HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

APPEAL SUIT NOs.564 and 565 of 1992

COMMON JUDGMENT:

These two appeals are filed by Defendant No.7 in O.S.No.275/1979 and Defendant No.4 in O.S.No.84 of 1985 i.e., Malladi Ramakrishna Rao, on the file of I Additional Subordinate Judge, Kakinada, against the decrees and Common Judgment passed in the above two suits dated 08.04.1991, whereunder both the suits are decreed for partition of 1/5th share in 'A' and 'E' schedule property and Item No.1 of Plaint 'B' Schedule Property and other reliefs.

For convenience of reference, the parties to the appeals are ranked as arrayed in O.S.No.275 of 1979 by the I Additional Subordinate Judge at Kakinada, through out the judgment.

The Defendant Nos. 5 and 9 in O.S.No.275 of 1979 by name Jayanthi Subbalakshmi and Duvvuri Nagamani filed O.S.No.84 of 1985 claiming partition of the plaint schedule property. 7th Defendant in O.S.No.275 of 1979 and 4th defendant in O.S.No.84 of 1985 alone filed the present appeals claiming right in Item No.1 of Plaint 'B' Schedule property in O.S.No.275 of 1979 i.e., house door bearing No.54-6-22, which is containing 12 rooms and site. The said property is not a part of schedule in O.S.No.84 of 1985.

Malladi Sesharatnam is the wife of Venkatramaiah (who is the paternal grand son of D.1). Malladi Sesharatnam filed a suit for partition claiming 1/8th share in 'A to D' schedule property contending that schedule property belonging to joint family and her husband died on 01.08.1979 under suspicious circumstances while continuing as member of the hindu joint family. First defendant is a manager of hindu joint family consisting of herself, her husband and defendant Nos. 1 to 3 . Plaintiff's husband is the only son of defendant Nos. 2 and 3 and the 1st defendant is his paternal grand father. Her marriage with Venkataramaiah took place at Kapileswarapuram at Kakinada. Due to differences between plaintiff, her husband and first defendant, she is living separately along with her husband.

The schedule property is the joint family property of all the members including the husband of the plaintiff. After the death of her husband- Venkataramaiah, defendant

Nos. 1 to 3 neglected the plaintiff completely. Consequent upon the death of her husband, she became entitled to share of her husband in joint family property, who died intestate, and the plaintiff and 3rd defendant are only the legal heirs of deceased Venkataramaiah. She requested through mediators including the grand father of the plaintiff for amicable partition, the defendants did not cooperate for partition of schedule property. Therefore, she filed the suit for partition of 'A to D' schedule property into 8 shares and allot one such share to her.

Defendant No.1 filed Written Statement denying the material allegations of the plaint in O.S.No.275 of 1979 disputing the right of the plaintiff and nature of property. But this appeal is unconcerned with the pleas of first defendant with regard to other items, I am confining to note down the specific plea of defendant No.1 with regard to Item No.1 of Plaint 'B' Schedule property. In Para No.9 of the Written Statement, he specifically contended that the plaintiff has no right in Item No.1 of Plaint 'B' Schedule property and even the defendants have no right to seek partition since it is not the joint family property. The property was purchased by Jayanthi Venkateswarlu and others under a registered Sale Deed dated 27.02.1971 and it is a separate property of Jayanthi Venkateswarlu and others. Hence, the plaintiff is not entitled to claim any share in Item No.1 of Plaint 'B' Schedule property.

Defendant Nos. 2 and 3 filed joint Written Statement denying the allegations made in the plaint. In para No. 9 of the Written Statement, they contended that they are not concerned with Item No.1 of Plaint 'B' Schedule property except Nagamani, the daughter of defendant Nos.2 and 3 (D.9 in O.S.No.275 of 1979), has got 1/3rd share in plaint schedule property. Nagamani's paternal grand mother out of love and affection on her, gave cash to her and she invested the same in purchasing Item No.1 of Plaint 'B' Schedule property under registered Sale Deed dated 27.02.1971 along with Defendant Nos. 4 and 7 and therefore, Nagamani, D.4 and D.7 are entitled to claim 1/3rd share in Item No.1 of Plaint 'B' Schedule property. Thus, the plaintiff is not entitled to claim any right in Item No.1 of Plaint 'B' Schedule property.

Defendant No.3 filed additional Written Statement and in para No.4 of the said Additional Written Statement, she specifically contended that the allegation that item Nos. 2 and 3 of 'B' schedule are the joint family properties of defendant Nos. 1 and 2 and husband of plaintiff are absolutely false and thereby the question of devolution of the said properties on defendant Nos. 4 to 6 does not arise and prayed for dismissal of the suit.

Defendant Nos. 4 to 6 filed joint Written Statement and in para No.4 of the said Written Statement, they specifically contended that the defendant Nos. 4, 7 and Malladi Nagamani together purchased Item No.1 of Plaint 'B' Schedule property under registered Sale Deed dated 27.02.1971 from Veerubhotla Suramma and others and the consideration for the said purchase was paid by defendant Nos. 4, 7 and Malladi Nagamani and thereby, the plaintiff is not entitled to claim any share in the said property.

