

* THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

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+ C.C.C.A.No. 94 OF 1996

% Dated 20-03-2015

G.Lalitha Bai and others ... APPELLANTS

VERSUS

\$ G.R.Jaya Rao and others ...
RESPONDENTS

! Counsel for Appellants : Sri Sai Gangadhar Chamarty

^ Counsel for 1st Respondent : Sri K.Narasimha Chary

^ Counsel for Respondents 2 to 6 : Sri Harender Pershad

^ Counsel for Respondents 7 to 10 : Sri J.V.Suryanarayana

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+ C.C.C.A.No. 139 OF 2000

% Dated 20-03-2015

G.Vijaya Laxmi and others ... APPELLANTS

VERSUS

\$ G.R.Jaya Rao and others ...
RESPONDENTS

! Counsel for Appellants : Sri Harender Pershad

^ Counsel for 1st Respondent : Sri K.Narasimha Chary

^ Counsel for Respondents 3 to 6 : Sri J.V.Suryanarayana

^ Counsel for Respondents 7 to 11 : Sri Sai Gangadhar Chamarty

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? Cases referred:

1. AIR 1956 SC 593* (1)
2. AIR 1960 SC 335
3. (1995) 4 SCC 572
4. (2004) 7 SCC 233
5. 1973 (2) APLJ 10 (SN)
6. 1956 An.W.R.943
7. AIR 1962 AP 226
8. AIR 1974 SC 171
9. AIR 2008 SC 543
10. AIR 1974 SC 280 (1)
11. AIR 1977 SC 1712
12. (1992) 4 SCC 683
13. (1921) 2 R.B. 608

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

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C.C.C.A.No. 94 OF 1996

AND

C.C.C.A.No. 139 OF 2000

COMMON JUDGMENT:

These two appeals arose out of decree and judgment in O.S.No. 441 of 1984 on the file of the Court of IV Additional Judge, City Civil Court, Hyderabad (for short, 'the trial Court'), dated 10-04-1996, whereby and whereunder a preliminary decree, for partition of A and B schedule property into 7 equal shares with separate possession and rendition of true and correct account of profits from A schedule, was passed.

2. Defendant Nos. 11 to 15 and defendant Nos. 2 to 6 in O.S.No. 441 of 1984 before the trial Court filed C.C.C.A.No. 94 of 1996 and C.C.C.A.No. 139 of 2000 respectively. For convenience of reference, the ranks given to the parties in O.S.No. 441 of 1984 before the trial Court will be adopted throughout this common judgment.

3. The plaintiff filed the suit, for partition of A and B schedule property into 7 equal shares and for allotment of one such share each to the plaintiff and defendant Nos. 7 to 10; 1/7th share to defendant Nos. 2 to 6 and 1/7th share to defendant Nos. 11 to 15, alleging that his father late Rama Swamy, who worked in Public Works Department, acquired A and B schedule property in the name of his first wife late Narasamma. The 7th defendant is

second wife of late Rama Swamy. The plaintiff and defendant Nos. 8 to 10 are children of Rama Swamy and the 7th defendant. The 7th defendant died during pendency of the suit. Therefore, the share of the 7th defendant devolved upon the plaintiff and defendant Nos. 8 to 10. The 1st defendant and late Kishan Rao are children of Rama Swamy and Narasamma. Defendant Nos. 2 to 6 are legal-heirs of Kishan Rao. During pendency of the suit, the 1st defendant also died and his legal-heirs *i.e.* defendant Nos. 11 to 15 were brought on record. During pendency of these appeals, the 11th defendant died on 07-07-2008. Since her legal-heirs were already on record, no steps were taken to implead any other person as legal-heirs of the 11th defendant.

Rama Swamy, while working as overseer in P.W. Department, acquired A and B schedule property situated at Himayat Nagar and Dhoolpet in the name of his first wife Narasamma; constructed a house which was assigned M.C.H.No. 13-2-371 in an extent of 1,000 square yards at Dhoolpet *i.e.* B schedule property and also constructed a house which was assigned M.C.H.No. 3-6-596 in an extent of 980 square yards at Himayat Nagar *i.e.* A schedule property which is more specifically described in the schedule annexed to the plaint.

The plaintiff further admitted that his father Rama Swamy filed O.S.No. 42 of 1964 on the file of the Court of I Assistant Judge, City Civil Court, Hyderabad, for declaration that he was the owner of immovable property bearing M.C.H.No. 13-2-371 situated at Dhoolpet, and M.C.H.No. 3-6-596 situated at Himayat Nagar. The said suit was transferred to IV Additional Judge, City Civil Court, Hyderabad, and renumbered as O.S.No. 15 of 1966. On contest, the suit was decreed in favour of Rama Swamy. Aggrieved by the decree and judgment in O.S.No. 15 of 1966, the defendants therein preferred an appeal in A.S.No. 95 of 1968 on the file of the Court of

Additional Chief Judge, City Civil Court, Hyderabad. Confirming the decree and judgment in O.S.No. 15 of 1966, the appeal was dismissed on 22-02-1972. Thereafter, the brothers of Rama Swamy vacated and delivered vacant possession of the property to Rama Swamy. Since the date of delivery, the said Rama Swamy along with his sons and second wife continued in possession and enjoyment of the property jointly. Sometime thereafter, Rama Swamy died on 09-02-1973 leaving behind the plaintiff and the defendants to succeed his estate. After the death of Rama Swamy, his eldest son late Kishan Rao, being the elder male member of the joint family, used to look after the property on behalf of all the joint family members while promising to cooperate for partition of schedule property but protracted the request, on one pretext or the other, for partition. The said Kishan Rao used to collect rent for A schedule property since 1973 to a tune of Rs.1,000/- p.m. and he has to render true and correct account of the income derived from A schedule property. Kishan Rao initially used to live at Dhoolpet *i.e.* B schedule property and, later, shifted his family to a part of the house at Himayat Nagar in the year 1970 while letting out other part of the property to various tenants on monthly rent of Rs.1,000/- p.m. Later, Kishan Rao shifted to A schedule property while allowing tenants to continue in possession of other part of the property. Thus, the said Kishan Rao enjoyed the income from A schedule property.

Kishan Rao died on 19-11-1980. Defendant Nos. 2 to 6, who are wife and children of Kishan Rao, continued in possession and enjoyment of A schedule property and the property in possession of Kishan Rao and his legal-heirs, after his death, would fetch not less than Rs.800/- p.m. However, rent was enhanced and defendant Nos. 2 to 6 collected rent @ Rs.1,200/- p.m. from tenants at enhanced rate.

Due to increase of members in the families of legal-heirs of Rama Swamy after their marriage, the plaintiff felt that it was impossible to continue

to live jointly and started demanding for partition of schedule property but no purpose was served. Despite the demand, defendant Nos. 1 to 6 and defendant Nos. 11 to 15 did not pay any share in the income from A schedule property and defendant Nos. 2 to 6 and 11 to 15 are utilizing the entire income from A schedule property without paying a penny to the share of the plaintiff and defendant Nos. 7 to 10. Therefore, they are under obligation to render true and correct account of income derived from A schedule property by way of rent.

As defendant Nos. 1 to 6 did not cooperate for partition of schedule property as demanded by the plaintiff, the plaintiff got issued legal notice dated 15-02-1984 along with defendant Nos. 7 to 10 demanding for partition of schedule property with separate possession and for rendition of true and correct account of income from A schedule property but defendant Nos. 1 to 6 did not cooperate for partition. Hence, the plaintiff filed the suit for the reliefs stated in the earlier paras.

