the year 1982 and then his wife also started living with him in the one room accommodation. However, when the plaintiff asked the defendant to vacate the said accommodation in his possession when some disputes arose between the two brothers in 1998 the

defendant refused to vacate and that necessitated initiation of legal proceedings by the plaintiff for getting back the premises in occupation of the defendant. In the suit filed by the plaintiff he had claimed a decree of possession as well as *mesne profits* @ Rs.5,000/-p.m. for a period of three months prior to the filing of the suit and also for the subsequent period till the delivery of possession to him.

3. The defendant contested the suit and claimed that even though the house in dispute was purchased in the name of the plaintiff and he(the defendant) had acted as his attorney at that time but subsequently in January,1980 it was thrown in the hotch potch of the joint family of Kalias by the plaintiff by making a declaration to that effect which was re-affirmed also on the occasion of Rakhi in the same year when also he had visited India and with that declaration the house in dispute had ceased to be the separate property of the plaintiff. The joint family according to the defendant at that time comprised of their father(who subsequently died in the year 1981), mother, married sister and another brother Virender Nath. The defendant also pleaded that in the ground floor portion their mother was also living with him and the other brother Virender Nath was living on the first floor. Regarding the money which the plaintiff claimed to have remitted from abroad the defendant pleaded that he did not have details of those remittances but it was claimed while admitting that for the purchase of the house in dispute the plaintiff had contributed in good measure that

their father had also contributed money (In the memorandum of appeal however the appellant-defendant admitted the remittance of U.S. \$ 10,000 and 11,000 by the plaintiff in the bank account of the mother). It was also pleaded that the plaintiff had filed the suit only as a counter blast to the petition filed by the defendant for dissolution of his marriage with his wife on the ground that she was having adulterous relationship with the plaintiff. The defendant thus while praying for the dismissal of the plaintiff's suit sought a decree of partition of the house in dispute by presenting a counter-claim claiming 1/4th share therein. The mother and the sister of the original parties to the suit, who had also been subsequently ordered by the trial Court to be impleaded in the suit as well as in the counter-claim, supported the original defendant (the appellant herein) by adopting the defence raised by him in his written statement. Third brother Virender Nath was also impleaded but he did not participate in the trial and remained *ex parte*.

4. The plaintiff in his reply to the counter-claim took a preliminary objection that the suit (counter-claim) was not maintainable and the defendant was debarred from raising the plea of benami in view of Section 4 of the Benami Transactions (Prohibition) Act, 1988. On merits, the plaintiff denied that anybody except him had contributed money for the purchase of the house in dispute or that he had thrown that property into the hotch potch of the joint family. He also denied the very existence of

any Joint Hindu Family. The plaintiff also denied that he had visited India in January, 1980 or on the Rakhi day in August, 1980, as had been claimed by the defendant

5. Following issues were framed by the trial Court for trial:-

- “1) *Whether this suit is not properly valued for the purposes of Court fee and jurisdiction as alleged in the written statement? OPD*
- 2) *Whether the suit building after its purchase in the name of the plaintiff was thrown into the hotchpotch of joint family pool and was treated as a joint family property as alleged in the counter claim filed on behalf of the defendant? OPD*
- 3) *Whether defendant no. 1 is a licensee in respect of suit premises as alleged in the plaint and if so to what effect? OPP*
- 4) *In case issue no. 2 is decided in the affirmative, whether the plaintiff is entitled to recover mesne profits from the defendant and if so at what rate and for which period? OPP*
- 5) *Relief.”*

6. The learned trial Court decided issues no. 2, 3 and 4 against the defendant-appellant and passed a decree of possession and *mesne profits* also @ Rs. 5000/- per month w.e.f. 01.05.1999 till the vacation of the licensed premises by the defendant-appellant. The decision of the trial Court is now under challenge before this Court at the insistence of the defendant.