Defendant No.7 filed separate Written Statement contending that defendant No.7 is having interest in Item No.1 of Plaint 'B' Schedule property and he purchased the said property along with defendant Nos. 4 and 9 and he has been paying the property tax to the concerned department along with defendant Nos. 4 and 9 therefore he is entitled to claim 1/3rd share in it.

Defendant No.9 filed Written Statement and his specific contention with regard to Item No.1 of Plaint 'B' Schedule property is that in 1945 Venkataramayya and his son purchased an old house in the name of his wife by name Manikyamba and later constructed a pucca upstairs building, which is item I of Plaint 'B' schedule property. Thus, claimed that the first defendant is the owner of Item No.1 of Plaint 'B' Schedule property.

Defendant No.10 filed Written Statement, but he did not specifically raise any contention with regard to Item No.1 of Plaint 'B' Schedule property except pleading that he is adopted son of defendant Nos. 2 and 3. He also filed additional Written Statement and it is silent with regard to nature of acquisition of Item No.1 of Plaint 'B' Schedule property. He also filed another additional Written Statement, but nothing is pleaded regarding Item No.1 of Plaint 'B' Schedule property.

After filing Written Statement and additional Written Statements, the plaintiff in O.S.No.275 of 1979 i.e., Malladi Sesharatnam filed rejoinder contending that defendant No.7 (appellant herein) is not entitled to claim any share in the schedule property and that Item No.1 of Plaint 'B' schedule property is the joint family property, but the properties kept in the name of the persons according to his wish and convenience by the first defendant and denied the purchase of Item No.1 of Plaint 'B' Schedule property by defendant Nos. 4,7 and 9 and therefore, the schedule property is only joint family property and hence she is entitled to claim share in the joint family property.

A.S.No.565 of 1992

The plaintiffs in O.S.No.84 of 1985 are the defendant Nos. 5 and 9 in O.S.No.275 of 1979 and the contentions raised by them in O.S.No.84 of 1985 are almost similar to that of O.S.No.275 of 1979. Therefore, it is wholly unnecessary to reiterate the specific pleas of the plaintiffs in O.S.No.84 of 1985. But they did not claim any share in Item No.1 of Plaint 'B' Schedule property in O.S.No.275 of 1979 since it is not part of the schedule property.

Defendant No.1 in O.S.No.275 of 1979 filed written statement contending that since Item No.1 of Plaint 'B' Schedule property in O.S.No.275 of 1979 is not a part of schedule property in O.S.No.84 of 1985 and the specific contentions raised by various defendants in O.S.No.84 of 1985 needs no consideration. However, the 4th defendant by name Malladi Ramakrishna Rao, who is 7th defendant in O.S.No.275 of 1979, filed separate Written Statement contending that he is not interested in immovable properties of the plaint schedule and he is only interested in Item No.11 to 13 of plaint 'D' schedule property and claimed 1/4th share in Item No.11 and 12 and half share in Item No.13 as he contributed Rs.53,650/- of his own money in item No.13. He also claimed 1/4th share in Cargo boat.

The other defendants filed Written Statements by raising various contentions and their contentions needs no consideration since these appeals are confined to Item No.1 of Plaint 'B' Schedule property only.

On the strength of above pleadings, the trial Court framed the following issues in O.S.No.275 of 1979 and O.S.No.84 of 1985 respectively:

O.S.No.275 of 1979:

1. Whether the family arrangement of the year 1964 pleaded by the 1st defendant whereunder the 2nd defendant received a sum of Rs.5000/- and separated himself from the joint family is true ?

2. Whether the husband of plaintiff died as member of the joint family consisting of himself and defendant Nos. 1 and 2 ?

3. What are the properties belonging to the joint family and are liable

for partition ?

4. Whether Items in A, B and C schedules standing in the name of the defendants are the joint family properties but kept in their names in the circumstances stated for benefit of the joint family ?

5. Whether the Plaint 'D' schedule properties are in existence they belong to the plaintiff and they were in possession of the 1st defendant ?

6. Whether the suit for partition of the 'C' schedule property is not maintainable ?

7. Whether the plaintiff has given up her right, if any, in the joint family properties by taking the Jewels mentioned in the written statement of the 2nd defendant and borne out from the receipt dated 13.08.1979?

8. Whether the plaintiff is entitled to the partition as prayed for ?

9. Whether the plaintiff is entitled to the profits, past and future as

prayed for ?

10. To what relief ?

The following Additional Issues are framed on 12.8.1987,18.1.1991 and 17.1.1991 respectively:

1. Whether the plaint 'EFG' schedule properties are the family properties and are liable for partition ?
2. Whether the Will dated 10.05.1983 is true, valid and binding ?
3. Whether D.10 is the adopted son of D.2 and D.3 ?