4. The 1st defendant filed written statement denying material allegations, while admitting the relationship between the parties, *inter alia* contending that his mother Narasamma was the sole, full and absolute owner of A and B schedule property while denying purchase of the property by Rama Swamy in the name of his first wife Narasamma. It is specifically contended that Narasamma acquired the property with the sale proceeds of her Stridhana Jewellery. As such, the property is absolute and exclusive property of the said Narasamma. The 1st defendant admitted that he, Kishan Rao and Rama Swamy filed O.S.No. 15 of 1966 on the file of the Court of V Additional Judge, City Civil Court, Hyderabad, for declaration that they were exclusive owners of plaint B schedule property herein since brothers of Rama Swamy claimed right in A and B schedule property as joint owners. The suit was decreed and the appeal preferred thereto in A.S.No. 95 of 1968 was

dismissed by the Additional Chief Judge, City Civil Court, Hyderabad. The 1st defendant also admitted about death of Rama Swamy and relationship with the plaintiff and defendant Nos. 7 to 10 but denied inheritance of A and B schedule property by the plaintiff and defendant Nos. 7 to 10. The said Kishan Rao admittedly collected rent since 1973 for the house at Himayat Nagar in his individual capacity as owner of the property but not on behalf of joint family. Therefore, Kishan Rao and his legal-heirs are not under obligation to render true and correct account of income from schedule property. Similarly, the 1st defendant is not under obligation to render true and correct of income from schedule property at Dhoolpet as the 1st defendant and Kishan Rao along with Rama Swamy succeeded the property of Narasamma. Therefore, Kishan Rao, the 1st defendant and Rama Swamy are entitled to 1/3rd share each. After death of Rama Swamy, each legal-heir is entitled to a share in the share of Rama Swamy. Thus, the plaintiff would be entitled to 1/21st share; defendant Nos. 11 to 15, being legal-heirs of the 1st defendant, entitled to 8/21st share; defendant Nos. 2 to 6, being legal-heirs of Kishan Rao, entitled to 8/21st share and defendant Nos. 7 to 10 are entitled to 1/21st share each in A and B schedule property.

5. Defendant Nos. 2 to 6 filed separate written statement denying material allegations while admitting relationship with each other and reiterated the contentions raised by the 1st defendant in his written statement. In addition to the pleas raised by the 1st defendant, defendant Nos. 2 to 6 specifically contended that Kishan Rao never received any amount as rent but they are in possession and enjoyment of the property. It is specifically contended that they were never in possession of any part of B schedule property. However, the plaintiff and the other defendants used to live in different portions of B schedule property. Thereby, question of

deriving any income from B schedule property does not arise. The defendants themselves paying property tax to the Municipal Corporation in their own right to schedule property and they are not under obligation to render true and correct account of income from schedule property and prayed to dismiss the suit.

6. The 8th defendant filed separate written statement supporting the plaintiff's contention. Therefore, I need not repeat the specific pleas raised by the 8th defendant in his written statement.

7. Defendant Nos. 11 to 15, legal-heirs of the 1st defendant, filed separate written statement contending that A and B schedule property is absolute and exclusive property of Narasamma, who is mother of the 1st defendant, and denied the contention of the plaintiff that A and B schedule property was purchased by Rama Swamy in the name of his first wife Narasamma and prayed for dismissal of the suit while praying the trial Court to declare that the plaintiff is entitled to 1/21st share.

8. Defendant Nos. 7, 9 and 10 filed a memo adopting the written statement filed by of the 8th defendant.

9. On the strength of the above pleadings, the trial Court framed the following issues:

Issues:

- 1) *Whether the plaintiff is entitled for 1/7th share from out of the income upto date as per schedule 'A' and 'C' from D2 to D6 as prayed for?*
- 2) *Whether the plaintiff is entitled for 1/7th share in the moveable assets left by late Ramaswamy as prayed for?*
- 3) *Whether the late Ramaswamy was the absolute owner and possessor of the immovable properties mentioned in schedule 'A' and 'B' of the plaint as alleged?*
- 4) *Whether late Narasamma first wife of late Ramaswamy and mothr of D1 was the absolute and exclusive owners and possessor of the suit*

'A' and 'B' properties, having purchased the same with the sale proceedings of her stridhana jewelry as alleged in the W.S?

- 5) *Whether the plaintiff is entitled only 1/21st share in the suit schedule properties as alleged in the W.S?*
- 6) *To what relief?*
(extracted)

10. During the course of trial, on behalf of the plaintiff, P.Ws.1 and 2 were examined and got marked Exs.A1 to A12. On behalf of the defendants, D.Ws.1 to 7 were examined and got marked Exs.B1 to B95.

11. Upon hearing argument of both counsel, the trial Court decreed the suit holding that the property was acquired by Rama Swamy in the name of his first wife Narasamma; thereby, A and B schedule property is self acquired property of Rama Swamy and, consequently, the plaintiff is entitled to 1/7th share and further directed defendant Nos. 2 to 6 to render true and correct account of income from A schedule property.

12. Aggrieved by the decree and judgment, defendant Nos. 11 to 15 filed C.C.C.A.No. 94 of 1996 and defendant Nos. 2 to 6 filed C.C.C.A.No. 139 of 2000 on various grounds. The specific grounds urged in both the appeals are that the trial Court failed to appreciate the evidence; the presumption drawn by the trial Court that late Rama Swamy is the owner of the property though it was registered in the name of his first wife Narasamma is not based on any law and the presumption drawn by the trial Court with regard to nature of property is erroneous. The oral evidence on record established that Narasamma, first wife of Rama Swamy, came from affluent family and it is naturally possible for her to purchase the property by sale of gold. In such a case, the finding of the trial Court that defendant Nos. 1 to 6 and 11 to 15 failed to establish source of income of Narasamma is apparently an error on the face of record since the burden is upon the person who pleaded that Rama Swamy paid consideration for the sale transaction and the said Rama

Swamy is the implied owner of the property but, instead of insisting for discharge of initial burden, thrown the burden on defendant Nos. 1 to 6 and 11 to 15 and this approach is erroneous. The trial Court did not consider recitals of sale deeds stood in the name of Narasamma and treatment of the property subsequent to filing of suit by Rama Swamy, Kishan Rao and the 1st defendant for declaration against the brothers of Rama Swamy. If the decree and judgment in the suit, which was confirmed in the appeal, are taken into consideration, the trial Court ought not to have come to such erroneous conclusion that B schedule property is joint family property. The trial Court also failed to consider income of Rama Swamy to acquire A and B schedule property in the year 1933 and thereafter. In the absence of proof that Rama Swamy was in a position to spend huge amount during those days for purchase of A and B schedule property and for construction of buildings therein, the case of the plaintiffs cannot be accepted but the trial Court, on erroneous appreciation, concluded that A and B schedule property is joint family property and the plaintiff and defendant Nos. 7 to 10 are entitled to 1/7th share each is an error apparent on the face of record. The finding of the Court in O.S.No. 15 of 1966 between brothers of Rama Swamy and Rama Swamy and his sons is binding on the plaintiff and defendant Nos. 7 to 10 as they are representatives in interest from Rama Swamy. Therefore, the conclusions arrived by the trial Court are erroneous and unsustainable under law.

The trial Court did not consider pleadings and evidence in proper perspective and committed an error in passing preliminary decree and finally prayed to set aside the preliminary decree and judgment of the trial Court.

During the course of argument, learned counsel for the appellants, while reiterating the grounds urged in the grounds of appeal in both the appeals, mainly contended that pleadings are insufficient regarding nature of

property and, in the absence of any evidence to prove that sale transactions of Narasamma and constructions therein are benami, nominal or sham, the Court is not supposed to record any such finding. At the same time, B schedule property was the subject matter of earlier suit O.S.No. 15 of 1966 filed by Rama Swamy and his sons against brothers of Rama Swamy. Moreover, the plaintiff and defendant Nos. 7 to 10 claiming right through Rama Swamy as representatives in interest and the decree and judgment in O.S.No. 15 of 1966, confirmed in A.S.No. 95 of 1968, is binding on him and, thereby, they are estopped to contend otherwise.

It is further contended that judicial admissions and evidentiary admissions of Rama Swamy in O.S.No. 15 of 1966 are binding on the plaintiff and defendant Nos. 7 to 10 and, having obtained decree on the strength of such evidence by Rama Swamy, Kishan Rao and Laxman Rao, the plaintiff and defendant Nos. 7 to 10, being representatives in interest, are not entitled to approbate or reprobate and they are estopped to contend otherwise but the available judicial and evidentiary admissions were not considered by the trial Court in proper perspective and committed an error.