7. I have heard Shri D.N.Goburdhan, learned counsel for the appellant and Shri Nishant Datta, learned counsel for the respondent and have also examined the evidence adduced during the trial. The admitted position that

emerges is that the house in dispute was purchased in the name of the respondent and that the agreement to sell prior to the execution of the sale deed was signed on behalf of the plaintiff by the defendant as his attorney. Thus, the presumption is that the plaintiff was the exclusive owner of the house in dispute. Regarding the payment of sale consideration the defendant himself had claimed that the plaintiff had paid in good measure which showed that the defendant was not disputing the plaintiff's claim that the money which he had been remitting in the bank account of his mother was used to purchase the house in dispute in his name. Even though in the written statement it had been claimed by the defendant that their father had also contributed some money towards the sale consideration of the house in dispute and in evidence it was suggested to the plaintiff in cross-examination that their father had paid a sum of Rs.50,000/- to the property dealer as advance and another sum of Rs.1,50,000/- in cash to the builder at the time of execution of agreement to sell and then in his own evidence also the defendant took that stand but except for his own *ipse dixit* there is no other evidence adduced to substantiate that plea and, therefore, the learned trial Court has rightly not accepted the same. In fact the defendant-appellant had admitted in his written statement, though not very clearly, that the house in dispute was the personal property of the plaintiff. That admission is evident from the averments made by the defendant in his written statement-cum-counter

claim that the plaintiff had made a solemn declaration that he was throwing into the hotch potch of the Joint Hindu Family the house in dispute which had been purchased in his name and that “ With the solemn declaration having being made by the plaintiff, the suit property ceased to be the separate property of the plaintiff and became the Joint Hindu Family property of the plaintiff, the defendant, their brother, Group Caption Virender Nath, their late father Sh. Shankar Das Kalia (who died on 5th May,1981), mother and sister.....”. From this portion extracted from the written statement of the defendant it is more than clear that even according to the case of the defendant and other members of Kalia family the house in dispute was the personal acquisition of the plaintiff.

8. Now I come to the plea of the defendant- appellant that in the year 1980 the house in dispute, which I have held to be the personal property of the plaintiff, was thrown into the hotch potch of the Joint Hindu Family (Kalia family) and as a result of that the house in dispute became the Joint Family Property in which every member of Kalia family acquired equal share and the same, therefore, became liable to be partitioned because of the disputes between the plaintiff and other family members. In my view, this defence taken by the defendant is without any merit since it was not his case and not even that of his mother and married sister that at any time Kalia family had any ancestral property in their hands. If there was no joint family property or *coparcenery* property in existence at the time of

alleged throwing of the house in dispute by the plaintiff into the common hotch potch there could be no question of applicability of the rule of blending self-acquired property of a member of *coparcenery* with the properties of the *coparcenery* or undivided Hindu family. For this view I am fortified by a Division Bench judgment of this Court in “***Kewal Krishan Mayor v. Kailash Chand Mayor and Ors.***”, 95 (2002) DLT 115 wherein this very question had cropped up for consideration and after noticing some judgments of the Hon’ble Supreme Court on the same point the Division Bench had come to the conclusion that to attract the rule of blending of separate property of a coparcener with joint family property there has to be in existence some coparcenery property as well as some separate property of a coparcener. It would be profitable to extract below the relevant paragraphs from the said judgment of the Division Bench of this Court:

“24. As regards the other point about the deceased having thrown his two properties in common pool of the alleged joint Hindu family, learned Judge proceeded on the assumption that the law does not lay down that a separate property could not be impressed with the character of joint Hindu family in the absence of the existence of joint family or coparcenery property. He further proceeded on the assumption that the existence of joint family property is not necessary before a member of the family throws his self acquired property in the joint stock. It is this erroneous assumption of law by the learned Single Judge, which in our view led him to incorrect conclusions.

25. Under the Hindu Law property may be divided under the two classes, namely, (a) Joint family property and (b) separate property. Joint family property may be further sub divided according to the source for which it comes into, namely, (a) ancestral property (b) separate property of coparceners thrown into the common coparcenery stock and (c) property joint acquired by members of a joint family with the aid of ancestral property. It is not the case of the plaintiff that the two properties were

ancestral properties. His case is that these two properties (9/10 and 8/11 W.E.A. Karol Bagh, New Delhi) were separate properties of Lala Bai Mukand and were thrown by him into the common coparcenary stock by declaration (Ex. P.W. 1/3) made by him. This is the case set up by him in the plaint and for that it is necessary for us to deal with the question that under what circumstances property, which originally is separate and self acquired property of a member of a joint Hindu family may become joint family property.

26. The law is now well settled that such a separate or self acquired property by operation of the doctrine of blending becomes joint family property, if it has been voluntarily thrown by him into the common stock with the intention of abandoning all separate claims upon it. A clear intention to waive his separate rights must be established. The basis of the doctrine is the existence of coparcenary property as well as existence of separate property of a coparcener.

