

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.395 of 2000****Judgment reserved on :13.12.2018****Judgment delivered on: 11.01.2019**

1. Ameera (died and deleted)
2. Ghana Bai wd/o Sunder Lodhi (dead)
3. Khemkaran, aged about 27 years;
4. Bala, aged about 25 years;

Both sons of Dashrath;

5. (a) Vimla Bai, aged about 27 years, wd/o Lalsingh;
 - (b) Gaya, aged about 9 years d/o Lalsingh;
 - (c) Rekha, aged about 8 years d/o Lalsingh;
 - (d) Lanabai, aged about 5 years d/o Lalsingh;
 - (e) Prakash, aged about 2 years s/o Lalsingh;
- through GAL mother Vimlabai wd/o Lalsingh;

All R/o village Bamhani Nawagao, Tahsil Kawardha District Rajnandgaon, M.P. (Now C.G.)

6. a. Matibai wd/o. Horilal aged about 45 years,
- b. Miss. Usha D/o. Horilal aged about 21 years,
- c. Smt. Sushila Bai D/o. Horilal and W/o. Mohit aged about 19 years,
- d. Narottam S/o Horilal aged about 14 years (minor through Natural guardian Mother Smt. Matibai),
- e. Keshav S/o. Horilal aged about 10 years minor through Natural guardian Mother Smt. Motibai),

---- Appellants

Versus

1. a. Prahlad Lodhi S/o. Ramlakhan Lodhi aged about 42 years,
- b. Awadh Lodhi S/o. Ramlakhan Lodhi aged about 40 years,
- c. Kali Bai D/o. Ramlakhan Lodhi aged about 28 years,
- d. Majnu S/o. Ramlakhan Lodhi aged about 36 years,

All are residence at Lasadhila Ph. No.37 Tahsil Kawardha District Kabirdham (CG)

2. Rukhmin, aged about 42 years, w/o Bisesar Lodhi R/o village Kuteli, PH No.26, Tahsil Kawardha, District Rajnandgaon, MP (Now CG)
3. State of M.P. through Collector Rajnandgaon

---- Respondents

For Appellants : Mr.Aishwarya Pandey and Mr.P.K.Tulsyan,
Advocates

For Respondents No.1 (a) to : Mr.Malay Shrivastava, Advocate
(d) and 2

For Respondent No.3 : Mr.Arun Sao, Dy.A.G.

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Judgment

1. The substantial questions of law involved, formulated and to be answered in the second appeal preferred by defendants No.1 to 6 are as under:-

- “1. Whether the suit was maintainable without impleading the necessary party ?
2. Whether the suit was maintainable without including the lands purchased in the name of other members of the joint family ?
3. Whether the First Appellate Court is justified in holding that the suit land was held by Sunder Lal and it was available for partition ?”

[For the sake of convenience, the parties would be referred hereinafter as per their status shown and ranking given in the suit before the trial Court].

2. The suit land was originally held by Sunder Lal. He had three daughters i.e. plaintiff No.1-Urmila, plaintiff No.2-Rukhmani and defendant No.1-Ameera. Defendant No.2-Ghana Bai is widow of late Sunder Lal and defendants No.3 to 6 are sons of defendant

No.1-Ameera out of her wedlock with Dashrath. Plaintiffs No.1 and 2 brought a suit for declaration of title that they have total half share in the suit land as shown in Schedule "A" annexed with the plaint situated at village Rajpur, area 0.68 acre, at village Dharigawa, area 17.88 acres, at village Nawagaon area 12.05 acres, at village Bamhanipara-Nawagaon, area 20 acres and at village Bamhani, area 11.60 acres, total 62.21 acres and further sought relief that sale made in favour of defendants No.3 to 6 on 19.10.67 relating to 11.60 acres of land alleging that the suit properties were purchased by Sunderlal in the names of defendant No.1 and defendants No.3 to 6 benami as the said properties actually belonged to Sunderlal, father of the plaintiffs and prayed for decree of partition and possession.

3. Defendant No.1 filed her written statement opposing the plaint averments stating inter-alia that the land shown in Schedule "A" mainly 20 acres was settled in her favour by registered sale deed, as such, it is her property and it was not the property held by Sunder Lal, therefore, that property is not available for partition. Likewise, 11.60 acres of land was settled in favour of defendants No.3 to 6 i.e. sons of defendant No.1, as such, these properties are not available for partition and it cannot be partitioned and the plaintiffs are not entitled for partition and the suit deserves to be dismissed with cost(s).
4. Defendants No.3 to 6 have opposed the plaint averments and have taken the stand in line of defendant No.1.
5. The trial Court after appreciating oral and documentary evidence

available on record, by its judgment and decree dated 8.10.96 dismissed the suit holding that late Sunder Lal, father of the plaintiffs and defendant No.1 was not owner of 62.21 acres of land and the plaintiffs are not entitled for half share in the suit property and the suit has not been filed in respect to the entire suit property and the suit is also liable to be dismissed on account of non-joinder of necessary party.