Finally, it is contended that the plaintiff, who asserted that the property was purchased by Rama Swamy in the name of Narasamma, has to discharge his initial burden that Rama Swamy had sufficient means to acquire the property, then only the burden will shift on to defendant Nos. 1 to 6 and 11 to 15 to prove that Narasamma possessed sufficient means to purchase A and B schedule property and construct buildings therein but the trial Court erroneously placed onus of proof on defendant Nos. 1 to 6 and 11 to 15 and committed an error. If the evidence on record, both oral and documentary, is appreciated in proper perspective, the decree and judgment of the trial Court are liable to be set aside and, at best, the plaintiff and defendant Nos. 7 to 10 are entitled to 1/21st share, out of the 1/3rd share of

Rama Swamy, along with the 1st defendant and Kishan Rao each and prayed to set aside the decree and judgment of the trial Court.

13. *Per contra*, learned counsel for the plaintiff would contend that admission made by Rama Swamy with regard to title to B schedule property in O.S.No. 15 of 1966 is not binding on the plaintiff and defendant Nos. 7 to 10 since it can be used only against maker of admission and, apart from that, declaratory decree binds inter parties but not legal-heirs of party to the suit. Therefore, decree and judgment in O.S.No. 15 of 1966 and admissions made both in plaint and evidence *i.e.* judicial and evidentiary admissions are not binding on the plaintiff and defendant Nos. 7 to 10. Therefore, on this ground alone, the appeals are liable to be dismissed.

It is further contended that purchase of property in the name of wife by husband is not totally prohibited and, when Rama Swamy, being an employee in P.W.D., possessed sufficient means to acquire A and B schedule property and possessed means to construct buildings therein, the Court can easily conclude that the property was purchased by Rama Swamy advancing amount but obtained sale deeds in the name of Narasamma and, later, constructed buildings therein. In such a case, burden is upon defendant Nos. 1 to 6 and 11 to 15 to establish that the property was acquired by Narasamma possessing sufficient means to acquire A and B schedule property. Since defendant Nos. 1 to 6 and 11 to 15 failed to establish source of income of Narasamma to purchase A and B schedule property and buildings therein, the trial Court rightly disbelieved the case of defendant Nos. 1 to 6 and 11 to 15 while accepting the plea of the plaintiff and defendant Nos. 7 to 10. Thus, there is no error in the decree and judgment warranting interference of this court and prayed to dismiss the appeals.

14. Sri J.V.Suryanarayana, learned senior counsel appearing for

defendant Nos. 7 to 10, would contend that admissions in O.S.No. 15 of 1966 by Rama Swamy with regard to nature of acquisition of B schedule property either judicial or evidentiary are not binding on the plaintiff and defendant Nos. 7 to 10 and drawn attention of this Court to Section 21 of the Indian Evidence Act, 1872 (for brevity, 'the Act of 1872'), since admission binds the maker of such admission but not third party. Apart from that, pleadings are clear that the property was purchased by Rama Swamy while he was working as an employee till his retirement during his lifetime and, even after his retirement, he was re-employed for two years which established that the said Rama Swamy had sufficient means to purchase the property in the name of Narasamma and construct buildings therein. On the other hand, defendant Nos. 1 to 6 and 11 to 15 miserably failed to establish possessing means to purchase vacant property by Narasamma and construct buildings therein which is now described as A and B schedule property. Therefore, the finding of the trial Court needs no interference since it is based on proper appreciation of facts and law.

The decree and judgment in O.S.No. 15 of 1966 are in the nature of declaration and they bind the parties to the decree in view of Section 35 of the Specific Relief Act, 1963 (for brevity, 'the Act of 1963'), and they would not operate as *res judicata*. However, the plaintiff and defendant Nos. 7 to 10 are not bound by the decree in O.S.No. 15 of 1966 since they are claiming right as coparceners as the entire property belongs to joint family. Therefore, the decree and judgment of the trial Court do not call for interference of this Court in these appeals even after reappraisal of entire evidence on record and, finally, prayed to confirm the decree and judgment of the trial Court.

15. Both counsel filed written submissions almost reiterating the contentions raised during argument. Learned counsel for the plaintiff, in support of his contentions, drawn attention of this Court to ***Nagubai Ammal and others Vs. B.Shama Rao and others***^[1], ***Mst.Rukhmabai Vs. Lala***

Laxminarayan and others^[2] and **Nand Kishore Mehra Vs. Sushila Mehra**^[3]. The contentions raised in the written briefs and the legal decisions will be discussed at appropriate stage.

16. Considering rival contentions, perusing oral and documentary evidence and the impugned decree and judgment, the points that arise for consideration are as follows:

- (1) *Whether late Rama Swamy is the absolute owner of A and B schedule property?*
- (2) *Whether the plaintiff and defendant Nos. 7 to 10 are entitled to claim 1/7th share each in A and B schedule property, if not, what is their share in the property?*
- (3) *Whether defendant Nos.1 and 11 to 15 as one set and defendant Nos. 2 to 6 as another set are liable to render true and correct account of income from A schedule property?*
- (4) *Whether the decree and judgment in O.S.No. 15 of 1966, which was confirmed in A.S.No. 95 of 1968, is binding on the plaintiff and defendant Nos. 7 to 10?*

17. **In Re. Point Nos. 1, 2 and 4:**

As these points are interconnected to one another, I find that it is expedient to decide all the three points by common discussion. The plaintiff, defendant Nos. 8 to 10 are children of Rama Swamy and the 7th defendant while Kishan Rao and the 1st defendant are sons of Rama Swamy and his first wife Narasamma. These facts are not disputed. Admittedly, vacant site at Himayat Nagar (A schedule property) was registered in the name of

Narasamma, first wife of Rama Swamy, under the original of Ex.B3 (Ex.B4 is translation copy of Ex.B3) but no registered sale deed pertaining to purchase of B schedule property was produced before the trial Court except relying on Ex.B1 i.e. certified copy of judgment in A.S.No. 95 of 1968 whereas the contention of the plaintiff is that the property was purchased by Rama Swamy in the name of his first wife Narasamma. The specific plea in para No. 2 of the plaint is required to be adverted to find out the exact plea of the plaintiff and it is extracted hereunder for better appreciation:

"Late G. Ramaswamy during his life time acquired two immovable properties two plots of land in the name of his first wife Smt. Narsamma. Smt. Narsamma died in the year 1945 Ramswamy then was working in P.W.D. and constructed with his earnings the compound wall and the structures, which bear Municipal No. 13-2-371, and piece of open land admeasuring 1000 sq. yards situated at Dhoolpet, Hyderabad and another at Himayatnagar now bearing and covered M.C.H.No. 3-6-596 on land admeasuring about 980 sq. yards."

The specific plea extracted above would indicate that Rama Swamy purchased the property in the name of his first wife Narasamma but it is not clear whether Rama Swamy purchased the property in the name of Narasamma to confer any benefit on her or as a benamidar for Rama Swamy and the plaint does not disclose anything about reasons for obtaining sale deeds in the name of Narasamma while paying consideration by Rama Swamy. On close analysis of para No. 2 and other paras of the plaint, the plea of the plaintiff is that the transaction is benami or nominal or sham transaction. Purchase of property in the name of wife is not totally prohibited under the Benami Transactions (Prohibition) Act, 1988 (for brevity, 'the Act of 1988'). However, the Act of 1988 has no retrospective effect since it operates only prospective. Since the property was purchased in the years 1933 and 1936 itself, the provisions of the Act of 1988 have no application to these transactions. The trial Court, on appreciation of evidence, recorded a finding that Narasamma is only a registered owner but Rama Swamy is the real

owner. The said finding is now challenged before this Court on various grounds referred *supra*.