Issues in O.S.No.84 of 1985:

1. Whether the suit is bad for misjoinder of parties ?
2. Whether the plaintiff is entitled for partition of the schedule mentioned properties into four equal shares and for allotment of 1/4th separate share to each of the plaintiffs from 'A to F' schedule properties together with possession thereof after ejecting the defendants therefrom ?
3. Whether the defendants are liable to render accounts ?
4. To what relief ?

The trial Court clubbed both the suits and recorded common evidence in O.S.No.275 of 1979.

During trial, on behalf of Plaintiffs, PWs. 1 to 8 were examined and marked Exs. A.1 and A.2 and on behalf of defendants, D.1 to 5 were examined and Exs. B.1 to B. 43 and Exs. C.1 to C. 18 were marked.

Upon hearing the argument of both the counsel in both the suits, the trial Court decreed the suit in favour of plaintiffs passing a preliminary decree dividing 'A to E' schedule properties and Item No.1 of the Plaint 'B' schedule property into five equal shares and allotted one such share to the plaintiffs in both the suits and 3rd and 10th defendant in O.S.No.275 of 1979 and 9th defendant i.e., 2nd defendant in O.S.No.84 of 1985 and 2nd plaintiff in O.S.84 of 1985. The other reliefs granted by the trial Court needs no consideration in these appeals since these appeals are confined to Item No.1 of Plaint 'B' Schedule property only.

Aggrieved by the decrees and common Judgment of the trial Court, the 7th defendant in O.S.No.275 of 1979 and 4th defendant in O.S.No.84 of 1985, filed the present appeals on various grounds and the contentions in both the appeals are identical. Hence, I need not specifically refer the specific contentions of the parties separately to avoid repetition.

The common contentions in both the appeals are that the trial Court went wrong in holding that Item No.1 of Plaint 'B' Schedule property belongs to joint family property and that the first defendant advanced amount for purchasing Item No.1 of Plaint 'B' Schedule property and obtained document in the name of defendant Nos. 4,7 and 9 in O.S.No.275 of 1979 without any evidence and accordingly, the trial Court committed an error in arriving such a conclusion. The appellant also questioned the findings with regard to Item Nos. 1 to 13 of Plaint 'E' schedule property. However, while advancing arguments before this Court by Sri M. Ramamohan on behalf of M.S.R. Subrahmanyam, learned counsel for appellant fairly conceded that 7th defendant in O.S.No.275 of 1979 is not-pressing his claim in 'E' schedule property and continued the appeals only in respect of Item No.1 of Plaint 'B' Schedule property in O.S.No.275 of 1979.

During pendency of A.S.No.564 of 1992, the appellant and respondent No.2 therein died and their L.Rs were brought on record as appellant Nos.2 and 3 and respondent Nos. 9 and 10 respectively, as per the Orders dated 07.03.2012 in A.S.M.P.No.1918 of 2009 and dated 18.06.2013 in A.S.M.P.No.1350 of 2013 respectively.

During pendency of A.S.No.565 of 1992, the appellant and respondent No.10 therein died and their L.Rs were brought on record as appellant Nos. 2 and 3 and respondent Nos. 12 and 13 respectively, as per the Orders dated 25.10.2013 in A.S.M.P.No.2216 of 2013 and dated 18.06.2013 in A.S.M.P.No.1353 of 2013 respectively.

During the course of argument, the learned counsel for appellant/7th defendant would submit that the property was purchased under registered Sale Deed-Ex.B.2 dated 27.02.1971 by the 7th defendant along with Jayanthi Venkateswarlu and Duvvuri Nagamani (D.4 and D.9, respectively) from Veerubhotla Suramma, who was examined as PW.4, but the trial Court observed that due to non production of the Sale Deed Ex.B.2 at the earliest point of time and failure to raise specific contention with regard to purchase of the property in initial stage itself in the Written Statement, while contending that they are not aware of the purchase of the property and later taking the plea of purchasing of Item No.1 of Plaint ‘B’ schedule property by D.4,7 and 9 cannot be believed. If really, defendant Nos. 4,7 and 9 purchased the property jointly under registered document, they would have claimed right in the schedule property based on Ex.B.2 at the earlier point of time itself. Therefore, the trial Court disbelieved the same. This conclusion is legally un-sustainable and sought to set aside the finding.

It is further contended by the learned counsel for 7th defendant (appellant herein) that when the document is registered in the name of defendant Nos. 4,7 and 9, they are presumed to be the owners, until the plaintiff proves that the first defendant advanced the amount for purchasing of Item No.1 of Plaint ‘B’ Schedule property and obtained document in the name of defendant Nos. 4,7 and 9. But the trial Court on surmises held that Item No.1 of Plaint ‘B’ Schedule property is the joint family property and the said finding is erroneous and contrary to law, that too without any evidence and prayed to allow these appeals setting aside the preliminary decrees and common judgment insofar as Item No.1 of Plaint ‘B’ Schedule property.

Sri E.V.V.S.Ravi Kumar, learned counsel for respondents, supported the contention of the defendant No.7/appellant herein and none of other respondents did contest the matter though received notices.