6. On appeal being preferred by the plaintiffs, the First Appellate Court allowed the appeal and set aside the judgment and decree of the trial Court and decreed the suit of the plaintiffs.
7. Questioning legality and validity of the judgment and decree passed by the First Appellate Court, this second appeal under Section 100 of the CPC has been filed by the appellants/defendants No.1 to 6, in which substantial questions of law have been framed by this Court, which have been set-out in the opening paragraph of this judgment.
8. Mr.Aishwarya Pandey, learned counsel for the appellants/defendants No.1 to 6, would submit that the First Appellate Court is absolutely unjustified in reversing the well merited and well reasoned judgment and decree of the trial Court, as such, the property situated at village Bamhanipara-Nawagaon (area 20 acres) and Bamhani (area 11.60 acres) are the property of defendant No.1 and defendants No.3 to 6 respectively and these properties are not available for partition and it cannot be held to be the properties of Sunder Lal. Therefore, the First Appellate Court is totally unjustified in directing for partition in those properties. He

would further submit that the suit has rightly been held to be not maintainable on account of non-joinder of Dashrath as party defendant in the suit as well as in the suit, lands situated at village Lashatola and Kuteli have not been included. Therefore, the judgment and decree passed by the First Appellate Court deserves to be set aside.

9. Mr.Malay Shrivastava, learned counsel for respondents No.1 (a) to (d) and 2/plaintiffs, would submit that the First Appellate Court is absolutely justified in reversing the judgment and decree of the trial Court as legal representatives of Dashrath have already been impleaded as defendants in the suit during the course of trial and the properties situated at village Lashatola and Kuteli are self-acquired property of the plaintiffs and therefore, these properties are not available for partition, as such, the First Appellate Court has rightly reversed the judgment and decree of the trial Court.

10. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the records with utmost circumspection.

Answer to substantial question of law No.1:-

11. It is the case of the defendants that in absence of Dashrath as party defendant, the suit as framed and filed by the plaintiffs for partition is not maintainable as the suit property particularly 12.05 acres situated at village Nawagaon was held by Dashrath, but it was registered in the name of Sunder Lal. Therefore, he was not necessary party. The First Appellate Court has clearly recorded a

finding that Dashrath made an application for impleadment on 18.2.80, but before he could be impleaded on his application for impleadment he died and his legal representatives have already been brought on record as party defendants i.e. defendants No.3 to 6 in the suit, as such, the suit is not barred on account of non-joinder of necessary party. In view of that, the finding recorded by the First Appellate Court is in accordance with law and this substantial question of law is answered against the defendants and in favour of the plaintiffs.

Answer to substantial question No.2:-

12. The trial Court dismissed the suit holding that the lands situated at village Lashatola and Kuteli have not been included and therefore, the suit for partial partition is not maintainable in view of Order 2 Rule 2 of the CPC. The First Appellate Court has held that the lands situated at village Lashatola and Kuteli are the properties owned and acquired by the plaintiffs being their self-acquired property vide Exs.P/3 and P/4 and therefore, these properties are not the properties held by Sunder Lal and it is not available for partition. This finding recorded by the First Appellate Court that the suit property situated at village Lashatola & Kuteli are self-acquired properties of the plaintiffs is a finding of fact based on evidence available on record and as such, the substantial question of law is answered against the defendants and in favour of the plaintiffs.

Answer to substantial question of No.3:-

13. The plaintiffs filed a suit for partition and possession initially claiming partition of only land bearing khasra No.1534/9 area 12.05 acres situated at Village Nawagaon, Tahsil and District Kawardha stating that the land belonged to their father Sunderlal. Thereafter by way of amendment, inserted a plea that the land situated at village Bamhanipara-Nawagaon admeasuring 20 acres was purchased by the plaintiff's father Sunderlal benami in the name of defendant No.1 and similarly at village Bamhani 11.60 acres of land was purchased by Sunderlal on 19.10.67 in the names of sons of defendant No.1 being defendants No.3 to 6 benami and as such, Sunderlal is the original/actual owner of these lands. The said plea was opposed by the defendants by filing written statement.
14. The trial Court after appreciating the evidence held that Sunderlal was not owner of the suit land admeasuring 62.61 acres and dismissed the suit, which has been reversed by the First Appellate Court holding that Sunderlal was owner of all the properties and decreed the suit of the plaintiffs.
15. The question for consideration would be whether the First Appellate Court is justified in holding that entire suit land admeasuring 62.61 acres was held/owned by the plaintiffs' father Sunderlal and that is available for partition between the plaintiffs and defendant No.1.

