

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 22.02.2019

Judgment Pronounced on : 04.06.2019

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBBIAH
and
THE HONOURABLE MR.JUSTICE KRISHNAN RAMASAMY

Original Side Appeal No. 209 of 2008

Mrs. Kona Varonica Swarnamukhi .. Appellant/Plaintiff

Versus

Mrs. Devika Rani .. Respondent/Defendant

Original Side Appeal filed under Order XXXVI Rule 1 of the Original Side Rules read with Clause 15 of the Letters Patent, against the judgment and decree dated 28.04.2008 passed by the learned Single Judge in C.S. No. 500 of 2002 on the file of this Court.

For appellant : Mr. T.V. Ramanujam, Senior Advocate
for Mr. M. Kamalanathan

For respondent : Mr. B. Kumar, Senior Advocate
for Mr. P.K. Sabapathy

JUDGMENT

R.SUBBIAH, J

This Original side appeal is filed as against the Judgment and decree dated 28.04.2008 passed by the learned Single Judge in C.S. No. 500 of 2002, whereby the suit filed by the appellant/plaintiff was decreed in part only to the extent of declaring her right in respect of undivided one half share in plaint item No.1 of the properties and 35% undivided right in the land in plaint schedule item No.2 with an observation that the plaintiff has to seek her remedy for possession by filing a suit for partition. At the same time, the learned Single Judge dismissed the suit in so far as it relates to item No.3 of the properties. The claim of the plaintiff for mesne profits, both past and future, in the plaint schedule item Nos.1 and 2 of the

properties, was directed to be pursued by instituting a separate proceedings under Order 20 Rule 12 of C.P.C. Aggrieved by the Judgment and Decree in disallowing some of the claims made by the plaintiff in the suit, she has come up with the present Original Side Appeal.

2. The appellant, as plaintiff, has filed the suit in C.S. No. 500 of 2002, for the following reliefs:-

(i) Declaring the plaintiff's absolute title to the plaint described item No. 1 to 3.

(ii) Directing the defendant to deliver vacant possession of 920 square feet in the first floor of the plaint schedule item No.1 and possession of the entire plaint schedule item Nos. 2 and 3 properties.

(iii) Directing the defendant to pay mesne profits at Rs.10,000/- per month from 23.08.2000 till date of suit.

(iv) Directing the defendant to pay future mesne profits at the the rate of Rs.10,000/- per month from the date of plaint till recovery of possession.

(v) Directing the defendant to render true and proper accounts of the income from the plaint schedule item 2 and 3 and to pay to the plaintiff such sum as may be found due, and

(vi) Directing the defendant to pay the costs of the suit.

3.(i) The appellant, as plaintiff, has filed the suit contending that her father Late. Sampathi Bhoopal was a dance master and he died on 30.05.1976. According to the plaintiff, under the able guidance of her father, she learnt Classical Bharatha Naatiyam and specialised in 108 Karnas and she was the only unique Bharatha Nattiyam Dancer of that class. The plaintiff became so popular in the field of dance that she was adopted by the Government of Tamil Nadu as "State Dancer" and she was also conferred with the title "Kalaimamani" recognising her contribution to the field of art. The Plaintiff has performed innumerable dance programmes ever since 1960 not only in Tamil Nadu, but also throughout India and 52 countries out of India, until March 1991, when she got married and thereafter stopped performing dance programmes.

(ii) According to the plaintiff, during the period when she was performing dance programmes, both in India and abroad, she

was getting decent professional income. At that time, the defendant, who is her younger sister, was unemployed and she had no independent source of income. Therefore, the plaintiff appointed the defendant as her agent to manage her private and financial affairs. The plaintiff practically gave all her income to the defendant to run the family and to save the money she earned by investing the same in properties. The plaintiff reposed absolute faith, trust and confidence in the defendant, especially when the defendant was her younger sister. The confidence which the plaintiff reposed in the defendant, was fortified by the fact that between 1977 and 1991, the defendant associated herself in the dance programmes by playing Nattuvangam and assisted the plaintiff as a Nattuvanganist in the troupe. It is the specific contention of the plaintiff that during the relevant period, the defendant was in total control of the financial affairs of the plaintiff, not only to take care of the family, but also attending to property affairs, dance programmes etc.,