Considering the contentions of the learned counsel for 7th defendant/appellant herein, perusing oral and documentary evidence and the decrees and Common Judgment under challenge, the point that arise for consideration is :

" ***Whether Item No.1 of Plaint 'B' Schedule property is the joint family property of plaintiff and defendant Nos. 1 to 10 and if so, the plaintiff is entitled to claim 1/5th share in Item No.1 of Plaint 'B' Schedule property in O.S.No.275 of 1979*** ?

POINT: The claim of the plaintiff in O.S.No.275 of 1979 is that entire 'A to D' schedule property is the joint family property. But, she did not raise any specific contention that Item No.1 of Plaint 'B' Schedule property was purchased by defendant No.1 with the aid of joint family income and obtained Sale Deed in the name of defendant Nos.4,7 and 9, except contending that it is a joint family property. However, after filing of Written Statements and Additional Written Statements by the Defendants, she filed re-joinder with the leave of the Court disputing various contentions raised by defendant Nos. 4 to 7, 9 and D.1 in their written statements with regard to nature of acquisition of Item No.1 of Plaint 'B' Schedule property and specifically contended that appellant herein and D.9 (second plaintiff in O.S.No.84 of 1985)are not the owners of the property and the property was purchased by defendant No.1 by paying sale consideration with the joint family income and obtained document in the name of D.4, D.7 and D.9. Defendant No.7 is admittedly a teacher by then and having his own independent source of income. Whereas, the defendant Nos. 5 and 9, who are the daughters of defendant Nos. 2 and 3, were given cash and they invested the same in purchasing Item No.1 of Plaint 'B' Schedule property. The first defendant in his Written Statement denied the nature of acquisition contending that it is the separate or exclusive property of D.4,D.7(appellants herein) and D.9 (plaintiff in O.S.No.84 of 1985). Similarly, all the defendants contended that it is the separate property of Defendant Nos.4,7 and 9 either in their written statements or additional written statements. When the plaintiff contending that the property was purchased by defendant No.1 in the name of defendant Nos. 4,7 and 9, it is neither nominal nor sham and at best this plea may amount to a Benami transaction, as defined under Section 2 (a) of Benami Transactions (Prohibition) Act, 1988, which defined the Benami transaction as follows:

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

When the plaintiff contending that it is a benami transaction, the plea must be specific. But, no such specific contention was raised in the plaint. According to settled law, the Benami Transactions (Prohibition) Act has no retrospective application, but it has only prospective application. The property vide Ex.B.2 was purchased long prior to commencement of 'Benami Transactions (Prohibition) Act, 1988'. Therefore, the provisions of the said Act have no application to the transaction covered by Ex.B.2. Hence, the plaintiff is not entitled to raise a plea that the transaction covered by Ex.B.2 is a benami transaction as the defendant No.1 had paid sale consideration and obtained the document in the name of defendant Nos. 4,7 and 9. When the plaintiff pleaded that it is a benami transaction, the burden heavily lies on the person, who asserted that the transaction is a benami transaction, as held by the Apex Court in **Valliammal (D) By Lrs vs Subramaniam & Ors,** wherein it was ruled as follows**:**

> "There is a presumption in law that the person who purchases the property is the owner of the same. This presumption can be displaced by successfully pleading and proving that the document was taken benami in the name of another person from some reason, and the person whose name appears in the document is not the real owner, but only a benami. Heavy burden lies on the person who pleads that the recorded owner is a benami-holder".

In the same judgment, the Apex Court laid down certain tests to determine whether a transaction is a benami transaction or not. The tests are (1) Source from which the purchase money came and (2) the motive why the property was purchased under benami transaction. The Apex Court further held that unless the party, who asserted the transaction is a benami transaction, satisfies the tests, the same cannot be considered as a benami transaction.

In earlier judgments of the Apex Court and this Court, the Courts laid down certain tests to determine whether a transaction is a benami transaction or not. The following are the factors to be taken into consideration to determine the benami nature or otherwise of the property transaction, which are as follows:

1. The relationship of the party.
2. The motive for transaction.
3. Source of the purchase price or consideration as the case may be.
4. Conduct of the parties and the concerning source of circumstances.

In **Ramaiah v. Singaraiah,** this Court held that "each factor by itself may be decisive, but the cumulative effect or the totality of all the relevant and material factors should be the safe guide for determining the benami nature or otherwise of a transaction,. In another judgment reported in **Lachu Reddy V. Venkamma**, this Court held that " in a benami transaction, the intention of the parties is the essence of the transaction and the source of the sale price also plays a large part in the determination of the nature of the transaction".

In **Ramarao V. Srikrishna Murthi**, this Court laid down four tests to determine the nature of transaction, they are as follows:

1. Motive for taking the sale deed in the name of another.
2. Custody of the Sale Deed and connected vouchers.
3. Passing of consideration; and
4. Possession of the property.