18. Learned counsel for the plaintiff contended that the sale transactions in the name of Narasamma are only benami transactions; Rama Swamy was working as overseer in P.W.D. by the date of purchase having sufficient means to pay sale consideration for purchase of both A and B schedule (vacant land) and, later, constructed buildings in both the vacant sites but Narasamma did not possess any means to purchase or acquire vacant land at Dhoolpet and Himayat Nagar and raise constructions therein. Unless defendant Nos. 1 to 6 and 11 to 15 proved that Narasamma had any source of income or possessed any property and, with the sale proceeds of such property, acquired schedule property, her husband Rama Swamy alone can be said to be the owner of the property and placed reliance on **Nand Kishore Mehra** (3rd *supra*), wherein the Apex Court held 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 law declared by Apex Court in the above judgment, plea

of benami is available to claim right or defence. However, burden is upon such person, who is claiming such right, to prove that '***purchase in the name of wife or unmarried daughter is not intended to confer any benefit on the person in whose name document was obtained***'. Therefore, the plaintiff is entitled to raise plea of benami even according to the provisions of the Act of 1988. In fact, the provisions of the Act of 1988 have no application to the present facts of the case for the reason that the transactions were entered long prior to commencement of the Act of 1988. Therefore, the plaintiff is entitled to contend that the sale transactions are benami transactions and Narasamma is only benamidar but subject to proving that the sale deeds were not obtained in the name of Narasamma without intending to confer any benefit on her. On analysis of the plaint, there is no whisper in the entire plaint that the documents were obtained not intending to confer any benefit on Narasamma except contending that Rama Swamy purchased the property in the name of Narasamma while working as an employee in P.W.D.

19. Sri Harender Pershad, learned counsel for defendant Nos. 2 to 6, would contend that onus of proof is on the person who is asserting that the transaction is benami and, unless the plaintiff discharged his initial onus of proof, it will not shift to the defendants to prove *contra*. Certain tests are laid down to determine whether a transaction is benami transaction or not and, unless those tests are satisfied, sale transactions of A and B schedule property cannot be treated as benami transactions and placed reliance on ***Valliammal (d) by L.Rs. Vs. Subramaniam and others***^[4]. In the above judgment, the Supreme Court ruled that

"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 for 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."

The source from where the purchase money came and the motive why the property was purchased benami are by far the most important tests for determining whether the sale standing in the name of one person, is in reality for the benefit of another. It is well settled that intention of the parties is the essence of the benami transaction and the money must have been provided by the party invoking the doctrine of benami. Sri Sai Gangadhar Chamarty, learned counsel for defendant Nos. 1 and 11 to 15, also raised similar contention raised by Sri Harender Pershad, learned counsel for defendant Nos. 2 to 6. A Division Bench of this Court and Apex Court laid down certain tests to determine whether a transaction is benami transaction or not.

In ***Ramaiah Vs. Singaraiah***^[5], 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 ***Lachu Reddy Vs. Venkamma***^[6], 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 Vs. Srikrishna Murthi***^[7], this Court laid down four tests to determine the nature of a 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 others***^[8], the Apex Court laid down certain tests to decide the nature of a 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 the law laid down by Apex Court and this Court, while determining that the nature of a transaction is benami transaction, the Court has to apply the tests laid down in the above judgments.

20. Learned senior counsel appearing for defendant Nos. 7 to 10 would submit that when Narasamma had no source of income to acquire the property, her husband Rama Swamy, who was working in P.W.D. by then having source of income, is deemed to be the real owners of the property unless it is proved that Narasamma had sufficient means to acquire the property.

21. To substantiate the contentions of the plaintiff, the plaintiff himself was examined as P.W.1. In examination in chief, P.W.1 reiterated the specific plea raised in para No. 2 of the plaint. According to para No. 2 of examination in chief, his father acquired two properties; they are two houses bearing No. 13-2-371 situated at Dhoolpet in an extent of 1,000 square yards and 3-6-596 in an extent of 980 square yards situated at Himayat Nagar but his evidence is silent as to whether Rama Swamy obtained documents in the name of Narasamma without intending to confer any benefit on her. Therefore, the specific requirement as held by Apex Court in **Nand Kishore Mehra** (3rd *supra*) is not satisfied. In cross-examination, P.W.1 admitted that he was born in 1950 and he knows family affairs from his

age of 14 or 15 years. The plaintiff became major in 1968 but filed the suit in 1984 *i.e.* almost 16 years after attaining majority. However, the plaintiff did not challenge the decree and judgment in O.S.No. 15 of 1966, which was confirmed in A.S.No. 95 of 1968 under Ex.B1, within three years from the date of attaining majority though he is aware of family affairs and filing of the suit. He further admitted that construction in Dhoolpet property took place before his birth but construction in Himayat Nagar property was raised when he was 5 years old. He also admitted that Rama Swamy retired in the year 1953 or so from service and he was employed in different districts during his service. If this piece of evidence is accepted, P.W.1 is not aware anything about purchase of A and B schedule property and raising constructions therein in view of his own admissions. Even according to him, when he was aged 14 or 15 years, he got acquaintance with family affairs. Therefore, P.W.1 might have got acquaintance with family affairs in the year 1964 or 1965 as he was born in 1950 but purchase and constructions took place long prior to 1964 and 1965. Therefore, his testimony with regard to nature of acquisition and intention of Rama Swamy in obtaining documents in the name of his first wife Narasamma cannot be accepted. According to the decision relied on by learned counsel for the plaintiff, unless it is proved that the documents were obtained without intending to confer any benefit on Narasamma, the transaction cannot be termed as benami transaction. Here in this case, there is no pleading and evidence to establish that Rama Swamy obtained sale deeds for the vacant sites at Dhoolpet and Himayat Nagar without intending to confer any benefit on Narasamma. Unless the plaintiff established the same, the plaintiff will not get the relief sought in the suit in view of the last five lines of para No. 8 of the judgment relied on by learned counsel for the plaintiff himself. In cross-examination, several suggestions were put to P.W.1 about purchase of the property by Narasamma with the sale proceeds of jewelry but P.W.1 pleaded ignorance

not even denying the same. In cross-examination of P.W.1 by learned counsel for defendant Nos. 2 to 6, P.W.1 made a categorical admission that he does not know the actual dates of purchase of suit property as he was not born by then but admitted that first wife of Rama Swamy by name Narasamma died in 1945. Therefore, P.W.1 had no knowledge about nature of acquisition of property and, thereby, his evidence is only hearsay.

22. The plaintiff also got examined P.W.2 A.Satyanarayana Rao, Advocate, who was the legal consultant of Rama Swamy. P.W.2 mostly testified about execution of will which is not at all pleaded in the plaint. However, in the last para of examination in chief, P.W.2 testified that Rama Swamy retired as an engineer in P.W.D. and house property belonging to Rama Swamy is self acquired property. So, his evidence regarding nature of acquisition is relevant for deciding the present issue. In cross-examination by learned counsel for defendant Nos. 2 to 6 dated 23-04-1991, P.W.2 admitted that he was not present when Rama Swamy obtained sale deeds for both items and he did not look into those sale deeds. A suggestion was put to P.W.2 that A and B schedule property was not purchased by Rama Swamy but denied by him. In further cross-examination, P.W.2 admitted that Rama Swamy worked as overseer in P.W.D., retired from service in 1952 and Rama Swamy had funds to purchase A and B schedule property. In the later part of cross-examination, P.W.2 admitted that he does not know income of Rama Swamy prior to 1950, he did not inherit any properties and that he is aware about the litigation between Rama Swamy and his brothers, wherein Rama Swamy contended that B schedule house is purchased with the sale proceeds of jewelry of Narasamma. Therefore, this admission of P.W.2 is fatal to the case of the plaintiff who claimed right in B schedule property.