(iii) It is the contention of the plaintiff that with the exclusive funds provided by her, the defendant, during June 1981, negotiated to purchase the property described in item No.1 of the plaint, namely 113 (present No.104), Santhome High Road, Raja Annamalaipuram, Chennai-600 028) and purchased the same by a registered Sale deed dated 27.08.1981 from one Mrs. Sarama. However, for the reasons best known to the defendant, the property described in item No.1 of the plaint was purchased in the name of the plaintiff, defendant and their mother Mrs.Ranjani Bhoopal. This property was purchased by the defendant with the funds provided by the plaintiff to the tune of Rs.3 lakhs and by availing Rs.1 lakh as loan with Egmore Benefit Society and the loan availed by the plaintiff was later discharged with her own savings. Similarly, in the year 1984, out of the amount earned by the plaintiff, the defendant purchased the property described in item No.2 of the plaint, namely New No.51, Beemanna Mudali Street, Alwarpet, Madras-600 018, by a sale deed dated 28.06.1984. The property described in item No.2 of the properties, was purchased in the name of the defendant and her mother namely Mrs. Ranjani Bhoopal. Subsequently, from and out of the earnings of the plaintiff, the defendant purchased the property described in item No.3 of the plaint, namely Flat bearing Door No.147/1A, Diwakar Apartments, Luz Church Road, Mylapore, Chennai-600 004, in the name of the defendant herself. Similarly, the defendant had purchased another flat bearing No.147/B, Divakar Apartments, Luz Church Road, Mylapore, Chennai on 05.05.1989 out of the funds provided by the plaintiff in the name of their mother, which the plaintiff's mother had subsequently settled it in favour of the plaintiff, as the same was purchased from and out of the money given by the plaintiff.

(iv) The plaintiff would further contend that the

properties described in item Nos.1 to 3 of the plaint, have been purchased with her own money, which will stand testimony to the fact that her mother had executed a settlement deed in her favour in respect of her 1/3rd share in the property described in item No.1 in the plaint, namely 113 (present No.104), Santhome High Road, Raja Annamalaipuram, Chennai-600 028, and half share in the property in item No.2 of the plaint, namely, No.51, Beemanna Mudali Street, Mylapore, Madras-600 004. Likewise, the defendant had also executed a registered Will dated 19.06.1991 whereby she bequeathed her 1/3rd half share in the property to the plaintiff, described as item No.1 of the Plaint, which would only strengthen the claim of the plaintiff that the properties described in item Nos. 1 to 3 of the plaint, have been purchased exclusively from and out of the funds provided by her.

(v) It is the case of the plaintiff that the defendant was given in marriage during the year 1978 and her husband was a Diploma Engineer. The husband of the defendant did not get any employment and therefore, he was also asked to look after the financial affairs, tax matters and dance programme of the plaintiff. Thus, the defendant and her husband were in complete custody and control of the account books, correspondence with auditors and income tax assessment with respect to the earnings of the plaintiff. It is for the purpose of filing of Income Tax Returns, it was projected that as if the plaintiff is entitled to 1/3rd share in the plaint described item No.1 of the property and that the defendant and her mother are entitled to remaining 1/3rd share each. Thus, the properties described in item No.1 to 3 of the plaint were purchased with the exclusive funds earned by the plaintiff through her dance programmes. In fact, a dance hall was constructed in the second floor of the property described as item No.1 in the plaint with the funds of the plaintiff. Further, at the time of purchase, the property described as item No.2 of the plaint, was vacant with a partly constructed building in the ground floor and it was the plaintiff, who, with her funds, developed the same.

(vi) According to the plaintiff, the defendant has no independent source of income either to purchase the property described in item Nos.1 to 3 of the plaint or to contribute any money for purchase of any of the properties. The defendant was the agent appointed by the plaintiff and she acted in a fiduciary capacity. The defendant was getting only a meagre income for assisting the plaintiff as her agent. Even though the sale deeds in respect of the properties described in the plaint, stand in the name of the plaintiff, her mother and the defendant, it is the plaintiff who is the absolute and real owner of the entire property and the defendant has no manner of right.

