

**IN THE HIGH COURT OF BOMBAY AT GOA
SECOND APPEAL NO.34 OF 2007**

1. Smt. Chandrawati Punu Gaonkar
major in age, married, housewife and her husband,
2. Shri Puno Pavto Gaonkar
major in age,
both residents of house No.3,
Kajuwada, Kanebag, P.O. Morpirila, Quepem, Goa.
3. Smt. Laxawati Punu Velip
major in age, married, housewife and her husband
4. Shri Punu Bambo Velip
major in age, both residents of
house No.45, Vaizawada, P.O. Morpirila , Quepem, Goa.
5. Smt. Jayu Lasman Velip
major in age, married, housewife and her husband
6. Shri Laxman Shaba Velip
major in age,
both residents of house no.60, Cordem, via Camoli, Balli, Goa.
7. Smt. Surangawati Narayan Gaonkar
major in age, married, housewife and her husband.
8. Shri Narayan Punu Gaonkar
major in age,
Both residents of house No.22, Kanebag,
P.O. Morpiria, Quepem, Goa.

All above represented herein
through their Constituted Attorney
Shri Manguesh Fondu Velip,
Aged 24 years, landlord, resident of house No.959, Kuddem,
Cabo-de-Rama, Cola, Canacona Goa.
By virtue of Power of Attorney dated 3.8.1998,
executed at Canacona, Goa before the
Notary Shri Vithal V. Prabhu Dessai,
registered under no.2868/98.

.... Appellants

Versus

1. Shri. Nilu Manju Velip
son of late Manju Velip, major in age,
agriculturist, married, and his wife.
2. Smt. Rukmini Nilu Velip
major in age, housewife,

both residents of house No.953, Cuddem,
Cabo-de-rama, Cola, Canacona Goa.

3. Smt. Chandrabhagi Shaba Velip
major in age, widow, resident of
Kudde, Cabo-de-rama, Canacona Goa.
4. Smt. Lakshavati Kushali Velip
major in age, daughter,
resident of house No.47, Cordem, Bali, Quepem Goa.
5. Smt. Shobhavati Kushali Velip
major in age, daughter and her husband
6. Shri Kushali Gurko Velip
Major in age, both residents of Morpirla, Quepem, Goa.
7. Shri Fondu Zorgo Velip (since deceased)
son of late Zorgo Velip, major in age, agriculturist,
married and his wife,
- 7a. Shri Mangesh Fondu Velip,
Son of late Fondu Velip,
Aged 37 years, married, service.
- 7b. Smt. Mansi Mangesh Velip,
aged 33 years, married, service.
- 7c. Shri Gokuldas Fondu Velip,
Son of late Fondu Velip, Aged 35 years,
All above residents of House No.929, Kudali Cola,
Canacona Goa.
- 7d. Smt. Smita Datta Velip,
Daughter of late Fondu Velip and widow of late Datta Velip,
aged 40 years, housewife.
- 7e. Shri Darshan Datta Velip,
Son of late Datta Velip, Aged 19 years, student,
Both above residents of
House No.82-A, Cordem Balli, Quepem Goa.
- 7f. Smt. Kirti Kushali Velip,
Daughter of late Fondu Velip,
Aged 38 years, married and her husband
- 7g. Shri Kushali Kusta Velip,
Son of Kusta Velip, Aged 48 years,
Both above residents of House No.198/1, Morpirla,
Fatorpa, Quepem Goa.

8. Smt. Abole Fondu Velip
major in age, housewife,

both residents of house No. 959,

Cuddem, Cabo-de-rama, Cola, Canacona Goa.

....Respondents

Mr. S.S. Kakodkar, Advocate for the Appellants.

Mr. C.A. Coutinho, Advocate for Respondents No.1 to 5.

CORAM : F.M. REIS, J.