[Emphasis supplied by me.]

27. In Mallesappa Bandeppa Desai and Anr. v. Desai Mallappa alias Malesappa and Anr. MANU/SC/0377/1961 : [1961]3SCR779 approving the opinion of Privy Council in Rajanikantha Pal v. Jagmohan Pal AIR 1923 PC 57 it was held:-

The rule of blending postulates that a coparcener who is interested in the coparcenary property and who owns separate property of his own may be deliberate and intentional conduct treat his separate property as forming part of the coparcenary property. If it appears that property which is separately acquired has been deliberately and voluntarily thrown by the owner into the joint stock with the clear intention of abandoning his claim on the said property and with the object of assimilating it to the joint family property, then the said property becomes a part of the joint family estate; in other words, the separate property of a coparcener loses its separate character by reason of a coparcener of the owner's conduct and get thrown into the common stock of which it becomes a part. The doctrine, therefore, inevitably postulates that the owner of the separate property is a coparcener who has an interest in the coparcener property and desires to blend his separate property with the coparcenary property. There can be no doubt that the conduct on which a plea of blending is based must clearly and unequivocally show the intention of the owner of the separate property to convert his property into an item of joint family property. A mere intention of benefit the members of the family by allowing them the use of the income coming from the said property may not necessarily be enough to justify an inference of blending; but the basis of the doctrine is the existence of coparcenary and coparcenary property as well as the existence of the separate property of a coparcener.

[Emphasis supplied.]

28.

29. The basic requirements of the doctrine of blending namely, existence of coparcenary or coparcenary property as well as existence of separate property were reiterated by the Supreme Court in Goli Eswariah v.

Commissioner of Gift Tax, A.P. MANU/SC/0258/1970 : [1970]76ITR675(SC) wherein it was held:-

"To pronounce on the question of law presented for our decision, we must first examine what is the true scope of doctrine of throwing into the 'common stock' or 'common hotchpotch'. It must be remembered that a Hindu family is not a creature of a contract. As observed by this Court in Mallesappa Bandeppa Desai v. Desai Mallappa, MANU/SC/0377/1961 : [1961]3SCR779 that the doctrine of throwing into common stock inevitably postulates that the owner of a separate property is a coparcener who has an interest in the coparcenary property and desires to blend his separate property with the coparcenary property. The existence of a coparcenary is absolutely necessary before a coparcener can throw into the common stock his self acquired properties. The separate property of a member of a joint Hindu family may be impressed with the character of joint family property if it is voluntarily thrown by him into the common stock with the intention of abandoning his separate claim therein. The separate property of a Hindu ceases to be a separate property and acquires the characteristic of joint family or ancestral property not by any physical mixing with his joint family or ancestral property but by his own volition and intention by his waiving and surrendering his separate rights in it as separate property. The act by which the coparcener throws his separate property to the common stock is a unilateral act. There is no question of either the family rejecting or accepting it. By his individual volition he renounces his individual right in that property and treats it as a property of the family. No longer he declares his intention to treat his self acquired property as that of the joint family property, the property assumes the character of joint family property. The doctrine of throwing into the common stock is a doctrine peculiar to the Mitakshara School of Hindu law. When a coparcener throws his separate property into the common stock, he makes no gift under Chapter VII of the Transfer of Property Act. In such a case there is no donor or donee. Further no question of acceptance of the property thrown into the common stock arises."

30. Same principles was reiterated in K.V. Narayanan v. K.V. Ranganadhan and Ors. MANU/SC/0528/1976 : [1976]3SCR637 and in Pushpa Devi v. The Commissioner of Income-tax, New Delhi MANU/SC/0378/1977 : [1977]109ITR730(SC) .

31. Thus the pre-requisite of the doctrine on blending being existence of coparcenary or coparcener property as well as the existence of separate property, in case of any one of the basic requirement lacking there would be no question of applicability of the doctrine of blending.....

[Emphasis supplied by me.]

32.

33.

34. This theory of having blended his separate property and characterised it as a joint Hindu Family property this must fall to the ground simply on the ground that as on the date there was no coparcenary

or joint Hindu family property with which the two properties could have been blended.”