(vii) It is the specific plea of the plaintiff that after the loans due to the financial institution were discharged

by the plaintiff, there was no need for the defendant to collect the rent further for discharge of the loans, however, the defendant continued to collect the rent. When that was questioned, the defendant portrayed a different attitude and started making adverse claim in the properties in question. In fact, the defendant was residing in the property described in item No.2 of the plaint, after the same was developed by the plaintiff. While so, on 25.08.2000, the defendant attempted to trespass into a portion of the property described in item No.1 of the plaint, which resulted in the plaintiff and her mother giving a complaint to the police. As a counter-blast, the defendant filed a suit in O.S. No. 2374 of 2000 before the 1st Assistant Judge, City Civil Court, Chennai for permanent injunction to restrain the plaintiff, her mother and the husband of the plaintiff from interfering with her alleged possession of 1/3rd undivided share in the land having an extent of 920 square feet in the first floor of the property described in item No.1 of the plaint by alleging as if she is living in the said portion of the property since 1981. In such circumstances, the plaintiff has filed the suit for the relief stated supra.

4.(i) The defendant resisted the suit by filing written statement. According to the defendant, it is not only the plaintiff, but the defendant and her three other sisters also have learnt Bharatha Natyam and 108 Karnas from their father. It was asserted that the defendant herself is a dancer, besides performing Nattuvangam and singing and that she is still continuing the profession. The defendant through her Nattuvangam and singing performance, earned money independently. The defendant is a graduate and she herself is a very good dancer and singer, besides performed Nattuvangam and she had earned sufficient income. Therefore, it is futile on the part of the plaintiff to contend that she alone earned money and whatever properties acquired, must automatically belong to her. Such a plea raised by the plaintiff is opposed to the provisions contemplated under The Benami Transactions (Prohibition) Act, 1988 (hereinafter referred to as The Act). It is further contended that for the reasons best known, the plaintiff neither disclosed her total income, nor the acquisition of properties in her own name during the relevant period. In fact, the plaintiff has purchased several properties in her own name and she has been managing those properties all along on her own. To the knowledge of the defendant, the plaintiff purchased: (i) land measuring 10 acres at Valapuram, Sriperumbudur and a portion of which is in Papparapakkam Village, Thiruvallur District purchased in the year 1987, (ii) a commercial building on the Main Road of Ulundurpet Town, (iii) One plot measuring 1 ground at Rajalakshmi Nagar, near Irungattukottai, (iv) Two plots at Kattupakkam, near Mancaud and (v) Agricultural lands measuring 17 acres at Senthamangalam Village near Ulundurpet.

Apart from these lands, the plaintiff also purchased huge amount of gold, both as billion and jewellery, besides invested huge amount in fixed deposits, National Savings Certificates and share certificates in several companies. Therefore, it is not as if the plaintiff had entrusted all her savings to the defendant to purchase property on her behalf and that the defendant had purchased several movable and immovable properties and maintained the same on her own. In such circumstances, the suit is not maintainable, as it is barred under the provisions of The Benami Transactions (Prohibition) Act, 1988. The plaintiff is not even entitled to plead that the defendant was her "benami" for acquisition of the suit properties.

(ii) According to the defendant, the property described in item No.3 of the plaint was purchased by her on 05.05.1989 for a consideration of Rs.1,55,970/- and subsequent to such purchase, the defendant is in absolute and uninterrupted possession and enjoyment of the same. Similarly, the defendant is a co-owner in respect of the property described in item No.2 of the plaint and she is having 2/3rd share thereof and her mother is entitled to 1/3rd undivided share of land alone, besides she is the absolute owner of the superstructure standing thereon. The property described in item No.2 of the plaint was purchased by the defendant by paying a sum of Rs.1,10,000/- and her mother has paid only a sum of Rs.60,000/- and the plaintiff did not contribute any amount for purchasing this property. In fact, at the time of purchase of the property described in item No.2 of the plaint, it was a vacant land and there was a small building consisting of 608 square feet in the ground floor. After purchase, the defendant put up a construction in the year 1991 and 1996 consisting of 898 square feet in the ground floor, 1268 square feet in the first floor and 600 square feet in the second floor, out of her own earnings and by availing loan from Life Insurance Corporation of India and other financial institutions. The entire loan amount was repaid by the defendant and neither the plaintiff nor her mother contributed anything for repayment of the loan.

