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**IN THE HIGH COURT OF JUDICATURE OF BOMBAY**  
**BENCH AT AURANGABAD**

**SECOND APPEAL NO.515 OF 1998**

1. Sau. Sarubai w/o Ramdas Bari APPELLANTS  
Age – 60 years, Occ – Household,

2. Ramdas Ganpat Bari,  
(Deceased) Through LRs

2-A) Sarubai Ramdas Bari,  
Age – 80 years, Occ – Household

2-B) Kailas s/o Ramdas Bari,  
Age – 47 years, Occ – Electrician,

2-C) Vilas s/o Ramdas Bari,  
Age – 40 years, Occ – Electrician

2-D) Sau. Housabai Rambhau Aswa,  
Age – 55 years, Occ – Household

2-E) Sau. Kalika Jagan Dhage (Bari)  
Age – 45 years, Occ – Household

All R/o Bariwada, Chopada,  
Taluka – Chopada, District – Jalgaon

VERSUS

Sudhakar Shivram Bari RESPONDENT  
Age – 50 years, Occ – Service,  
R/o 593, Vithal Peth,  
Jalgaon, Taluka and District – Jalgaon

.....  
Mr. V. T. Choudhari, Advocate for the appellants  
Mr. R. M. Deshmukh, Advocate for the respondent  
.....

**[CORAM : SUNIL P. DESHMUKH, J.]**

**DATE : 18<sup>th</sup> NOVEMBER, 2015**

**ORAL JUDGMENT :**

1. Present second appeal has been preferred by original defendants aggrieved by judgment and decree of appellate court reversing the decision of trial court of dismissal of suit filed by the respondent – plaintiff.

2. Regular Civil Suit No. 126 of 1981 had been instituted by the respondent - plaintiff for possession against the appellants - defendants No.1 and 2. The plaintiff claimed to be the sole owner of the property having purchased the same way back in 1949 in his name, while he was minor, by his father on payment of consideration of Rs.1000/-. It is claimed that since then he has been owner and in possession of said property. Till 1969, he was in possession of the suit property along with his father, when he was required to move out of the town for education and service / employment purpose. It is alleged that after he moved out of the house for education and service / employment purpose, he had locked the suit premises, however, defendants No.1 and 2, who were staying in some other place, had sold out their own property and moved into the suit premises and occupied eight chowkies thereof, breaking open the lock. In the circumstances, the plaintiff had been forced to issue notice in

1976 to the defendants to vacate the suit premises. However, the notice was not heeded and under the circumstances, aforesaid suit came to be instituted claiming possession from defendants No.1 and 2.

3. Appellants – defendants No.1 and 2 resisted claims under the suit contending that the plaintiff was neither exclusive owner nor was he in possession of the suit premises, as has been claimed. It is claimed by defendant No.1 that as a matter of fact, while the plaintiff was five year old, their mother died and he had been brought up by defendant No.1 by staying in the house and her father during his lifetime, in presence of witnesses, had allotted eight chowkies of the suit property to the defendants permanently. The contentions of the plaintiff about the defendants being trespassers have been denied. It is averred that the suit property, after death of father, has devolved on the plaintiff and defendant No.1 and two other sisters, who are staying away, since being married. Defendant No.1, in her defence alternatively has also pleaded that the defendants had become owners of the suit property by adverse possession and that the suit is time barred.

4. Indisputable factual position as is emerging is that – a sale

deed had been executed in the name of the plaintiff, upon payment of consideration of Rs.1000/- by father of plaintiff and defendant No.1, during minority of the plaintiff. The plaintiff used to reside in the suit property till he went away for education and employment purpose. Two other sisters, who are not parties to the matter, have been staying away from the house. Defendant No.1 and her husband have been put in possession of eight chowkies portion of property on northern side by father of plaintiff during his lifetime. Defendants have been residing in the same separately from quite a long time

5. It appears that in initial round of litigation, the suit was decreed, however, an appeal came to be preferred by the defendants and the matter was remanded for fresh trial. Thereafter, the trial court, upon issues as had been framed, found that it cannot be said that the suit property was purchased by father only for the plaintiff and that the plaintiff cannot be said to be the only owner of the suit property. Claim of the plaintiff that it is his self acquired property has also been answered in negative. The trial court as such, found that the plaintiff is not entitled to possession of the suit property, on the basis of title. The trial court held that defendant No.1 has proved that she has share in the suit property, it being ancestral, after

her father. Long residence of the defendants has been held to be proved so also it was found by the trial court that about eight chowkies north side portion of the suit property had been given by father of plaintiff and defendant No.1 for permanent residence to the defendants. However, claim of the defendants about them being owners by adverse possession and the suit being outside limitation had been answered in the negative. The trial court considered that the sale deed had been executed admittedly during minority of the plaintiff and that the amount of consideration of Rs.1000/- had been paid to the vendor by father of the plaintiff. The trial court had adverted to that the plaintiff had expressed, during the course of evidence, that the money for payment of consideration for purchase had been paid by grand mother, however, it has been observed that the same is not borne out from evidence. In the circumstances, it was held that the property really was that of father and after his death, it has fallen as ancestral property in the hands of his legal heirs, including plaintiff and his sisters. The trial court had categorically observed that having regard to that the plaintiff could not give any evidence with regard to any income and / or source for payment of consideration for purchase, claim of the plaintiff, who was minor at the relevant time, that it is his self acquired

property, cannot be said to be proved and thus had rendered a negative finding on the same. The claim of the plaintiff about forcible entry by breaking open the lock by the defendants, has also been answered in the negative, for want of evidence.