16. The plaintiffs/respondents have specifically taken a plea of *benami* in respect of the land situated at Village Bamhanipara-Nawagaon stating inter-alia that their father purchased 20 acres of land on 1.3.1962 from Jangi S/o. Banshi Lodhi for cash consideration of ₹ 2,000/-, but it was registered in the name of defendant No.1. Likewise, their father purchased 11.60 acres of land from Jangi for cash consideration of ₹ 1500/- on 19.10.1967, but again it was registered in the names of defendants No.3 to 6 (sons of defendant No.1). It is specific case of the plaintiffs in the plaint that these lands are being managed and possessed by defendant No.1.

17. The Benami Transaction (Prohibition) Act, 1988 came into force w.e.f. 5.9.88 providing that no suit, claim or action to enforce any rights in respect of any property held benami against the person in whose name the property is held or against any other person shall lie by or on behalf of the person claiming to be the real owner of such property. The Supreme Court in the matter of R. Rajagopal Reddy (dead) by LRS. and others v. Padmini Chandrasekharan (Dead) by LRS.¹ partly overruling its earlier judgment i.e. Mithilesh Kumari and another v. Prem Behari Khare² has clearly held that act was prospective in nature and it has no retrospective operation except to a limited extent. In this case, suit was instituted on 8.9.82 much prior to coming into force

¹ (1995) 2 SCC 630

² (1989) 2 SCC 95

of the Act of 1988, therefore, a plea of benami is permissible to be raised.

18. The question for consideration would be whether the plea of *benami* taken by the plaintiffs with respect to above-stated lands (20 acres and 11.60 acres) in two villages has been established by the plaintiffs in accordance with law.

19. The Supreme Court in the matter of Jaydayal Poddar (Deceased) through its Lrs. and another v. Mst. Bibi Hazra and others³ has held that burden of proving that particular sale is benami and apparent purchaser is not the real owner, always rests on the person asserting it to be so. The burden has to be strictly discharged by adducing legal evidence of definite character to prove the fact of *benami*. It was observed by Their Lordships as under:-

“6. 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

3 (1974) 1 SCC 3

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. Though the question, whether a particular sale is benami or not, is largely one of fact, and for determining this question, no absolute formula or acid test, uniformly applicable in all situations, can be laid down; yet in weighing the probabilities and for gathering the relevant indicia, the Courts are usually guided by these circumstances: (1) the source from which the purchase money came; (2) the nature and possession of the property, after the purchase; (3) motive, if any, for giving the transaction a benami colour; (4) the position of the parties and the relationship, if any, between the claimant and the alleged benamidar; (5) the custody of the title-deeds after the sale and (6) the conduct of the parties concerned in dealing with the property after the sale.

7. The above indicia are not exhaustive and their efficacy varies according to the facts of each case. Nevertheless No.1 viz. the source, whence the purchase money came, is by far the most important test for determining whether the sale standing in the name of one person, is in reality for the benefit of another.”

20. Thus, the fact of benami pleaded by the plaintiffs and held to be established by the First Appellate Court has to be examined in the light of indicia indicated by Their Lordships of the Supreme Court in the matter of Jaydayal (supra). One of the most important tests for determining benami nature is whether sale standing in name of one person is in reality for the benefit of another, the source from which the purchase money came. It is the case of the plaintiffs that the suit lands were purchased by their father Shri Sunderlal in the names of defendant No.1 and defendants No.3 to 6 by sale deed dated 1.3.1962 and 19.10.1967 respectively by

making payment of consideration amount Rs.2,000/- and Rs.1500/- respectively to the seller Jangi Lodhi. In order to prove the payment of consideration amount by Sunderlal to the said Jangi, plaintiff No.2 has examined herself as PW-7. She has only stated that the suit land situated at village Nawagaon was purchased by her father in the name of her elder sister/defendant No.1 and her sons-defendants No.3 to 6, but she has not stated anything about the source from which the purchase money came to her father Sunderlal and ultimately paid to seller Jangi, she is totally silent about the source from which purchase money came to her father Sunderlal and that was paid to the seller Jangi Lodhi to purchase the suit land. However, Gendi (PW-8) is the wife of Jangi Lodhi who has been examined on behalf of the plaintiffs, she has stated in examination-in-chief that the suit lands were purchased by Sunderlal from her husband in the names of defendant No.1 and defendants No.3 to 6 and consideration amount was paid by Shri Sunderlal to her husband Jangi Lodhi, but in the cross-examination she has expressed that she is not aware that how much amount was paid by Sunderlal to her husband Jangi Lodhi, as such, there is absolutely no evidence on record to hold the source from which purchase money came to Sunderlal and finally allegedly paid to Shri Jangi Lodhi for purchase of the suit land in the names of defendant No.1 and defendants No.3 to 6 as the plaintiffs have failed to establish the

fact of source from which purchase money came to Sunderlal, father of the plaintiffs

21. The next test is the nature and possession of the property after purchase, it is the plaintiffs' own case set out clearly in the plaint that the suit land admeasuring 20 acres situated in village Bamhanipara-Nawagaon and 11.60 acres situated in village Bamhani is in possession of defendant No.1 and it is being managed by her throughout as on the date of institution of suit and that is the reason why the plaintiffs have also sought not only the relief of partition of their share but also sought recovery of possession from the defendants, as such, this test also goes against the plaintiffs and they are not in possession of the suit land admittedly on their own showing.