(iii) It is further defended by the defendant that she is also one of the co-owner of the undivided property described in item No.1 of the plaint, which was jointly purchased by the plaintiff, defendant and their mother. At the time of purchase of item No.1 of the properties in the year 1981, she paid her due share towards sale consideration. From that date, the defendant is residing in the property described in item No.1 of the plaint along with her family in a portion measuring an extent of 990 square feet in the first floor and rest of the portion measuring 7100 square feet are in possession of the plaintiff and her mother.

(iv) During the year 1991, when the plaintiff got married, she stopped performing dance programmes and went to Muscat along with her husband. The plaintiff thereafter

returned to India in the year 2000 only. In the year 2000, the plaintiff and her husband made several attempts to interfere with the peaceful possession of the defendant in a portion of item No.1 of the properties and attempted to dispossess her. The plaintiff and her husband also disconnected water and electricity supply meant for the defendant's portion and therefore, the defendant was constrained to give a complaint to the E-5 Police Station, Pattinapakkam against the plaintiff, her husband and the mother of the plaintiff. The defendant also filed a suit in O.S. No. 2374 of 2000 on the file of Ist Assistant City Civil Judge, Chennai for permanent injunction restraining the plaintiff herein, plaintiff's husband and her mother from interfering with her peaceful possession of the property. In the suit, the defendant also filed an application to appoint an Advocate Commissioner. She has also filed another application for a direction to the defendant therein (plaintiff herein) to restore the water and electricity supply to her portion of the property. The application for appointment of an Advocate Commissioner was allowed and after inspection, the Advocate Commissioner also filed a report. Based on the report, the Civil Court also directed the defendant therein (plaintiff herein) to restore the electricity and water amenity, but they did not comply with such a direction and deliberately disobeyed the directions. Thereafter, the defendant approached the Electricity Board and applied for getting separate Electricity Service Connection in her name in respect of the portion of the property in item No.1 of the plaint. When the application for separate Electricity Service Connection submitted by the defendant was pending, the plaintiff filed a Writ Petition before this Court in W.P.No.11525 of 2000 for a Mandamus forbearing the Electricity Board authorities from effecting separate Electricity Service Connection to the defendant herein, who was arrayed as third respondent in the writ petition. By order dated 07.11.2000, the said Writ Petition filed by the plaintiff was dismissed and thereafter, separate Electricity Service Connection was provided in the name of the defendant to the portion of the property in item No.1 of the plaint, which is in occupation of the defendant.

(v) The defendant also contended that when the husband of the plaintiff attempted to dispossess the defendant from property, the same was resisted by her, and she was also assaulted by the husband of the plaintiff and therefore, she has given a complaint. Based on her complaint, a case was registered and after investigation, a charge sheet was filed, which was taken on file in C.C.No.2457 of 2000 before the XXIII Metropolitan Magistrate, Saidapet, against the plaintiff, her husband and her son. It is in those circumstances that the plaintiff has filed the present suit as a counter-blast to the civil as well as criminal proceedings initiated by the defendant.

(vi) According to the defendant, the allegation that

she was not resourceful enough and has no independent source of income, is nothing but falsehood. The defendant herself is a dancer, besides she performed Nattuvangam in dance programmes. The defendant was never appointed as an agent of the plaintiff to look after her private and financial affairs. In the plaint, on the one hand, the plaintiff described the defendant as her agent, on the other hand, she stated that the defendant acted as a trustee, but committed breach of trust. The fact remains that the defendant never acted as an agent or trustee of the plaintiff. In fact, the plaintiff executed a Power of Attorney in favour of her mother Mrs. Ranjani Bhoopal to manage the properties and her financial affairs when she was in Muscat. Therefore, the question of the defendant being appointed as an agent will not arise. The plaintiff, the defendant and her mother are Income Tax Assessors and the Income Tax Returns have been filed separately in their respective names. The allegation that the plaintiff gave all her earnings to the defendant to be looked after, is false. The defendant got married in the year 1978 and thereafter, she has been maintaining her family out of the income of her husband. In fact, the husband of the defendant is an Engineer and was working in M/s. Hindustan Engineering Company from the year 1978 till 1985. Subsequently, in the year 1986, the husband of the defendant started his own Small Scale Industry in the name and style of Solar Engineering Company and he was carrying on the business of fabrication work. The husband of the defendant never involved in the financial affairs and Tax matters of the plaintiff. Similarly, the husband of the defendant was not in control of the accounts books and had correspondence with the auditors, on behalf of the plaintiff, as alleged.