6. The trial court, upon evidence as had been adduced by defendant No.1, found that the claim of defendant No.1 that she had been inducted in possession of eight chowkies of the suit property, during lifetime of father and that she had brought up the plaintiff, who was five years old while their mother had died, had not been rebutted. Even Ramdas Dajiba had been examined for said purpose, whose evidence could not be overturned by the plaintiff.

7. Being aggrieved by dismissal of the suit, the plaintiff filed Civil Appeal No.261 of 1989. The appellate court has framed points for consideration with regard to ownership of the plaintiff, about title of defendants No.1 and 2 to eight chowkies premises and about entitlement of the plaintiff for possession of the suit property. The appellate court appears to have considered that while the sale deed stands in the name of the plaintiff, the title to the property has been passed to him on the date of its execution and as such, the plaintiff is owner of the suit property.

It is considered by the appellate court that since plea of payment of consideration by father and property thereby being a self acquired property of father impliedly suggests that defendants claim the property '*Benami*', standing in the name of plaintiff, however, the appellate court further appears to have considered that whether such a contention can be raised by defendant No.1, in view of enforcement of enactment Prohibition of Benami Transactions Act, 1988 (hereinafter will be referred to as "Benami Act"). The appellate court, with reference to 1996 AIR SC 238 "*R. Rajagopal Reddy V. Paminikkan Drashekharan*" has considered that said enactment is made applicable prospectively and had brought into effect on 19<sup>th</sup> May, 1998, whereas defence in respect of *Benami* transaction appears to have been taken thereafter, that is to say on 9<sup>th</sup> June, 1988. Since the plea of *Benami* transaction, for the first time, according to the appellate court, appears to have been taken on 9<sup>th</sup> June, 1988 i.e. after commencement of Benami Act, such a plea cannot be allowed to be raised by the defendants, after the date of commencement of the enactment. The appellate court appears to have considered that section 4 (3) (2) of the *Benami* Act is of no avail in the present circumstances to the defendants. The appellate court, however, has not dealt with the long standing possession of the

defendants and has simply considered ground of adverse possession holding that it cannot be said that the possession can be said to be ever hostile to the real owner, denying his title. Thus, it is held by the appellate court that defendants cannot be said to claim title over the suit property on the ground of adverse possession. The appellate court as well found that the theory put up by the plaintiff about forcible possession by breaking open lock by the defendants does not appear to be probable and the defendants appear to have been residing in the suit property from the lifetime of father of plaintiff and defendant No.1. However, the appellate court appears to have considered that the defendants cannot retain possession of the suit property, since the plaintiff is the owner, although they may have been allowed to reside there by deceased father of plaintiff and defendant No.1. The appellate court has reversed order of dismissal of suit by the trial court and has decreed the suit, directing the defendants to hand over possession of the suit property and inquiry for determination of mesne profits had also been directed to be carried out.

8. Substantial questions of law that arise for determination in present second appeal are -

I) Whether the appellate court had properly considered the impact of decision of the Supreme Court in the case of “*R. Rajagopal Reddy V. Paminikkan Drashekharan*” reported in 1996 *AIR SC 238* on the facts of the present case ?

II) Whether under the provisions of Prohibition of Benami Transactions Act, claims by defendant No.1 about property being owned by father of plaintiff and defendant No.1 gets wiped out ?

9. Learned advocate for the appellants, in addition to the portions from the decision reported in *R. Rajgopal Reddy's case (supra)* also relies on a decision of Andhra Pradesh High Court reported in *AIR 2003 AP 107 “ Pradeep Kumar V. Mahaveer Pershad and others”*, wherein according to him, it has been held that prohibition pursuant to *Benami* Act is not applicable in the cases where the property in question is purchased in the name of minor. He further submits, defendant No.1 has given sufficient indication of hostility by denial of exclusive title of the plaintiff and by that the same coming their way by way of inheritance pursuant to provisions of the Hindu Succession Act, particularly giving emphasis on section 8 thereof.