In **Jaydayal Poddar (Deceased) vs Mst. Bibi Hazra And Ors,** the Apex Court laid down certain tests to decide the nature of transaction and ruled as follows:

> "It is well settled that the burden of proving that a particular sale is benami and the apparent purchaser is not the real owner, always rests on the person asserting it to be so. This burden has to be strictly discharged by adducing legal evidence of a definite character which would either directly prove the fact of Benami or establish circumstances ,unerringly and reasonably raising an inference of that

> fact. The essence ,of a benami is the intention of the party or parties concerned; and not unoften such intention is shrouded in a thick veil which cannot 'be ,easily pierced through. But such difficulties do not relieve the person asserting the transaction to be benami of any part of the serious onus that rests on him; nor justify the acceptance of mere conjectures or .surmises, as a substitute for proof. The reason is that a deed is a solemn document prepared and executed after considerable deliberation and the ,person expressly shown as the purchaser or transferee in the deed, starts with the initial presumption in his favour that the apparent state ,of affairs is the real state of affairs".

In view of law laid down by the Apex Court while determining that the transaction is a benami transaction, the Court has to apply the tests laid down in the above judgment and decide the nature of transaction. In one of the judgments of the Apex Court reported in **Nand Kishore Mehra v. Sushila Mehra** ruled as follows:

> " When Section 3(2) permits a person to enter into a benami transaction of purchase of property in the name of his wife or unmarried daughter, the question of punishing him under Section 3(3) or the question of acquiring the property concerned under Section 5 can never arise. The same reason shall equally hold good for non-applicability of the provisions of Sub Sections (1) and (2) of Section 4 in the matter of filing of the suit or taking up the defence. Further, it cannot be held that such a person cannot enforce his rights in the property, the purchase whereof was permitted by Section 3 (2). Therefore, there is no valid reason to deny to a person, enforcement of his rights validly acquired even in the past by purchase of property in the name of his wife or unmarried daughter, by making applicable the prohibition contained in respect of filing of suits or taking up of defences imposed in respect of benami transactions in general by sub Sections (1) and (2) of Section 4 of the Act. But it is clarified that a person cannot succeed in such suit or defence unless he proves that the property although purchased in the name of his wife or unmarried daughter, the same had not been purchased for the benefit of either the wife or the unmarried daughter, as the case may be because of the statutory presumption contained in Sub-section (2) of Section 3".

In view of the principle laid down in the above referred judgment, it is obligatory on the part of plaintiff not only to prove that consideration was paid by the first defendant for purchase of item No.1 of Plaint 'B' schedule property in O.S.No.275 of 1979, but also to prove the intention of purchaser in obtaining the document in the name of defendant No.4,7 and 9 intending to confer any benefit. But, here the defendant Nos. 4,7 and 9 are not the children of first defendant, but 5th defendant is the daughter of second and 3rd defendant and 7th defendant is the brother of the first defendant and 9th defendant is the legal representative of the second defendant. Therefore, the presumption contained in Section 3 (2) of Benami Transactions (Prohibition) Act, 1988, is not applicable to the present case. However, even to claim such benefit, it is for the plaintiff, who asserted that the transaction is a benami transaction due to payment of consideration by defendant No.1 and obtained document in the name of Defendant Nos. 4,7 and 9 in O.S.No.275 of 1979, has to prove the same by adducing cogent evidence. Here, there is no plea about the nature of acquisition, except, contending that defendant No.1 paid consideration and obtained document in the name of defendant Nos. 4,7 and 9. Indirectly, the plea of the plaintiff is that the transaction covered by Ex.B.2 is a benami transaction. Even in such situation, the necessary tests laid down by this Court time and again in the judgment referred above, are to be applied. The plaint is totally silent about the intention of the defendant in purchasing the property in the name of defendant Nos. 4,7 and 9. On the other hand, defendant No.7 is working as a teacher by the date of purchase, who can contribute a share to purchase the property. Similarly, defendant No.5 is the wife of defendant No.4, who is business man carrying on business in the name and style of Venkateswara Cloth Stores, Kakinada. Similarly, the 9th defendant is no other than the daughter of second defendant, whose marriage was performed by the date of purchase. Thus, the purchasers under Ex.B.2 (D.4,7 and 9) are having their own source of income to purchase Item No.1 of Plaint 'B' schedule property by the date of Ex.B.2. On the other hand, the plaintiff though examined herself as PW.1, did not state anything about the intention of defendant No.1 to obtain the document under Ex.B.2 in the name of D.4,7 and 9. But, in the cross examination of D.4 to 6 and 9 at page No.7, she admitted that Item No.1 of Plaint 'B' schedule property is at a distance of 10 to 12 yards from the item No.2 and she testified that she does not know that Item No.1 of Plaint 'B' schedule property is in the name of D.5, 7 and 9 and it is their ancestral property. In the cross examination by Defendant No.7, she admitted that D.1 is the own brother of D.7, but she does not know that defendant No.7 is a rich man and residing at Hyderabad. She further admitted that Item No.1 of Plaint 'B' schedule property consists of 12 rooms and site and she does not know who purchased it and the year of purchase. She also pleaded ignorance whether defendant Nos.4,7 and 9 have purchased it. Therefore, her evidence with regard to the alleged purchase of Item No.1 of Plaint 'B' schedule property by defendant No.1 in the name of D.4,7 and 9 is not supported by any material evidence since she had no knowledge about the purchase of the property. In cross examination at page No.8, she admitted that defendant Nos. 4,7 and 9 are sound in their financial position. This admission about the financial status of defendant Nos. 4,7 and 9 itself disprove the contention that defendant No.1 had paid the consideration and obtained the document in the name of Defendant Nos. 4,7 and 9. In the last 7 lines of cross examination at page No.8, she denied the suggestion that defendant Nos.5,7 and 9 purchased Item No.1 of Plaint 'B' schedule property. She further pleaded that defendant No.1 stated to her on enquiry that Item No.1 of