(vii) As regards the settlement deed executed by the mother of the plaintiff and defendant, in favour of the plaintiff, it is stated that there is no recital in those settlement deeds that it was executed in view of the fact that the plaintiff alone paid the sale consideration for purchase of the property. Rather, the recitals would indicate that the mother had executed the settlement deeds out of love and affection. So far as the execution of the Will by the defendant in respect of her 1/3 share in the property described as item No.1 in the plaint, it is the case of the defendant that in 1991, the plaintiff got married to a Christian and converted herself to Christianity. Since the plaintiff wanted the entire house for evangelical purpose, she insisted the defendant to give up her 1/3 right in the said property. It was also suggested by the plaintiff to execute a Will instead of settlement or other form of conveyance, as it would involve more stamp duty. The plaintiff also assured the defendant that if she executes such a Will, she will compensate the defendant monetarily. Therefore, having regard to the close proximity of relationship, the defendant executed the Will, however, since the plaintiff did not honour

the commitment to compensate the defendant monetarily, she revoked the Will. It is only thereafter that the plaintiff turned inimical towards the defendant.

(viii) According to the defendant, at the time of purchase of the property described as item No.1 in the plaint, there was a pucca building consisting of ground and first floors with a built up area of 5400 square feet. Subsequently, a dance hall and a room above the car shed was constructed, for which, the husband of the defendant spent lot of money for construction of the second floor with A.C. sheet roofing structure, since he himself is a fabricator. Further, at the time of mortgaging the property described as item No.1 in the plaint, the plaintiff, defendant and their mother jointly executed a mortgage deed and all the three paid their due share towards discharge of the said loan. Therefore, the defendant is entitled to 1/3rd share in the property described as item No.1 in the plaint. Similarly, for the property described as item No.2 in the plaint, the defendant, out of her money, made improvements, over which the plaintiff cannot make any claim. For making improvement, the defendant alone availed loan from Life Insurance Corporation of India and subsequently discharged it. As far as the property described as item No.3 in the plaint, the defendant is a bona-fide purchaser and the entire sale consideration for purchasing this item of property, was paid by her out of her own funds. Thus, the defendant is a bona-fide purchaser in respect of item No.3 of the plaint and contributed for purchase of the property described as item Nos.1 and 2 in the plaint for a valuable consideration and she is in absolute and uninterrupted possession and enjoyment of the said properties on her own right. In such view of the matter, the plaintiff cannot seek for rendition of accounts from the defendant and she has no locus-standi for the same.

(ix) Above all, it is contended by the defendant that the suit is hopelessly barred by limitation. The suit was filed after 21 years of purchasing the property described as item No. 1 in the plaint, 18 years after purchasing the property described as item No. 2 in the plaint and 13 years after purchasing the property described as item No. 3 in the plaint. The cause of action said to have arisen for instituting the suit is imaginary. The suit is therefore not maintainable and the defendant prayed for dismissal of the suit.

5. The learned Single Judge, on a consideration of the pleadings made by both sides, framed the following issues during trial, and they are:-

(i) Whether the plaintiff has got title to
plaint schedule item No. 1 to 3?

(ii) Whether the plaintiff is entitled for
delivery of possession?

(iii) Whether the plaintiff is also entitled for mesne profits both past and future?

(iv) Whether the settlement deeds said to have been executed by the mother of the parties in favour of the plaintiff in respect of Schedule items 1 and 2 are true and valid and whether they were acted upon?

(v) Whether the plaintiff has appointed the defendant as her agent to manage her financial affairs?

(vi) Whether the suit is in time? and

(vii) To what relief the plaintiff is entitled to?

Additional issues framed on 16.04.2008:-

(i) Did the plaintiff entrust all her earnings with the defendant with a direction to use the same for maintenance of the family for savings and for acquiring the properties? and

(ii) Did the defendant act in violation / breach of entrustment as above made by the plaintiff?"