DATE : 21st AUGUST, 2015

ORAL JUDGMENT :

Heard Mr. S.S. Kakodkar, learned Counsel appearing for the appellants and Mr. C.A. Coutinho, learned Counsel appearing for respondents no.1 to 5.

2. The appeal came to be admitted by an order dated 10/08/2007 on the following substantial questions of law:

2(a) Whether First Appellate Court was right in applying provisions of Benami Transaction Prohibition Act 1988 to conclude that, the suit property was purchased in the name of the father of the Plaintiffs 1,3,4 and Defendant No.3 as he was major and elder and not jointly in the name of the father of the contesting defendants by Deed of Sale of December 1926 when there was no bar in law to purchase the suit property in the name of the minor father of the contesting Defendants 1,2 and 5 in the Deed of Sale of December 1926?

2(b) Whether Benami Transaction Prohibition Act 1988 which came in force on 5th September 1988 and

provisions of Section 3,5 and 8 thereof on 9.5.1988 was applicable to the suit property bearing survey no.215/1 and 216/4 of Village Cola, Taluka Canacona when the suit property on the basis of Deed of Sale of the year December 1926 was inscribed in Land Registration Record, Matriz record much prior to the said Act coming into force in favour of late Zorgo Shaba Velip, the father of Plaintiffs No.1,3,5 and Defendant No.3 and father-in-law of Plaintiffs No.2,4,6 and Defendants No.4 who are parties to above appeal.

2(c) Whether First Appellate Court erred in law in applying Section 4(3)(b) of Benami Transaction Prohibition Act when there are no pleadings and legal evidence that, the late Zorgo Shaba Velip in whose favour Sale Deed was executed in the year 1926 was holding the suit property as a trustee or in a fiduciary capacity and that, the suit property was held for the benefit of another person for whom he is a trustee or towards whom in such capacity and/or that the same was purchased through the contribution of Shaba, when the case put forth itself by the contesting defendants 1,2 and 5 was that of a co-ownership and their possession as alleged by them being of character of co-sharer.

2(d) Whether First Appellate Court erred in law in not applying bar of Section 4(2) of Benami Transaction Prohibition Act to the defence based on any right in respect of suit property alleged to be Benami to the contesting Defendants 1,2 and 5.

2(e) Whether contesting Defendants 1,2 and 5 were barred to raise the plea of Benami transaction in view of the Indian Limitation Act?

2(f) Whether the First Appellate Court without discussing the evidence led by the parties objectively and without any lawful title or possession to the contesting defendants 1,2 and 5 could have concluded that they have been in possession of the suit property and set aside the order of the Trial Court without substituting cogent reasons when admittedly title

documents of Land Registration record was inscribed in name of late Zorgo Shaba Velip and so also Matriz record in name of said Zorgo on the basis of Deed of Sale executed in December 1926.

3. Mr. Kakodkar, learned Counsel appearing for the appellants has submitted that the learned Trial Judge has non suited the respondents on the ground that the defence raised by the respondents is hit by the provisions of Section 4 of the Benami Transaction (Prohibition) Act, 1988. The learned Counsel further points out that it is the case of the respondents in the written statement that the disputed property is in co-ownership between the defendants and that the original Sale Deed was executed in the name of the ^{father of the defendant no.3} ~~grandfather of the respondent no.3~~ because ^{of defendants no.1 & 5} the father ~~Zorgo~~ was a minor. The learned Counsel further points out ^{defendants} that it is the case of the ~~respondents~~ no.1,2 & 5 that the property was in fact purchased in the name of said Zorgo by the grandfather for the benefit of Zorgo as well as his brother Manju. The learned Counsel further points out that this defence of the respondents was held to be hit by the provisions of Section 4 of the Benami Transaction Act and, as such, the Lower Appellate Court was not justified to interfere in the impugned judgment on the ground that the claim of the respondents comes within the explanation to the provisions of Section 4 of the said Benami Transaction Act. The learned Counsel further submits that the learned Lower Appellate Court has erroneously come to the conclusion