Plaint 'B' schedule property was purchased by him in the name of defendant Nos. 4,7 and 9 and she further admitted that she did not make any enquiry in Kakinada Municipality about the purchase of Item No.1 of Plaint 'B' schedule property. The evidence of PW.1 is totally silent with regard to the intention of D.1 allegedly obtaining Ex.B.2 in the name of D.4,7 and 9 and even if the totality of the circumstances are taken into consideration, D.4,7 and 9 are financially sound to purchase Item No.1 of Plaint 'B' schedule property by their own earnings. Therefore, the evidence of PW.1 is of no use to prove that the transaction covered by Ex.B.2 is a benami transaction by applying the tests laid down by this Court in the earlier paras.

The plaintiff also examined P. Upamaka Sastry as PW.2. According to his evidence, he obtained particulars relating to Item 'A to C' schedule property and 'B' schedule property is joint family property. In cross examination at page No.5, he admitted that he does not know who is paying taxes for Item No.1 of Plaint 'B' schedule property, but, on enquiry, he came to know that defendant No.1 acquired the property in the name of D.4,7 and 9. A suggestion was put to him that Item No.1 of Plaint 'B' schedule property is the separate property of D.4,7 and 9, he denied the same. However, in the cross examination at page No.6, he admitted that he did not obtain the registered extracts of Sale Deed in the name of D.4,7 & 9.

Pakala Kama Sastry was examined as PW.3 and whose evidence is not relevant for deciding the present controversy with regard to Item No.1 of Plaint 'B' schedule property.

Veerbhatla Suramma was examined as PW.4, who testified that defendant No.1's family has got three houses at Kankinada and PW.4 sold his house to Defendant No.1 in 1971 and besides the house of PW.4, defendant No.1's family has got three houses. PW.4 admitted that himself and his 3 daughters executed Ex.B.2 dated 27.02.1971. His cross examination at best shows that he sold Item No.1 of Plaint 'B' schedule property to defendant No.1, but he executed registered Sale Deed in favour of D.4,7 and 9 under Ex.B.2 along with his daughters. His evidence is totally silent as to who paid the consideration under Ex.B.2. Therefore, in the absence of any evidence regarding payment of consideration by defendant No.1 under Ex.B.2, it is difficult to believe that the transaction covered by Ex.B.2 is a benami transaction. In the cross examination of PW.4 by D.4 to 6 and 9, he admitted that he did not read the contents of Ex.B.2 and he does not know the contents of Ex.B.2 and he does not know the names of attestors, but he stated that consideration was paid before Sub Registrar. A perusal of the contents in Ex.B.2 clearly shows that defendant Nos. 4,7 and 9 paid sale consideration in the presence of Sub Registrar, but contrary to the recitals of Ex.B.2, PW.4 testified that the property was purchased by defendant No.1 and the evidence of PW.4 was improbable to natural circumstances and he cannot be permitted to speak contrary to the contents in Ex.B.2, as per Section 91 of Evidence Act. Therefore, his evidence needs no consideration in view of glaring improbability in his evidence.

Plaintiff also examined PW.5, whose evidence is not relevant for deciding the issue involved in these appeals. Pakala Sita Mahalaxmi was examined as PW.6 and her evidence requires no consideration for deciding the issue relating to these appeals. M. Markhandeyulu was examined as PW.7, who is closely related to defendant No.1. According to his evidence, defendant Nos. 1 and 2 and deceased husband of the plaintiff, constituted as hindu joint family having own houses and boats while carrying on money lending business and used to keep the properties in the name of several persons and that defendant No.1 informed him of those facts several times and asked him to keep the same the property in his name, but he did not accept the same. Evidence of PW.7 is silent for what purpose Item No.1 of Plaint ‘B’ schedule property was kept in the name of D.4,7 and 9 and in normal course of events, no person keeps any property in the name of 3rd parties unless there is a specific reason. But, the reason for keeping the property in the name of others was not spoken by any of the witnesses, so also, the intention in keeping those properties. Similarly, K. Venkatrarao, who was examined as PW.8, also spoken about the properties kept in the name of others. But in the cross examination, he expressed his inability whether defendant Nos. 4,7 and 9 are the owners of Item No.1 of Plaint ‘B’ schedule property or not as he did not go through the Sale Deed pertaining to Item No.1 of Plaint ‘B’ schedule property.