6. The learned Single Judge, on a consideration of the oral and documentary evidence, rendered a finding that absolutely, there is no pleading in the plaint filed by the plaintiff to the effect that the plaintiff had purchased the plaint schedule item No.1 property as "benami" in the name of the defendant as well as in the name of their mother, and therefore, it is not open to the plaintiff to claim that Ex.P9, sale deed in respect of the plaint described item No.1 of the properties, was taken "benami" in the name of the defendant and their mother. After execution of the settlement deed by the mother, under Ex.P13, the plaintiff is only entitled for 2/3 undivided share in the plaint schedule item No.1 of the properties and not more than that. As far as the plaint schedule item No.2 of the properties is concerned, the learned Single Judge held that it is not the case of the the plaintiff that the entire sale price of

Rs.1,70,000/- was given by her and hence, the plaintiff cannot claim more than 35% of the undivided right. As far as the property described in item No.3 the plaint, it was held that the plaintiff has no right, interest or title in the said land, as it was purchased exclusively out of the funds of the defendant. The learned Single Judge also rejected the plea of the plaintiff that the defendant was appointed as her agent and she acted in a fiduciary capacity. A further finding was rendered that the plea of the defendant that the suit is barred by limitation, is not correct and that the suit was filed in time. Aggrieved by the aforesaid Judgment and Decree dated 28.04.2008, the plaintiff has come up with this appeal.

7. Mr.T.V.Ramanujun, learned Senior Counsel appearing for the appellant/plaintiff vehemently contended that the learned Single Judge negatived the plea of "benami transaction" raised by the plaintiff on an erroneous finding that in the pleadings in the plaint, no where, the plaintiff has pleaded about the transaction between the parties "benami" and no evidence can be let in without the pleading of "benami". Further, the learned Single Judge held that Section 4 of the Act is a bar to file a suit or to enforce right in respect of any property held "benami", without considering the provisions contained under Section 4(3)(b) of the Act at all. In fact, the ingredients of "benami transaction", as categorically pleaded by the plaintiff in para Nos.12 to 16 of the plaint, show that the transaction in the instant case, is a "benami transaction". The defendant was the agent of the plaintiff and she acted in a fiduciary capacity. The plaintiff has specifically pleaded in para No.15 of the plaint that the defendant acted in a fiduciary capacity and purchased the properties on behalf of the plaintiff with the funds provided by the plaintiff. There is a clear pleading in the plaint to the effect that only for Tax purpose, the properties mentioned in item Nos. 1 to 3 have been purchased in the joint name of the plaintiff, defendant and their mother. There was also a pleading to the effect that the defendant and her husband have been engaged in dealing with the funds of the plaintiff, having correspondence with the auditors and advocates on behalf of the plaintiff, including transacting the Bank Account. Further, the plaintiff has clearly pleaded that the defendant has no wherewithal to purchase the properties described in item Nos. 1 to 3 in the plaint. While so, the findings of the learned Single Judge are contrary to the express pleading made in the plaint by the plaintiff.

8. According to the learned Senior Counsel appearing for the plaintiff, the learned single Judge failed to consider the intention of the parties at the time of purchasing the plaint described item Nos.1 to 3 of the properties. According to him, there was a clear intention and understanding between the parties that the plaintiff is the real owner and after execution of the sale deeds, the defendant and her mother shall execute