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that it is the case of the respondents that the property was in the name of Zorgo as a trustee and/or in a fiduciary capacity being the elder son of the family. The learned Counsel further submits that there were no particulars nor any claim put forward by the respondents in the written statement which would entitle them to claim such exception. The learned Counsel further points out that the case of the appellants, as such, that the suit filed by ~~respondents~~ ^{defendants} no.1,2 & 5 against original ~~respondents~~ ^{defendants} no.3

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& 4 was a collusion suit has to be accepted. The learned Counsel further submits that the father of the original appellant was Zorgo and the appellants being the daughters of said Zorgo were owners of the suit ~~respondents~~ ^{defendants} property along with the ~~respondents~~ ^{defendants} no.3 & 4. The learned Counsel has thereafter taken me through the provisions of the Benami Transaction Act to point out that the Lower Appellate Court has erroneously come to the conclusion that the suit is to be examined in the context as to whether the suit is barred in terms of Section 4 of the Benami Transaction Act. The learned Counsel has thereafter taken me through the substantial questions of law framed by this Court at 2(a), 2(b), 2(c), 2(d), 2(e) & 2(f) and pointed out that on the basis of such contentions the findings of the Lower Appellate Court deserve to be quashed and set aside.

4. Mr. C.A. Coutinho, learned Counsel appearing for the respondents

no.1 to 5, on the other hand, has in fact accepted that the question of going into the aspect of Benami Transaction would not at all arise in the present case. The learned Counsel has pointed out that the defence

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raised by the respondents was that the property was in co-ownership and defendants it was not the case of respondents no.1,2 & 5 that they were the exclusive owners of the disputed property. The learned Counsel, as such, submits that this itself would suggest that the question of applying the provision of Benami Transaction Act is not at all justified.

5. Mr. Kakodkar, the learned Counsel for the appellant does not join issue on the said aspect and submits that the question of examining the dispute between the parties in terms of Section 4 of the Benami Transaction Act does not arise at all.

6. Taking note of the rival contentions of the learned Counsel appearing for the appellants and respondents, the Courts below were not at all justified to examine whether the defence of the respondents would be hit by Section 4 of the Benami Transaction Act, 1988. Mr. Kakodkar, learned Counsel appearing for the appellants has submitted that the contention to that effect raised by the appellants is not pressed by the appellants and, consequently, the findings of the learned Judge that the defence of the respondents is to be examined to ascertain as to whether

the defence is hit by Section 4 of the Benami Transaction Act is not at all necessary. Hence, the findings of the learned Judge on that aspect deserve to be quashed and set aside. In any event as rightly pointed out by Mr. C.A. Coutinho, learned Counsel appearing for the respondents, the defence of the respondents was on the basis that they were co-owners of the property. In such circumstances, as the ~~respondents~~ ^{defendants} no.1,2 & 5 do not claim exclusive ownership of the subject property this by itself would negate the contention that the defence of the respondents is based on a Benami Transaction. In such circumstances, all the substantial questions of law namely 2(a), 2(b), 2(c), 2(d) & 2(e) do not survive and are held to be not pressed by the appellants in the present appeal. All the substantial questions of law except question no.2(f) are answered accordingly.

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7. The only aspect which is remaining to be examined is the substantial question of law at 2(f). In support of the said substantial question of law, Mr. Kakodkar, has pointed out that there is no appreciation of evidence nor any consideration of the material on record by the Lower Appellate Court to come to the conclusion that the appellants were not entitled for the relief of declaration of title and injunction as the appellants were not in a possession of the property. The learned Counsel has taken me through the findings of the Lower

Appellate Court at para 31 of the judgment to point out that the learned Judge has rendered a sweeping finding that the appellants herein have not established their possession to come to the conclusion that the relief of declaration and injunction could be granted. The learned Counsel further points out that there is no scrutiny of evidence by the Lower Appellate Court to come to such conclusion and, consequently, according to him the substantial question of law deserves to be answered in favour of the appellants. The learned Counsel further submits that the disputed property is inscribed in the name of said Zorgo and, consequently, the inferences in terms of Article 953 of the Portuguese Civil Code would show that the possession of the property was with said Zorgo. The learned Counsel further points out that this document has not at all been examined by the learned Judge to come to the conclusion that the possession of the property has not been established by the appellants. The learned Counsel, as such, submits that the said substantial question of law is to be answered in favour of the appellants.