23. On close analysis of evidence of P.Ws.1 and 2, the contention that the property was purchased by Rama Swamy in the name of Narasamma was not substantiated by satisfactory evidence. P.W.2 was aged 53 years by the

date of his examination on 05-07-1990. If the age of 53 years is calculated backwards, P.W.2 might have born in 1937 whereas the sale transactions took place even prior to birth of P.W.2. Therefore, the evidence of P.W.2 with regard to purchase of property by Narasamma and payment of consideration by Rama Swamy is not acceptable. The trial Court, having discussed and relying on the evidence of defendant Nos. 1 to 6 and 11 to 15, concluded that the property was purchased by Rama Swamy but not by Narasamma by sale of her jewelry. One of the reasons assigned by the trial Court for arriving such conclusion is that defendant Nos. 1 to 6 and 11 to 15 failed to establish that Narasamma possessed any gold jewelry since Rama Swamy did not present any gold to her. Curiously, in the first para of page No. 20 of the judgment, the trial Court noted that Rama Swamy joined in service in P.W.D. on 06-02-1933 and retired on 31-08-1953. His entry into the department might be in lower cadre or in the category of overseer but no details of his salary were furnished before the trial Court. At the same time, B schedule property was purchased in the year 1933-34 as has been noted by the trial Court in para No. 24 of its judgment. When Rama Swamy joined in service in the month of February, 1933, question of earning huge amount and investing the same to purchase B schedule property in the same year itself do not arise that too, by the date of his joining into service, he got married. Similarly, purchase of A schedule property in 1936-37 by Rama Swamy investing huge amount within short span of three-four years from his joining into service is unbelievable, that too it is not even the case of the plaintiff that Rama Swamy had any other source of income either from movable or immovable property. In the absence of any other source of income, question of purchasing A and B schedule property within a span of 3 to 4 years after his joining into service is improbable to natural circumstances and he would not have saved that much of amount to purchase A and B schedule property having married Narasamma by that time. That apart, as per the evidence on

record, by the date of his retirement, he was getting pension of Rs.300/- p.m. If that is the case, the income of Rama Swamy during the period 1933-1937 might be far below the pension what he was getting after 20 years. The said Rama Swamy was re-employed, on his application, for a further period of two years as is evident from Exs.B63 to B68. Later, Rama Swamy registered himself as a contractor in 1959 as has also been evident from Exs.B69 to B73. However, these documents are subsequent to his retirement and purchase of A and B schedule property and constructing buildings therein. Thereby, these documents are of no assistance to prove income of the deceased Rama Swamy during 1933-1937. In addition to the above, Rama Swamy himself addressed Exs.B57 to B60 letters to Kishan Rao in the years 1961 and 1962 expressing his inability to maintain the family meeting regular expenses and requested to contribute something but Kishan Rao did not contribute anything. This is another strong piece of evidence to disbelieve financial soundness of Rama Swamy even after 27 years from the date of purchase of A and B schedule property. The trial Court, at the end of para No. 24 of the judgment, came to the conclusion that Rama Swamy was in sound financial condition to purchase the property and raise constructions in A and B schedule property "**from 1948 till 1962**" and accepted the case of the plaintiff. The finding of the trial Court is silent with regard to financial condition of Rama Swamy at the time of purchase of A and B schedule property *i.e.* from 1933 to 1937. At best, the evidence, if any, produced with regard to financial condition of Rama Swamy prior to the death of Narasamma alone has to be looked into but subsequent financial condition, just before retirement and after retirement, as has been noted at the end of para No. 24 of the judgment, is irrelevant to decide nature of acquisition of A and B schedule property and constructions therein. Even otherwise, it is not the case of the plaintiff that any of the constructions were raised during 1948 to 1962. As per the evidence of P.W.1, construction in B schedule property

was in existence even before his birth and construction in A schedule property took place in 1955 when he was 5 years old but this was not substantiated by any other document like approved plan. The plaintiff produced voluminous documents like bills and permissions obtained by Rama Swamy to effect certain repairs but those documents are of no avail to establish the plaintiff's case since they are subsequent to the death of Narasamma. No piece of paper is brought on record to prove that the property was treated as the property of Rama Swamy during the lifetime of Narasamma.

24. The trial Court, basing on the evidence of defendant Nos. 1 to 6 and 11 to 15 about failure to production of evidence that Narasamma possessed gold jewelry and sale of it *etc.*, concluded that defendant Nos. 1 to 6 and 11 to 15 failed to establish source of income of Narasamma to purchase A and B schedule property and raise constructions therein. It is clear from the finding of the trial Court that the trial Court placed burden of proof on defendant Nos. 1 to 6 and 11 to 15 though burden is upon the plaintiff to establish that the property was purchased by Rama Swamy, obtained sale deeds in the name of his first wife Narasamma and Narasamma is only a benamidar for Rama Swamy as held by Apex Court in ***Nand Kishore Mehra*** (3rd *supra*) and ***Valliammal (d) by L.Rs.*** (4th *supra*). In ***Binapani Paul Vs. Pratima Ghosh and others*** ^[9], the Supreme Court discussed about burden of proof and nature of transfer in the name of wife paying consideration by husband at length. In view of the principles laid down in the above judgment, onus of proof is on the plaintiff who asserted that purchase of A and B schedule property is benami transaction. Contrary to the law declared by Apex Court, the trial Court placed onus of proof on defendant Nos. 1 to 6 and 11 to 15 and, for their failure, the trial Court concluded that Rama Swamy is the actual owner of A and B schedule property. The approach of the trial Court, in placing initial onus of proof on defendant Nos. 1 to 6 and 11 to 15 and

accepting the evidence of the plaintiff without any proof, is an error apparent on the face of record.

25. The main endeavour of defendant Nos. 1 to 6 and 11 to 15 is that the judgment in O.S.No. 15 of 1966, confirmed in A.S.No. 95 of 1968, is the best piece of evidence to accept their contention that B schedule property was purchased by Narasamma and raised construction therein with her income. The plaintiff in para No. 5 of the plaint admitted about filing of O.S.No. 15 of 1966; passing of decree in favour of Rama Swamy, Kishan Rao and Laxman Rao; and its confirmation in A.S.No. 95 of 1968 declaring that Rama Swamy, Kishan Rao and Laxman Rao are the owners of B schedule property. In the evidence of P.W.1, he did not disclose anything under what circumstances the suit was filed. However, P.W.1 admitted filing of the suit, passing of decree in favour of Rama Swamy, Kishan Rao and Laxman Rao and its attaining finality in the appeal. The judgment in A.S.No. 95 of 1968 was produced before the trial Court which is marked as Ex.B1 by defendant Nos. 1 to 6 and 11 to 15. According to the contents of Ex.B1, Rama Swamy, Kishan Rao and Laxman Rao claimed that B schedule property was purchased by Narasamma with the sale proceeds of her gold jewelry and, after her death, they became absolute owners of the property. The trial Court in O.S.No. 15 of 1966, accepting the contention of Rama Swamy, Kishan Rao and Laxman Rao-the 1st defendant herein, passed decree in their favour and the same was confirmed in A.S.No. 95 of 1968 under the original of Ex.B1 declaring that Rama Swamy, Kishan Rao and the 1st defendant herein are absolute owners of B schedule property. When decree was passed declaring that Rama Swamy, Kishan Rao and the 1st defendant herein were absolute owners of the property, the plaintiff is now precluded to contend otherwise. The plaintiff and defendant Nos. 7 to 10 are now claiming right through Rama Swamy as representatives in interest being the second wife

and children born through the second wife. Therefore, the plaintiff and defendant Nos. 7 to 10 are only representatives in interest and, thereby, the decree passed in O.S.No. 15 of 1966, confirmed in A.S.No. 95 of 1968, is binding on them.