On overall consideration of entire evidence, the evidence of PWs. 1 to 8 is full of improbability to the natural circumstances and none of the witnesses spoke about the intention of defendant No.1 in keeping Item No.1 of Plaint ‘B’ schedule property in the name of D.4,7 and 9, so also, passing of consideration. According to PW.4 also, the consideration was paid before the Sub Registrar by the defendant Nos. 4,7 and 9 and not by D.1. His examination in chief is totally silent regarding the payment of consideration by defendant No1. In the absence of any evidence regarding the intention of D.1 in obtaining the document in the name of D.4,7 and 9, payment of consideration by him under Ex.B.2, enjoyment of the property and possession of title deeds pertaining to the property and other relevant circumstances, it is safe to hold that that D.4,7 and 9 are the real owners of Item No.1 of Plaint ‘B’ schedule property.

Defendant No.4 was examined as DW.1. In his examination in chief, he testified about the purchase of Item No.1 of Plaint ‘B’ schedule property by him along with D.7 and D.9 for an amount Rs.5000/-. In the cross examination of Dw.1, nothing could be elicited by the counsel for plaintiff and other counsel to rebut his evidence with regard to purchase of Item No.1 of Plaint ‘B’ schedule property and payment of consideration by D.4, 7 and 9. Even no suggestion was put to DW.4 i.e., Dw.1 about payment of consideration by D.1 out of the joint family income for purchase of property covered by Ex.B.2. In the cross examination at page 12, he admitted that his mother-in-law requested him to shift the cloth shop from the house of Prabrahma Sastry to item No.1 of the Plaint ‘B’ Schedule property after the death of D.1 at the instance of his mother-in-law. At the time of construction of Item No.1 of Plaint ‘B’ schedule property by defendant No.7, he was not present, but his son was present. After death of defendant No.1, entire joint family property came into the hands of defendant No.3. Taking advantage of the admission of DW.1 about the absence of D.7 during construction of his house in Item No.1 of Plaint ‘B’ schedule property, it is contended that D.7 has nothing to do with the property. D.7 is an employee and his presence through out the construction of his house is impossible, but presence of his son at the time of construction on behalf of D.7 is sufficient and it is not a ground to believe that the Item No.1 of Plaint ‘B’ schedule property belongs to joint family. Therefore, the unrebutted testimony of defendant No.4 i.e., DW.1 with regard to purchase of Item No.1 of Plaint ‘B’ schedule property is acceptable. Defendant No.7 was examined as DW.2, who testified about purchase of the property along with D.4 and 9 under Ex.B.2 for Rs.5000/- in the year 1971. In the cross examination of DW.2, nothing was elicited to rebut the contention that he purchased the Item No.1 of Plaint ‘B’ schedule property along with D.4 and D.9. In the cross examination by the counsel for plaintiff, DW.2 admitted that he did not sign on any paper in the Sub Registrar Office on 27.02.1971_and he does not remember who signed on the receipt of registration fee and that he does not know where PW.4 is living after sale of the house etc., The facts elicited in the cross examination are of no assistance to prove the case of the plaintiff. In the cross examination by the counsel for defendant No.10 is of no avail for the reason that it relates to the Will marked as Ex.A.1.

On overall consideration of the evidence of Dws. 1 and 2, it is clear that D.4,7 and 9 had purchased the property. Therefore, it can be safely concluded that D.4, 7 and 9 are the real owners of Item No.1 of Plaint 'B' schedule property in O.S.No.245 of 1979.

Defendants examined Malladi Manikyamba, Akkella Butchi Venkatrarao and Panangapalli Viswanadham as Dws. 3 to 5 respectively on their behalf, but their evidence is of no use to establish the contentions of the defendants with regard to Item No.1 of Plaint 'B' schedule property.

On overall consideration of the evidence, it is clear that Ex.B.2 was registered in the name of D.4,7 and 9 and no evidence is brought on record about payment of consideration by defendant No.1 and obtaining the document in the name of D.4, 7 and 9. The intention of defendant No.1 in obtaining the document was also not proved and no reason was assigned for keeping the property in the name of 3rd parties. In the absence of proof of those requirements, it is difficult to believe that the transaction covered under Ex.B.2 is a benami transaction and consideration was paid by D.1 to obtain Sale Deed in favour of D.4, 7 and 9.

A perusal of Ex.B.2 discloses that the executant-Veerubatla Suramma and 3 others received consideration from D.4,7 and 9 in cash. If really, they did not receive the consideration from the purchasers, the question of mentioning the payment of consideration by D.4,7 and 9 does not arise. Apart from oral evidence and Ex.B.2 registered Sale Deed, there is voluminous documentary evidence to prove that Item No.1 of Plaint 'B' schedule property is the exclusive property of D.4,7 and D.9. Tax Receipts under Exs. B.9 and B10,11,18 and 19 establishes that D.4.7 and 9 are alone paying the property tax for Item No.1 of Plaint 'B' schedule property. If really, the property is not purchased by them, the question of payment of tax by them for the property does not arise and production of tax receipts by them in Court would normally does not arise, if they are not the real owners of the property.