9. Thus, the claim of the defendant for partition of the house in dispute on the ground that it was a joint family property because of the same having been thrown into the common stock of the joint family cannot be accepted.

10. It was also contended by the learned counsel for the appellant that since as per the plaintiff's own case the entire sale consideration for the purchase of the house in dispute was paid to the vendor out of the savings bank account of their mother but the sale deed was got registered in the name of the plaintiff it is clear that this was a case of benami transaction and the plaintiff was a mere benamidar and consequently he could not maintain a suit for possession against the defendant claiming himself to be the real owner. Mr. Goburdhan also contended that the bar against raising any defence on the ground of benami is not attracted here in view of the exception clause in sub-Section 3(b) of Section 4 of the Act of 1988. Therefore, contended Mr. Goburdhan, the objection taken by the plaintiff in reply to the counter claim that the plea of benami was barred under Section 4(1) of the said Act of 1988 cannot be accepted.

11. In my view, even this argument raised by the learned counsel for the appellant has to be rejected since it was not his case that the house in dispute had been purchased by the mother in the name of her son as a

benamidar. As noticed already, his defence proceeded on the basis that the house in dispute was the personal property of the plaintiff but the same had assumed the character of a joint family property when the plaintiff had made a declaration that he was throwing that property into the common hotch potch of Kalia family and that plea has already been rejected by me.

12. In any event, even if it is accepted that the mother had purchased the house in dispute in the name of her son as a benamidar the defendant cannot derive any benefit since the plea of benami transaction is now hit by the provisions of Section 4(1) of The Benami Transactions(Prohibition) Act,1988 which reads as under:

“4(1)No suit, claim or action to enforce any right in respect of any propertyheld benami against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property”

Learned counsel for the appellant in order to bring out the case from purview of this provision of law took shelter under sub-section 3(b) of Section 4 which reads under:-

“4(3)Nothing in this section shall apply,-

- (a)*
- (b) where the person in whose name the property is held is a trustee or other person standing in a fiduciary capacity, and the property is held for the benefit of another person for whom he is a trustee or towards whom he stands in such capacity.”*

13. The submission of Mr. Goburdhan was that it is a case of mother and son the son was standing in a fiduciary capacity and also as a trustee qua the mother while holding the property in his own name and, therefore,

the plea of benami was not hit by Section 4(1) of the Act of 1988 in view of the exception provided under sub-section 3(b) of Section 4. This argument also cannot be accepted since it was not even the case of the mother that she had purchased the house in dispute in the name of the plaintiff as a benamidar and that he was holding that property as a trustee for her or in a fiduciary capacity towards her. Even the defendant had not taken such a plea. In any event, the plaintiff, in whose name his mother had purchased the house in dispute, cannot be said to be the trustee of his mother and it also cannot be said that he was holding that property in fiduciary capacity towards his mother. A similar question had cropped up for consideration before a learned Single Bench of this Court in which case also the property in question had been purchased by the mother in the name of her son and when that son had sought to take shelter under the provisions of Section 4(3)(b) of the Act of 1988 this Court had taken the view that the son could not be said to be holding the property as a trustee of her mother or in a fiduciary capacity. That decision is reported as **2003 (67) DRJ 174, “Anil Bhasin vs. Vijay Kumar Bhasin & Ors.”** and the relevant paras of that decision are reproduced below:

15. It is obvious that in view of Section [7](#) of the Benami Transaction Act, which repealed Sections [81](#) and [82](#) of the Indian Trusts Act 1882, there cannot be the same concept of trusteeship or fiduciary capacity, or that of the transferee being deemed to be holding for the benefit of the person buying or providing the consideration as was the position prior to the amendment of 1988.

16. At the same time, there exists the provisions of Section [4\(3\)\(b\)](#) of the Benami Transactions Act 1988, being in the nature of a proviso excluding

from the prohibition, the right to recover property held benami, in such situations where the person in whose name the property is held, is a trustee or other persons standing in a fiduciary capacity.

17. To my mind, the only interpretation which can reconcile all the provisions, is to hold that after the repeal of Sections [81](#) and [82](#) of the Indian Trusts Act 1882, it is only those instances of fiduciary capacity such as property of partnership firm held in the name of one of the partners, or property which Mr. X wanted Mr. Y to buy in the name of Mr. X, but in violation of that instruction, Mr. Y has bought the property in his (Y's) own name. In such a case Mr. Y being in fiduciary capacity and a trustee of Mr. X, the provisions of Section [4\(3\)\(b\)](#) will ensure that prohibition of Benami Transaction does not stand in the way of a legal proceeding by Mr. X to enforce any right in respect of the said property.