22. The plaintiffs have not produced original sale deed dated 1.3.1962 and 19.10.1967 by which the suit lands were alleged to have been purchased benami, as such, it appears that the custody of aforesaid title deeds are not with the plaintiffs. Even otherwise, two sale deeds have not been brought in the record of the trial Court at all and solemn document and evidence of sale (transaction) has not been brought on record by the parties including the plaintiffs. Neither any pleading was made nor evidence whatsoever was led to show any reason for giving a benami character to the said transaction dated 1.3.1962 and 19.10.1967. The plaint is blissfully silent in this regard as to why

Sunderlal, father of the plaintiffs thought it expedient to purchase the said lands in the names of only eldest daughter defendant No.1 and his grandsons-defendants No.3 to 6.

23. The next test for determining benamidar is position of parties and relationship, if any, between the claimant and the alleged benamidar. As already pointed out, Sunderlal had three daughters namely Ameenabai (defendant No.1), Urmila (plaintiff No.1) and Rukhmani (plaintiff No.2). Defendants No.3 to 6 are sons of defendant No.1 out of her wedlock with Dashrath. The plaintiffs have asserted that the suit lands (20 acres+11.60 acres) were purchased by their father-Sunderlal *benami* in favour of her elder sister (defendant No.1) and her elder sister's sons-defendants No.3 to 6. The plaintiffs have only and only asserted in plaint as well as evidence that above-stated lands were purchased by their father *benami* without disclosing further as to source from which purchase money came and motive for giving benami character to the such transactions. The conduct of the plaintiffs so far as these lands are concerned is not free from blame. The suit lands were said to be purchased allegedly by their father *benami* way back on 1.3.62 and 19.10.67, Shri Sunderlal died in the year 1980 and the instant suit was filed on 8.9.1982 without including the alleged land (purchased benami) seeking partition, which was ultimately amended on 1.8.83 seeking partition and possession of the said lands. Thus, in view

of the aforesaid finding, it is quite vivid that the plaintiffs have failed to plead and establish that the suit land situated at village Bamhanipara-Nawagaon and village Bamhani admeasuring 20.00 acres and 11.60 acres was purchased *benami* by Shri Sunderlal, father of the plaintiffs in the names of defendant No.1 and defendants No.3 to 6 respectively and as such, the finding recorded by the First Appellate Court to this extent holding the above-stated suit land was purchased benami by Sunderlal deserves to be set aside being a finding perverse and contrary to record.

24. So far as the land situated at village Bamhni area 12.05 acres is concerned, the plaintiffs' father purchased the said land by registered sale deed dated 15.6.1964 vide Ex.P/1 from Shri Chhabil Dani and became the title-holder of the suit land. The said document has been proved in accordance with law and this finding has even not been seriously disputed by the defendants. Likewise, there is no serious challenge to findings with regard to the land situated at village Rajpur area 0.68 acre and the land situated at village Dargawa admeasuring 17.88 acres, as such, the suit land situated at village Rajpur area 0.68 acre, Dargawa area 17.88 acres, Nawagaon area 12.05 acres only are the properties which was owned by Sunderlal and which is available for partition and on which the plaintiffs are entitled for $\frac{1}{2}$ of share as directed by the First Appellate Court. The finding of fact

recorded by the First Appellate Court in this behalf is based on evidence available on record and it is not perverse requiring no interference.

25. As a fallout and consequence of the above-stated discussion, the decree of the First Appellate Court is partly modified holding that the plaintiffs are only entitled for partition and possession to the extent of $\frac{1}{2}$ share with respect to the suit land situated at village Rajpur area 0.68 acre, village Dargawa area 17.88 acres and village Nawagaon area 12.05 acre and they are not entitled for any share in the suit land situated at village Bamhanipara-Nawagaon and village Bamhani totalling to 20.00 acre+11.60 acre.

26. Consequently, the second appeal is partly allowed and judgment and decree of the First Appellate Court is modified to the extent indicated hereinabove. No cost(s)

27. A decree be drawn up accordingly.

Sd/-

(Sanjay K.Agrawal)
Judge