26. Whereas, learned counsel for the plaintiff contended that when the plaintiff and defendant Nos. 7 to 10 are not parties to the suit, the decree and judgment in O.S.No. 15 of 1966 are not binding on them and the same is accepted by the trial Court. No doubt, according to Section 35 of the Act of 1963, a declaration made under this Chapter is binding only on the parties to the suit, persons claiming through them respectively, and, where any of the parties are trustees, on the persons for whom, if in existence at the date of declaration, such parties would be trustees. Therefore, it is clear from Section 35 of the Act of 1963 that a declaratory decree is not only binding on the parties to the suit but also the persons claiming through them respectively though declaratory decree is a decree *in personam*. Evidently, the plaintiff and defendant Nos. 7 to 10 are claiming right, being second wife-the 7th defendant and children of Rama Swamy born through the 7th defendant, contending that Rama Swamy alone purchased A and B schedule property. Therefore, their claim is directly through Rama Swamy being representatives in interest. Thereby, the decree and judgment under Ex.B1 are binding on the plaintiff and defendant Nos. 7 to 10. The plaintiff and defendant Nos. 7 to 10 now cannot be allowed to contend that they are not parties to the earlier suit since they were minors. The trial Court, accepting the contention of the plaintiff and defendant Nos. 7 to 10, held that the decree and judgment are not binding on them. Thereby, the finding of the trial Court is totally contrary to Section 35 of the Act of 1963 and, therefore, the same is liable to be set aside.

27. One of the major contentions of defendant Nos. 1 to 6 and 11 to 15 is

that Rama Swamy made a categorical admission in O.S.No. 15 of 1966 that the property was purchased by Narasamma with the sale proceeds from jewelry and the trial Court, accepting the same, passed decree which was confirmed under the original of Ex.B1. Therefore, such admission estops the plaintiff and defendant Nos. 7 to 10 to contend otherwise. However, deposition of Rama Swamy in O.S.No. 15 of 1966 is not produced but relied on Ex.B1, wherein it was observed that Rama Swamy, Kishan Rao and the 1st defendant herein claimed that the property was purchased with the sale proceeds of jewelry by Narasamma and, at page No. 34 of Ex.B1, it was concluded that municipal records disclosed that the property stands in the name of Rama Swamy after the death of Narasamma and Rama Swamy paying property tax. This admission, in the earlier round of litigation, by Rama Swamy about original title to the property is, therefore, binding on the plaintiff and defendant Nos. 7 to 10.

28. The major contention of learned senior counsel for defendant Nos. 7 to 10 is that an admission can be used against the maker of such admission but not against any person other than the maker and drawn attention of this Court to Section 21 of the Act of 1872. In view of the above submission, I feel that it is better to extract Section 21 of the Act of 1872 and it is extracted hereunder for better appreciation:

*"Admissions are relevant and may be proved as against the person who makes them, or his representative in interest; but they cannot be proved by or on behalf of the person who makes them or **"by his representative in interest"**, except in the following cases:-*

- (1) An admission may be proved by or on behalf of the person making it, when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under Section 32.*
- (2) An admission may be proved by or on behalf of the person making it, when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable.*

(3) *An admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission."*

In view of the plain language of Section 21 of the Act of 1872, the contention of learned senior counsel cannot be accepted for the simple reason that admissions may be proved as against the person who makes them or his representatives in interest. In the present case, the plaintiff and defendant Nos. 7 to 10, who are claiming $1/7^{\text{th}}$ share each, are only representatives in interest of Rama Swamy. Therefore, the admission made by Rama Swamy can be proved against the plaintiff and defendant Nos. 7 to 10 as they are representatives in interest. The word, "representatives in interest", has not been defined in the Act but evidently means privies. From the meaning of the word privies, admissions by persons from whom the parties have derived interest can be said to be representatives in interest. The phrase representative in interest means that the person who has derived his title from the author of a statement. Therefore, the plaintiff and defendant Nos. 7 to 10 are the persons who are claiming share in the property through Rama Swamy who made both judicial and evidentiary admissions in the earlier round of litigation. Hence, the admissions made by Rama Swamy are binding on the plaintiff and defendant Nos. 7 to 10 and, thereby, they are now estopped to contend otherwise.

29. Admission is of two types; one is judicial admission and the other is evidentiary admission. Admissions though not conclusive proof, they estopped the person who made such admissions or representatives in interest in view of Section 31 of the Act of 1872. At the same time, judicial admissions need not be proved by adducing any evidence in view of Section 58 of the Act of 1872. Whether an admission is evidentiary or judicial, the party who made such admission if explained under what circumstances he made such admission, the admission can be ignored. In the present case, the deceased Rama Swamy filed suit along with Kishan Rao and the 1st

defendant herein; obtained decree; contested the matter even in the appeal and got it confirmed. Even now, the plaintiff and defendant Nos. 7 to 10 did not explain under what circumstances such admission was made except contending that due to claiming share illegally by brothers of Rama Swamy, Rama Swamy filed the suit to protect the property but this explanation is not sufficient to take away the earlier admission made by Rama Swamy in the first round of litigation with regard to B schedule property. Learned counsel for the plaintiff contended that when an admission is made to protect the property under the circumstances prevailing then, that cannot be taken into consideration since it is not a conclusive proof and placed reliance on **Nagubai Ammal and others** (1st *supra*), wherein the Supreme Court, in para No. 18 of the judgment, discussing about evidentiary value of an admission, held as follows:

"An admission is not conclusive as to the truth of the matters started therein. It is only a piece of evidence, the weight to be attached to which must depend on the circumstances under which it is made. It can be shown to be erroneous or untrue, so long as the person to whom it was made has not acted upon it to his detriment, when it might become conclusive by way of estoppel."

It was further held as follows:

"It is no doubt true that what a party himself admits to be true may reasonably be presumed to be so. But before this rule can be invoked, it must be shown that there is a clear and unambiguous statement by the opponent such as will be conclusive unless explained. A statement by a party that certain proceedings were fraudulent and not collusive in character would not, be sufficient, without more, to sustain a finding that the proceedings were collusive."

Learned counsel also placed reliance on **Smt. Krishnawati Vs. Shri Hans Raj** ^[10], wherein the Supreme Court, while considering evidentiary value of an admission made in previous proceedings, held as follows:

"Previous self-serving statements by a party in other proceedings cannot be used as substantive evidence in subsequent proceedings against that party."

On the strength of the principles laid down in the above two judgments, learned counsel for the plaintiff would contend that on the basis of Ex.B1, the Court cannot deny the relief. No doubt admission made in the earlier proceedings is not a substantive piece of evidence but in the later judgment of Apex Court in **Sita Ram Bhau Patil Vs. Ramachandra Nago Patil**^[11], it was held as follows:

"Admission is the best piece of substantive evidence that an opposite party can rely upon, though not conclusive, is decisive of the matter, unless successfully withdrawn or proved erroneous. Admission may in certain circumstances, operate as an estoppel. The question which is needed to be considered is what weight is to be attached to an admission and for that purpose it is necessary to find out as to whether it is clear, unambiguous and a relevant piece of evidence, and further it is proved in accordance with the provisions of the Evidence Act. It would be appropriate that an opportunity is given to the person under cross-examination to tender his explanation and clear the point on the question of admission.

In view of the above, the law on the admissions can be summarized to the effect that admission made by a party though not conclusive, is a decisive factor in a case unless the other party successfully withdraws the same or proves it to be erroneous. Even if the admission is not conclusive it may operate as an estoppel. Law requires that an opportunity be given to the person who has made admission under cross-examination to tender his explanation and clarify the point on the question of admission. Failure of a party to prove its defence does not amount to admission, nor it can reverse or discharge the burden of proof of the Plaintiff."

In view of the recent decision of the Supreme Court, it is difficult to accept the contention of the plaintiff for more than one reason. The first reason is that the said Rama Swamy made admission about nature of acquisition in O.S.No. 15 of 1966, obtained decree and got it confirmed in A.S.No. 95 of 1968 and the second reason is that the plaintiff did not explain any specific reason for making such admission but, in fact, the plaintiff is incompetent to explain the reason which is in the mind of deceased Rama Swamy. Therefore, it is difficult to apply the principle laid down in **Smt. Krishnawati** (5th *supra*). Applying the principle laid down in **Nagubai**

Ammal and others (1st *supra*), it can safely be concluded that admission made by Rama Swamy is binding on his privies *i.e.* representatives in interest, who are the plaintiff and defendant Nos. 7 to 10, since admission is the best piece of evidence and, unless it is explained, it can be relied upon in subsequent proceedings. Even according to Section 31 of the Act of 1872, though admission is not a conclusive proof, still it estops the person who made such admission or the representatives in interest of such person who made such admission.