8. On the other hand, Mr. C.A. Coutinho, learned Counsel has pointed out that the finding of the learned Judge at para 31 is the conclusion on the basis of the evidence scrutinized by the Lower Appellate Court in the earlier part of the judgment. The learned Counsel has pointed out that the Lower Appellate Court has taken note of the fact

that PW1 who was the attorney of the appellants has deposed in the Court and was not at all aware about the factual aspect in respect of the disputed property. The learned Counsel further points out that the Lower Appellate Court has also taken note of the admission of PW1 in his cross-examination to the effect that ~~respondents~~ ^{defendants} no.3 & 4 were not entitled to interfere and enjoy any portion other than the northern portion

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of the disputed property. The learned Counsel further submits that this itself suggests that the appellants nor the defendants no.3 & 4 were in exclusive possession of the entire property. The learned Counsel has also taken me through the findings of the learned Judge whilst examining the evidence of PW2 who has clearly admitted that separate portions were being enjoyed by the ~~respondents~~ ^{defendants} no.3 & 4 and ~~respondents~~ ^{defendants} no.1,2 & 5. The learned Counsel, as such, submits that there is no case for any interference in the impugned judgments.

9. I have considered the submissions of the learned Counsel and have also gone through the records. The substantial question of law framed by this Court is essentially in the context of appreciating the evidence on record. Mr. S.S. Kakodkar, learned Counsel appearing for the appellants has not shown that the findings of the Lower Appellate Court with regard to possession are not in accordance with the evidence on record. The learned Counsel was unable to point out any piece of material which has

not been examined by the learned Judge whilst coming to such conclusion. The learned Counsel was also not in a position to show that such findings are perverse finding arrived at by the Lower Appellate Court by misreading any material on record. On the contrary, on perusal of the judgments of the Lower Appellate Court, I find that the learned Judge has rightly appreciated the evidence of PW1 who has deposed as attorney of the appellants to hold that the appellants and the original ~~defendants~~ ~~respondents~~ no.3 & 4 were not in exclusive possession of the disputed property. In fact, on perusal of the evidence of PW2, the contention of ~~defendants~~ ~~respondents~~ no.1,2 & 5 that they were enjoying the property separately stands corroborated. In such circumstances, I find that the Lower Appellate Court has rightly come to the conclusion that the appellants ~~defendants~~ ~~respondents~~ no.3 & 4 were not in exclusive possession of the disputed property and, as such, were not entitled for declaration of title and injunction against ~~defendants~~ ~~respondents~~ no.3 & 4 when there was no prayer for restoration of possession. This finding of fact by the Lower Appellate Court cannot be reappreciated by this Court unless any perversity is shown in such finding. As far as the contention of Mr. Kakodkar that the property is registered in the name of Zorgo and, as such, he is presumed to be in possession of the disputed property, in view of Article 953 of the Portuguese Civil Code, I find that such presumption has been rebutted in the present case on the basis of material on record

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and on the basis of the decree passed by the Civil Court at the instance of
defendants
respondents no.1,2 & 5. The fact finding Courts below have come to the
defendants
conclusion that the appellants and respondents no.3 & 4 were not in
exclusive possession of the entire disputed property. In such
circumstances, the contention of Mr. Kakodkar relying on Article 953
cannot be accepted. In view of the above, I find that the substantial
question of law at 2(f) also is answered against the appellants.

10. As such, I find no merit in the above Second Appeal which stands
accordingly rejected.

F.M. REIS, J.

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