

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO.33 OF 2016
WITH
CIVIL APPLICATION NO.50 OF 2016
IN
SECOND APPEAL NO.33 OF 2016**

Shri. Chandrakant Vithoba Sawant

...Appellant
(Original Plaintiff)

vs.

Sou. Rajashri Chandrakant Sawant

...Respondent
(Original Defendant)

....

Mr. G.N. Salunke, for the Appellant.

Mr. S.R. Ganabavale, i/b. Sangramsinh Yadav, for the Respondent.

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CORAM : S.C. GUPTE, J.

DATED : 30 JANUARY 2017

P.C. :

. Heard learned Counsel for the parties.

2. This Second Appeal challenges a judgment and order passed by the District Court at Gadhinglaj. By the impugned judgment and order, the learned District Judge allowed the Respondent's appeal against the judgment and decree passed by the Civil Judge, Senior Division, Gadhinglaj in Regular Civil Suit No.130 of 2003 filed by the Appellant herein. The Appellant's suit was for a declaration that he was the owner of the suit property, which was bought by him in the name of his wife – the Original Defendant and for a permanent injunction against

creating any third party rights in respect of the suit property.

3. The Appellant's case before the Trial Court was that he had purchased the property in the name of his wife, the Original Defendant, out of love and affection and that it was a benami transaction. That the entire consideration of sale was paid by him and that he was entitled to a declaration that he was the real owner of the entire property, entitled to perpetual injunction against the Defendant in respect of creation of third party rights. In her written statement before the Trial Court the Original Defendant resisted the Appellant's suit *inter alia* relying on Section 4 of the Benami Transactions (Prohibition) Act, 1988 (the Act). The Defendant denied that the suit property was purchased, and a building was constructed therein, from out of the earnings of the Plaintiff or that the Appellant had no right, title or interest in or upon the suit property. The Defendant, in other words, claimed absolute ownership of the suit property. The Trial Court disbelieved the Defendant's case that the property was purchased and the construction was made by her out of her own funds. The Trial Court accepted the Appellant's case that the property was purchased and construction was made by the Appellant out of his own funds. The Trial Court came to the conclusion that the transaction of purchase in the name of the Defendant was entered into by the Appellant benami, out of love for the latter, but not for the benefit of the latter and that, accordingly, the Appellant was the real owner of the suit property and was also in possession thereof. The Trial Court, accordingly, decreed the Appellant's suit and declared his ownership and granted a permanent injunction against the Defendant from creating third party rights in the property.

4. The appeal court allowed the Respondent's appeal on the ground that though the Trial Court had found in favour of the Appellant that he had purchased the suit property in the name of the Defendant from out of his own funds, it did not correctly appreciate the provisions of sub-section (2) of Section 3 of the Act, which enact a presumption that the purchase of the property by any person in the name of his wife shall be presumed to be for the benefit of the wife unless the contrary was proved. The appeal court noted that in his pleadings the Appellant did not plead that the property was purchased by him for his own benefit and not for the benefit of his wife - the Defendant. The appeal court, accordingly, came to the conclusion that mere proof of payment of purchase money, or incurring of cost of construction over the suit property, was not sufficient to seek a declaration of his ownership by the Appellant. He had further to prove that the property had not been purchased for the benefit of his wife.

5. In the first place, one fails to understand how a plaintiff can maintain a suit for declaration of his ownership, alleging that the property was purchased benami in the name of his wife, in the face of the bar of suits contained in Section 4 of the Act. Since, however, this point was not considered by any of the courts below, we may not enter that controversy. It is, however, very clear that the impugned judgment and order of the first appellate court is clearly unexceptionable even on a reading of Section 3 of the Act. Sub-section (1) of Section 3 of the Act prohibits all benami transactions. Sub-section (2), however, excepts a purchase of property made by any person in the name of his wife or unmarried daughter from the bar contained in sub-section (1). Sub-

section (2) also contains a presumption that the property had been purchased for the benefit of the wife or the unmarried daughter, as the case may be. The presumption can be rebutted only by tendering proof to the contrary. In the plaint, the Appellant's case was that the Appellant bought the suit property through his own money in the name of wife, the Original Defendant, out of love for her. He has not pleaded further that though the property was purchased in the name of the Original Defendant out of love and affection, it was not purchased for her benefit. There was no material adduced in this behalf in the evidence either. The appellate court held that even if one were to totally believe the entire evidence of the Appellant, the motive of the Appellant of purchase of the suit property in the name of his wife for his own benefit as against the benefit of the wife cannot be inferred. The approach of the Appeal Court and its analysis of evidence and application of law thereto do not give rise to any substantial question of law.

6. There is, thus, no merit in the Second Appeal and the same is dismissed.

7. Learned Counsel for the Respondent states that he shall not create any third party right in or over the suit property for a period of six weeks from today. The statement is accepted.

8. In view of the dismissal of the Second Appeal, the Civil Application does not survive and the same is disposed of.

(S.C. GUPTE, J.)