30. Section 115 of the Act of 1872 deals with the principle of estoppel. According to it, when one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing. In view of the plain language used under Section 115 of the Act of 1872, even representative in interest of the person who made a declaration, act or omission, intentionally permitting another person to act upon such representation, the representative of such person is precluded to dispute the truth of such statement. The principle of estoppel is a rule of evidence whereas the doctrine of *res judicata* is a rule of procedure. In the instant case, Rama Swamy, by his declaration or statement, made Kishan Rao and the 1st defendant herein to believe such declaration or statement; acting upon such statement or declaration, they claimed right in the property and, thereby, the plaintiff and defendant Nos. 7 to 10 cannot deny the statement or declaration made by Rama Swamy in the earlier suit and the appeal. If for any reason the plaintiff is allowed to deny the truth in the statement or declaration of Rama Swamy, it amounts to encouraging concealment of truth. Hence, by applying the principle of estoppel, the plaintiff is debarred from disputing the earlier statement made by his father Rama Swamy. Estoppel by record or judgment is applicable to

the present facts of the case since the civil Court in O.S.No. 15 of 1966 declared that Rama Swamy, Kishan Rao and the 1st defendant herein are the absolute owners of B schedule property on the strength of declaration or statement of all the three persons which was confirmed in A.S.No. 95 of 1968. Where a final judicial decision has been pronounced by a judicial tribunal of competent jurisdiction over the parties to, and the subject-matter of, the litigation, any party or privy to such litigation, as against any other party or privy thereto, and, in the case of a decision in *rem*, any person whatsoever, as against any other person, is estopped in any subsequent litigation from disputing or questioning such decision on the merits, whether it be used as the foundation of an action, or relied upon as a bar to any claim, indictment or complaint, or to any affirmative defence, case, or allegation, if, but not unless, the party interested raises the point of estoppel at the proper time and in the proper manner. In any view of the matter, decree in declaration suit is decree in *personam* in view of Section 35 of the Act of 1963 which binds representatives in interest of the party to such decree.

31. A co-joint reading of doctrine of estoppel under Section 115 of the Act of 1872 and effect of declaratory decree under Section 35 of the Act of 1963, it is obvious that privies are estopped to deny the truth in the statement or declaration made in the earlier suit. The plaintiff and defendant Nos. 7 to 10 are representatives in interest being the legal-heirs of deceased Rama Swamy. Hence, they are precluded to raise a plea which is contrary to the plea raised by Rama Swamy in the earlier round of litigation which attained finality under the original of Ex.B1. In view of my foregoing discussion, doctrine of estoppel is applicable to the present facts of the case and the plaintiff and defendant Nos. 7 to 10 are not entitled to deny right of the deceased Kishan Rao and his legal-heirs *i.e.* defendant Nos. 2 to 6 and the deceased 1st defendant and his legal-heirs *i.e.* defendant Nos. 11 to 15. When a similar question came up for consideration in ***R.N.Gosain Vs.***

Yashpal Dhir ^[12], the Apex Court ruled as follows:

"Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage."

In the above judgment, the Apex Court relied on **Verschures Creameries Limited Vs. Hull and Netherlands Steamship Company Limited** ^[13] to hold that

"After taking an advantage under an order (for example for the payment of costs) a party may be precluded from saying that it is invalid and asking to set it aside."

32. According to the judgment of Apex Court relied upon by learned counsel for the plaintiff in **Nand Kishore Mehra** (3rd *supra*), mere proof of payment of sale consideration for purchase of A and B schedule property by itself is not sufficient to construe purchase of A and B schedule property is benami transaction. The plaintiff has to prove that transfer of property was not intended to confer any benefit on Narasamma, the first wife of Rama Swamy. Raising the plea that the property was purchased by Narasamma with the sale proceeds of gold jewelry and raised constructions in B schedule property in O.S.No. 15 of 1966 itself shows that even if Rama Swamy paid sale consideration for purchase of B schedule property, his intention is only to confer benefit on Narasamma. Therefore, even by applying the principle laid down in **Nand Kishore Mehra** (3rd *supra*), it can safely be concluded that Narasamma is the absolute owner of B schedule property situated at Dhoolpet.

33. The trial Court, without looking into the actual principle laid down in the decisions referred *supra*, erroneously concluded that Rama Swamy

possessed sufficient means during 1948 to 1962 though B schedule property was purchased long prior to his retirement *i.e.* during the year 1933-34 *i.e.* just within one year after his joining into service. This finding is apparently erroneous and it is not substantiated by any evidence. Hence, the finding of the trial Court that B schedule property is the property purchased by Rama Swamy is hereby set aside holding that Narasamma, the first wife of Rama Swamy, was the absolute owner of B schedule property.

34. The plaintiff also claimed that A schedule property is the property purchased by Rama Swamy in the name of his first wife Narasamma. Undisputedly, the sale deed was registered in the name of his first wife Narasamma and the construction therein was also in the name of Narasamma. Though the plaintiff contended that the construction was subsequent to the death of Narasamma, no piece of paper is produced to establish date of construction of the building in A schedule property. On the other hand, defendant Nos. 1 to 6 and 11 to 15 produced voluminous evidence to establish that Kishan Rao obtained plan for extension of construction under the original of Ex.B15, made representation under Ex.B16 and paid necessary amount under challan for obtaining plan. Ex.B54 is another proposed plan for alterations and additions to A schedule property. Exs.B55 and B56 are rental agreements. All these documents would establish that part of superstructures in A schedule property were raised by Kishan Rao and the initial superstructures were raised by Narasamma. Added to that, a notice was issued by Controller of Accommodation, marked as Ex.B11, to Kishan Rao requesting to provide accommodation for location of office. Later, Kishan Rao sent a representation under Ex.B12 to Controller of Accommodation and got issued order of allotment marked as Ex.B13 but, later, was cancelled under Ex.B14. These documents also establish that Kishan Rao enjoyed A schedule property as exclusive owner and treated the same for all purposes as is the property of Kishan Rao and paid taxes to

municipal corporation. The only documents produced by the plaintiff are that he addressed letters seeking permission to lay pipeline *etc.*, but those documents are of no use to establish title of Rama Swamy. The plaintiff produced Ex.A8 plan for raising additional structures and alterations to A schedule property belonging to Rama Swamy. Even Ex.A8 is also not sufficient to conclude that Rama Swamy alone was the owner of the property. After the death of Narasamma, Rama Swamy became entitled to 1/3rd share in the property being husband. Mere applying for approval of plan for making additions and alterations would not confer any title on him since he is entitled to apply for such approval being co-owner along Kishan Rao and the 1st defendant herein. Therefore, this document is of no use to establish title of Rama Swamy to claim share therein by the plaintiff and defendant Nos. 7 to 10. Even according to the own case of the plaintiff, A schedule property stands in the name of Narasamma as is evident from Ex.A7 marked on behalf of the plaintiff.

35. One of the contentions of the plaintiff before the trial Court and this Court is Rama Swamy executed will dated 28-11-1953 marked as Ex.A1 and, in terms thereof, the plaintiff and defendant Nos. 7 to 10 are entitled to claim share of Rama Swamy. Admittedly, Rama Swamy did not sign on Ex.A1 will dated 28-11-1953. The plaintiff also produced Ex.A6 will as if Rama Swamy executed the same. As per appendix of evidence, Ex.A6 is original will signed by Rama Swamy but Ex.A6 is only a letter addressed to Kishan Rao and the 1st defendant herein on 13-07-1960, expressing the inability of Rama Swamy to maintain his family, requested to contribute something to pull on the family and also expressed his intention to postpone distribution of his property as accepted by Kishan Rao and the 1st defendant in the years 1953. Thereby, Ex.A6 is not a will and it is only a letter. Admittedly, Ex.A1 was not signed by Rama Swamy but obtained signatures

of attesters. Unless the will is duly signed by Rama Swamy, Ex.A1 cannot be accepted as the last will of Rama Swamy bequeathing his property. Execution of will would normally be completed when it is signed or affixed thumb impression of testator/testatrix. Since Ex.A1 is not duly signed by Rama Swamy, it cannot be accepted as the will of Rama Swamy bequeathing his property. However, it is not even the claim of the plaintiff that Rama Swamy bequeathed his property to any of the children of second wife as per the pleadings. Therefore, it is wholly unnecessary for me to look into genuineness or otherwise of the will and, if any finding is recorded about the will, it certainly amounts to traveling beyond pleadings.