10. Learned advocate for the plaintiff – respondent contends

that it is indisputable position that the property had been purchased in the name of the plaintiff and that he continued to be the owner. He is title holder of the property under a written instrument and his ownership cannot be denied and disputed only for the contentions as are being advanced that consideration for the purchase is flown from father. He submits that on the basis of title to the property, it is his rightful claim for possession of the same. He submits that there is enough contemporaneous material available showing that defendants No.1 and 2 were residents of other place and that after the plaintiff has moved away, they had forced their entry into the suit property. He submits that the defence as is sought to be taken under the amendment in 1988, is expressly prohibited under the provisions of *Benami* Act. He lays emphasis for said purpose on section 4 (2) of the *Benami* Act and also refers to the application moved for taking up such plea, dated 9<sup>th</sup> June, 1988. He submits that the *Benami* Act was enforced on 19<sup>th</sup> May, 1988, the defence being prohibited thereunder, the application filed on 9<sup>th</sup> June, 1988 although has been allowed, has to be ignored and excluded from being considered.

11. Situation emerges in the present matter is that the property had been purchased in the name of minor plaintiff in

the year 1949 for a consideration of Rs.1000/-, which was paid by father of the plaintiff and defendant No.1, albeit plaintiff purported to contend that the sum had come from his grand mother, however, there has been no evidence in respect of the same at all. It has also come on record that defendant No.1 had been residing in the suit premises from quite a long time and continued to reside in the same, along with defendant No.2, her husband. She had been let in possession by her father and had been given about eight chowkies area. Defendant No.1 had adduced evidence in respect of the same, which has gone un rebutted. This, to certain extent, is an indication that the father had been wielding his right and power of ownership, since at his instance defendants No.1 and 2 appear to have been let in, a specific portion had been allotted by father to them and they continued to reside in exclusive and separate portion of the suit property. Further, the plaintiff has not been in position to prove the contention that the defendants had broken open lock and had trespassed and forced their entry into the suit premises, while he was away for education and employment. It also emerges on record that the defendant No.1 has denied exclusive ownership claimed by the plaintiff over the suit property. She had further claimed that the suit property has been inherited by

her upon death of father of plaintiff and defendant No.1, along with two other sisters. These pleadings, to a considerable extent, are suggestive and indicative of the defendants' defence about property being *Benami* standing in the name of plaintiff. While the *Benami* Act had been enforced in the year 1988, by way of abundant precaution, it appears that a specific plea about the transaction being *Benami* appears to have been taken, which was allowed. It is the contention of the appellant – defendants that once the amendment had been sought and had been allowed, the same relates back to the date of evidence. Although, it is being contended on behalf of the plaintiff – respondent that such a plea is prohibited under the provisions of section 4 (2) of the *Benami* Act, in the facts and circumstances of the present case, it appears that it may not be specifically but by implication, defendants have taken up such a plea. For want of specific literal plea, it cannot be said that such a plea is not taken at all or at least was not implicit. It also appears that in the circumstances, having regard to that the suit had been filed in 1981, the defence had been taken in 1981 itself suggesting the defence, which is contended to be prohibited by the plaintiff and appears to have been expressly clarified later, contention on behalf of the respondent – plaintiff appears to be laid on a fragile

ground.

12. One will have to consider that the property is purchased by father in the name of son and further that father's right about disposition of property had not been questioned by the plaintiff at any point of time. It has come on record that it is during lifetime of the father, defendants No.1 and 2 were put in possession of a portion of said property and had since then been exclusively enjoyed by them. The decision in *R. Rajgopal Reddy's case (supra)* has ruled that as far as pending matters are concerned, defences in pending suits remain unaffected. It is only future defence which has been nullified and considered to be covered by sweep of section 4 (2) of the *Benami* Act.

13. In the present case, situation, however, additionally has to be seen that it would be saved a transaction under sub section (3) of section 4 of the *Benami* Act, which reads thus -

- “4. *Prohibition of the right to recover property held benami-*
- (1) .....
  - (2) .....
  - (3) *Nothing in this section shall apply,-*
    - (a) *where the person in whose name the property is held is a coparcener in a Hindu undivided family and the property is held for the benefit of the coparceners in the family; or*
    - (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.”*

14. In the given circumstances, the transaction appears to be of fiduciary nature. On this count as well, the suit could not have succeeded.

15. In the circumstances, it will have to be said that, the approach of the appellate court had been to a large extent pedantic without reference to the pleadings as appearing originally in defence taken by defendants No.1 and 2 and that having regard to the decision in *R. Rajgopal Reddy's case (supra)* that the *Benami* Act being prospective, the defence taken by defendant No.1 cannot be said to have been affected by enforcement of *Benami* Act.

16. In view of aforesaid, consideration entertained by the appellate court about defence being prohibited, does not appear to be proper and in the emerging circumstances, it cannot be overlooked that purchase had been made while plaintiff being minor and the treatment thereafter accorded by the father to the property under the same, to a large extent shows that the purchase was of fiduciary nature. Accordingly, the questions

framed, referred to above, stand answered. Second appeal is allowed. Judgment and decree passed by Additional District Judge, Amalner in Civil Appeal No.261 of 1989 dated 21<sup>st</sup> September, 1998 stands set aside.

17. Pending civil application, if any, stands disposed of.

**[SUNIL P. DESHMUKH, J.]**

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