18. The distinction is subtle, but significant. If Mr. X asks Mr. Y to purchase in his own name certain property, of which consideration has been paid by Mr. X, then that is a benami, transaction. On the other if Mr. X were to ask Mr. Y to buy the property in the name of Mr. X, but for any reason Mr. Y purchase the property in his own name (viz name of Mr. Y), then the relationship of trustee and or fiduciary capacity is available in the former case, but not in the latter case.”

14. Similar view was taken by Kerala High Court also in a judgment reported as *(1989) 180 ITR 503* titled “*C. Narayan vs. Gangadharan*”.

Therefore, the argument of Mr. Goburdhan in the present case that the plea of benami is permissible in view of sub-section 3(b) of Section 4 of the Act of 1988 stands rejected.

15. It was finally submitted by the learned counsel for the appellant that the learned trial Court had not given any decision in respect of the counter claim for the relief of partition lodged by the defendant and, therefore, this Court should remand back the matter to the trial Court with a direction to dispose of the counter claim also, one way or the other. There is no doubt that there is no specific observation made by the learned trial Court in the

concluding paras of the impugned judgment. However, since the relief of partition was sought by the defendant – appellant in his counter claim on the ground that the house in dispute belonged to the joint family and that plea had been categorically rejected by the trial Court it is clear that the counter claim stood rejected and particularly when he had not sought any other relief on any other ground in the counter claim. Therefore, there is no question of sending back the matter to the trial Court for passing a formal order of rejection of the counter claim. Learned counsel for the appellant had also contended that if such a formal order had been passed in respect of the counter claim the same would have atleast got a decent burial. Since appeal is in continuation of a suit that formal order of rejection of the counter claim lodged by the appellant – defendant can be passed even by this Court.

16. As a result of the rejection of all the pleas raised before this Court for the reversal of the decree of possession the appeal to that extent is liable to be dismissed. Nothing was argued on the question of award of *mesne profits* @ Rs. 5000/- per month by the trial Court as far as the period of three months prior to the institution of the suit is concerned. Considering the fact that the house in dispute is situated in a posh locality of Delhi the grant of *mesne profits* @ Rs. 5000/- per month does not appear to be unjustified also and, therefore, the trial Court's decree to that extent also stands affirmed.

17. However, as far as the grant of *mesne profits* by the trial Court to the plaintiff for the period after the filing of the suit till vacation of the property in question is concerned, the same cannot be sustained since no enquiry was ordered to be held by the trial Court for fixation of *mesne profits* for that period which was mandatorily required to be conducted in view of the provisions of Order XX Rule 12 of the Code of Civil Procedure and this legal position was not disputed even by learned counsel for the respondent – plaintiff. It is now well settled that in a suit for possession of some immovable property the Court has a discretion to order an enquiry into the *mesne profits* which are to be payable to the successful plaintiff after the institution of the suit till the delivery of the possession of the suit property by the unsuccessful defendant or to leave the plaintiff to have recourse to the remedy of filing of an independent suit for that relief. In case the Court feels inclined to award *mesne profits* to the successful plaintiff in the suit for possession itself then at first instance an enquiry is to be held and depending upon the result of that enquiry a final decree is to be passed regarding the relief of *mesne profits*. Since in the present case no enquiry was ordered by the learned trial Court for the *mesne profits* payable to the plaintiff for the period after the institution of the suit no decree could be passed in favour of the plaintiff for that period and, therefore, that part of the impugned judgment and decree is liable to be set aside.

18. In view of the fore-going conclusions, this appeal is allowed partly. The impugned judgment and decree to the extent the defendant has been ordered to vacate the premises in his occupation forming part of the house in dispute and to pay *mesne profits* for a period of three months prior to the institution of the suit @ Rs. 5000/- per month is concerned it is affirmed and the counter claim stands formally rejected. The decree awarding *mesne profits* to the plaintiff for the period after the institution of the suit, however, is set aside. In the facts and circumstances of the case, parties are left to bear their own costs and the appellant is granted three months' time to vacate the accommodation in his possession.

P.K. BHASIN,J

February 21, 2011
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