36. On overall consideration of entire material available on record, A schedule property was registered in the name of Narasamma; construction was raised by Narasamma; and Kishan Rao and Rama Swamy applied for approval of plans for additions and alterations separately but it would not change nature of acquisition of the property by Narasamma. In ***Valliammal (d) by L.Rs.*** (4th *supra*), the Apex Court is of the clear view that presumption as to ownership of the property is in favour of the person purchased till it is rebutted. In the present case, the general presumption of ownership of the purchaser was not rebutted by adducing any satisfactory evidence. Therefore, it is difficult to hold that Rama Swamy is the real owner of A schedule property and, therefore, the plaintiff and defendant Nos. 7 to 10 are entitled to 1/7th share each in the property. On the other hand, the voluminous material available on record clinchingly established that Narasamma, purchaser of A and B schedule property, alone was the owner of the property and, after her death, Kishan Rao, the 1st defendant and Rama Swamy succeeded the property in three equal shares in view of the clear admission made by the 1st defendant in his written statement and in the written statements filed by defendant Nos. 2 to 6 and 11 to 15. Accepting the

admission, I hold that A and B schedule property was succeeded by Kishan Rao, the 1st defendant and Rama Swamy being legal-heirs of Narasamma. Learned counsel for defendant Nos. 2 to 6 filed memo dated 16-03-2015 stating that prior to coming into force of the Hindu Succession Act, 1956 (for brevity, 'the Act of 1956'), Section 32 read with Section 35 of the Indian Succession Act, 1925, would govern the rule of succession of a Hindu female and, thereby, defendant Nos. 2 to 6 are the legal-heirs of the deceased Kishan Rao. Since the property was the absolute property or exclusive property of Narasamma, defendant Nos. 1 to 6 and 11 to 15 admitted that the plaintiff and defendant Nos. 7 to 10 are entitled to 1/21st share in the 1/3rd share of Rama Swamy irrespective of the rules governing succession of property by a female Hindu prior to 1956. That apart, under the original of Ex.B1, Rama Swamy is entitled to 1/3rd share in B schedule property which attained finality. If the contention of the plaintiff is accepted, it certainly amounts to annulling the decree and judgment. In view of Ex.B1 and admissions in pleadings, irrespective of succession of property of a Hindu female, who died intestate before commencement of the Act of 1956, I am of the considered view that the plaintiff and defendant Nos. 7 to 10, along with Kishan Rao and the 1st defendant, are entitled to 1/7th share each in the 1/3rd share of Rama Swamy. Therefore, the plaintiff is entitled to 1/21st share; defendant Nos. 11 to 15, being legal-heirs of the deceased 1st defendant, are entitled to 1/3rd share + 1/21st share *i.e.* 8/21st share; defendant Nos. 2 to 6, being legal-heirs of the deceased Kishan Rao, are entitled to 1/3rd share + 1/21st share *i.e.* 8/21st share and defendant Nos. 7 to 10 are entitled to 1/21st share each. Since the 7th defendant is also died, the plaintiff and defendant Nos. 8 to 10 are entitled to 1/4th share each in the 1/21st share of the 7th defendant *i.e.* 1/84th share each. Thereby, the plaintiff

is entitled to $5/84^{\text{th}}$ share *i.e.* $1/21^{\text{st}}$ + $1/84^{\text{th}}$ share; defendant Nos. 2 to 6 are entitled to $32/84^{\text{th}}$ share; defendant Nos. 8 to 10 are entitled to $5/84^{\text{th}}$ share each and defendant Nos. 11 to 15 are entitled to $32/84^{\text{th}}$ share in A and B schedule property. Accordingly, the points are answered.

37. **In Re. Point No. 3:**

The plaintiff claimed relief of rendition of true and correct account of income from A schedule property since B schedule property was in joint occupation of the plaintiff and the defendants during the lifetime of Rama Swamy. The trial Court directed defendant Nos. 1 to 6 and 11 to 15 to render true and correct account of income received from A schedule property and the said finding is now challenged before this Court by defendant Nos. 1 to 6 and 11 to 15 by way of preferring these two appeals. According to my finding on point Nos. 1, 2 and 4, the plaintiff and defendant Nos. 8 to 10 are entitled to $5/84^{\text{th}}$ share each in A and B schedule property. Since B schedule property is in joint possession and enjoyment of all the legal-heirs of the deceased Rama Swamy, question of rendition of true and correct account of income from B schedule property does not arise. Since Kishan Rao and his family *i.e.* defendant Nos. 2 to 6 are in enjoyment of A schedule property and income derived therefrom by letting out the same, they are under obligation to render true and correct account of income from A schedule property. Therefore, defendant Nos. 2 to 6 are liable to render true and correct account of income from A schedule property and pay $5/84^{\text{th}}$ share each to the plaintiff and defendant Nos. 8 to 10 from the date of decree till delivery of possession. The plaintiff is at liberty to file an application for ascertaining the income payable by defendant Nos. 2 to 6 from A schedule property and to decide the share of the plaintiff and defendant Nos. 8 to 10. The point is, accordingly, answered.

38. In view of my finding on point Nos. 1 to 4, I find that the trial Court, on

erroneous appreciation of facts and law, decreed the suit totally ignoring the voluminous oral and documentary evidence available on record and misinterpreted the law laid down by Apex Court in granting the decree. Hence, the decree is liable to be set aside.

39. In the result, the appeals are allowed; setting aside the decree and judgment in O.S.No. 441 of 1984 on the file of the Court of IV Additional Judge, City Civil Court, Hyderabad, dated 10-04-1996; passing a preliminary decree for partition of A and B schedule property into 84 equal shares and allotting $\frac{5}{84}$ th share each to the plaintiff and defendant Nos. 8 to 10; $\frac{32}{84}$ th share to defendant Nos. 2 to 6, being legal-heirs of Kishan Rao and $\frac{32}{84}$ th share to defendant Nos. 11 to 15, being legal-heirs of the deceased 1st defendant while directing defendant Nos. 2 to 6 to render true and correct account of income from A schedule property and pay $\frac{5}{84}$ th share each to the plaintiff and defendant Nos. 8 to 10 out of the income from A schedule property from the date of decree till delivery of possession. The plaintiff is at liberty file an application for ascertaining the income payable by defendant Nos. 2 to 6 from A schedule property. Pending miscellaneous petitions in both these appeals, if any, shall stand closed in consequence. No order as to costs.

M.SATYANARAYANA

MURTHY, J.

Date: 20-03-2015.

Note: L.R. copy to be marked.

B/O

JSK

[\[1\]](#) AIR 1956 SC 593* (1)

[\[2\]](#) AIR 1960 SC 335

[\[3\]](#) (1995) 4 SCC 572

[\[4\]](#) (2004) 7 SCC 233

[\[5\]](#) 1973 (2) APLJ 10 (SN)

[\[6\]](#) 1956 An.W.R.943

[\[7\]](#) AIR 1962 AP 226

[\[8\]](#) AIR 1974 SC 171

[\[9\]](#) AIR 2008 SC 543

[\[10\]](#) AIR 1974 SC 280 (1)

[\[11\]](#) AIR 1977 SC 1712

[\[12\]](#) (1992) 4 SCC 683

[\[13\]](#) (1921) 2 R.B.608