The trial Court while discussing about specific issues in O.S.No.275 of 1979 regarding Item No.1 of Plaint 'B' schedule property i.e., Issue Nos. 3 and 4, recorded a finding at page 65 of the Common Judgment about the rights of the parties in item

No.1, 2(a) and(b) of B Schedule properties, and in page 66, the trial Court discussed about the item No.1 of plaint 'B' schedule property and referred the specific contention of the first plaintiff i.e., 5th defendant contended in her written statement in O.S.No.275 of 1989 that Item No.1 of Plaint 'B' schedule property was purchased D.4,7 & 9 and each of them are having 1/3rd share. But, in the written statement also, 4th defendant did not claim any right in Item No.1 of Plaint 'B' schedule property. 9th defendant in O.S.No.275 of 1979 filed Written Statement reiterating the contentions raised in the plaint in O.S.No.84 of 1985. The trial Court proceeded to decide the question involved in O.S.No.275 of 1979 with regard to Item No.1 of Plaint 'B' schedule property as Point No.II and discussed the evidence on record and concluded that Item No.1 of Plaint 'B' schedule property is joint family property for the reason that D.4,7 & 9 did not raise any specific contention initially but later raised a contention stating that Item No.1 of Plaint 'B' schedule property belongs to them. The trial Court discussed about the claim of defendant Nos.4,7 and 9 under Ex.B.2 and also discussed about the source of income. However, the tax receipts under Exs. B.9, 10,11 and 18,29 and 30 were disbelieved by the trial Court assigning its own reasons. Moreover, they are *post litem* documents. But taking advantage of absence of any plea in the plaint in O.S.No.84 of 1985 regarding the purchase of item No.1 by D.4,7 and 9 and production of Sale Deed under Ex.B.2 at belated stage, the trial Court concluded that the property is the joint family property based on the production of title deed on 19.10.1987. However, reasoning recorded by the trial Court is not based on any material. In any view of the matter, it is for the plaintiff to prove that the Sale Deed was obtained for Item No.1 of Plaint 'B' schedule property in O.S.No.275 of 1979 by D.1 in the name of D.4,7 and 9 and paid consideration. But, no iota of evidence is brought on record to establish the same. Basing on belated production of Ex.B.2 before the Court and failure to raise a plea about purchase of property by D.4,7 and 9, initially the trial Court concluded that the schedule property is joint family property.

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The burden is on the plaintiff to establish her right by producing cogent and satisfactory evidence. However, the plaintiffs in O.S.No.84 of 1985 filed Written Statement and pleaded that Item No.1 of Plaint 'B' schedule property in O.S.No.275 of 1979 is purchased by D.4,7 & 9 at the earliest of point of time. Therefore, failure to raise the same plea in O.S.No.84 of 1985 is not at all a ground for the reason that

Item No.1 of Plaint ‘B’ schedule property is not the subject matter of the suit in O.S.No.84 of 1985. Hence, on that ground, the trial Court ought not to have arrived at a conclusion that Item No.1 of Plaint ‘B’ schedule property was the joint family property.

As the plaintiff failed to establish the requirements or the tests, laid down by the Apex Court and this Court referred in earlier paras, by producing any evidence and by drawing presumption in view of the decision reported in **Valliammal’s** case (1 supra), it is difficult to sustain the finding recorded by the trial Court with regard to Item No.1 of Plaint ‘B’ schedule property in O.S.No.275 of 1979. On the other hand, the voluminous evidence produced before the trial Court both oral and documentary established that D.4,7 and 9 are the joint exclusive owners of the property of Item No.1 of Plaint ‘B’ schedule property, but the trial Court did not apply the tests laid down by the Apex Court and this Court for determining the nature of transaction covered under Ex.B.2, on surmises and conjectures, arrived at a conclusion that the property in Item No.1 of Plaint ‘B’ schedule property in O.S.No.275 of 79 is the joint family property. The finding of the trial Court is totally erroneous and not supported by any legal reasoning. Hence, I find that judgment of the trial Court with regard to Item No.1 of Plaint ‘B’ schedule property is erroneous and the same is liable to be set aside.

In view of my finding on the point that the property in Item No.1 of Plaint ‘B’ schedule property is the separate or exclusive property of D.4,7 and 9 and not the joint family property, the plaintiff is not entitled to claim 1/5th share in Item No.1 of Plaint ‘B’ schedule property. Accordingly, the Point is answered.

In the result, these appeals are allowed setting aside the finding of the trial Court with regard to Item No.1 of Plaint ‘B’ schedule property in O.S.No.275 of 1979 holding that Defendant Nos. 4,7 & 9 in O.S.No.275 of 1979 are the absolute owners of the said property and the plaintiff is not entitled to claim 1/5th share in the said property.

M. SATYANARAYANA MURTHY, J

Date: 13-03-2015.

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145

HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

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APPEAL SUIT Nos. 564 and 565 of 1992

Dt. 13 -03-2015

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