necessary documents to fortify the title of the plaintiff with respect to the aforesaid properties, when demanded by the plaintiff. In order to fortify this submission, the learned Senior Counsel appearing for the plaintiff brought to the notice of the Court about the registered Settlement deed executed by the mother of the plaintiff in favour of the plaintiff on 04.03.1999, Ex.P13, by which the mother had settled 1/3rd share in item No.1 of the plaint, which only indicates that the plaintiff is the real owner and the mother and sister are only "benamidars" of the plaintiff. In respect of item No.2 of the plaint described property also, the mother of the plaintiff executed a Settlement deed dated 03.03.2000, marked as Ex.P14 and fortified the title of the plaintiff as the real owner. Likewise, the defendant also executed a registered Will dated 19.06.1991, Ex.P33, whereby, she bequeathed her 1/3rd share in item No.1 of the plaint described property in favour of the plaintiff. In fact, the Will was executed by the defendant on the date of marriage of the plaintiff and this clearly indicates that the plaintiff is the real owner of the properties covered in the plaint. If really the plaint item No.1 of the properties was purchased out of the joint contribution made by the defendant, the defendant would not have executed the Will bequeathing her share in the property. Above all, the defendant also executed an unregistered release deed in favour of her mother in respect of item No.1 of the properties, which was marked as Ex.P50, by specifically stating that she had already received the sale consideration. The defendant was also ready to execute necessary document to convey the title in respect of plaint described item No.3 of the properties, however, due to the present dispute between the parties, she refused to execute any such document. Thus, according to the learned Senior Counsel appearing for the plaintiff, the intention of the parties at the time of purchasing the plaint described properties is that, out of the funds provided by the plaintiff towards the entire sale consideration, the properties have been purchased in the name of the plaintiff, defendant and their mother for Tax purpose. Therefore, according to the learned Senior Counsel appearing for the plaintiff, the defendant and the mother of the plaintiff are "benamidars" of the plaintiff and that the plaintiff is the real owner of the properties in question. This was also clearly spoken to by the plaintiff as PW1 and her mother as PW2. According to the learned Senior Counsel appearing for the appellant/plaintiff, PW2 clearly deposed that the plaintiff is the real owner and that she and the defendant were only ostensible owners and at the time of purchasing the properties in question, they have assured and understood that they have to execute necessary documents, at a later point of time, to fortify the title of the properties in favour of the plaintiff. In such view of the matter, the learned Senior Counsel appearing for the plaintiff vehemently contended that plaint described

properties have been purchased under Exs.P-9, P-11 and P-13 only with the exclusive funds provided by the plaintiff and that the transaction in question is a "benami transaction". In this context, the learned Senior Counsel appearing for the plaintiff relied on the decision of the Honourable Supreme Court in the case of Jaydayal Poddar (deceased) through LRs and another Vs. MST. Bibi Hazra and others, reported in 1974 (1) SCC 3 = AIR 1974 SC 171, wherein it was held as follows:-

"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 a 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. Though the question, whether a particular sale is benami or not, is largely one of fact, and for determining this question, no absolute formulae or acid test, uniformly applicable in all situations, can be laid, yet in weighing the probabilities and for gathering the relevant indicia, the Courts are usually guided by these circumstances (i) the source from which the purchase money came; (ii) the nature and possession of the property, after the purchase (iii) motive, if any, for giving the transaction a benami colour; (iv) 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) conduct of the parties concerned in dealing with the property.

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."

9. Thus, by placing reliance on the above decision, the learned Senior Counsel appearing for the appellant/plaintiff contended that the plaintiff has let in acceptable evidence to show the nature of source of money for her to purchase the properties in question and also let in evidence to show that the defendant was her agent, received salary from her and that she acted in a fiduciary capacity for and on behalf of the plaintiff. The fact that the defendant was getting salary from the plaintiff, is admitted by the defendant herself by producing Exs.D77 to D79 evidencing that her annual salary is Rs.23,000/-. Further, the defendant never disputed the fact that the plaintiff is the real owner, until a dispute arose in the year 2000. Thus, the plaintiff clearly pleaded and proved that she had entrusted all the monies she earned to the defendant and her husband and reposed fullest and complete faith and confidence in the defendant. While so, the learned Single Judge ought to have reasonably inferred that the appellant/plaintiff alone was the only earning member and the defendant was only an employee under the plaintiff, who received monthly salary from the plaintiff and she had no independent source of income to acquire the properties described in the plaint.

10. The learned Senior Counsel appearing for the appellant/plaintiff further contended that the appellant was the only earning member in the family. The defendant worked as Secretary under the plaintiff and she received salary from the plaintiff, which is evident from Ex.P-8 series. The annual salary of the defendant was Rs.23,000/- which is evident from Ex.D77 Statement of Income Tax for the financial year 1984-85. Further, the defendant got married to one Mr.Nambinathan on 25.01.1978 and the marriage certificate was marked as Ex.P17, in which, in the column 'occupation' of the defendant, it was stated as Assistant Accountant. Further, the plaintiff has filed Ex.P18 to show that the husband of the defendant was getting annual remuneration at Rs.2,400/- only for the clerical works discharged by him. In Ex.P29, letter relating to dance performance of the plaintiff to be performed in the year 1984, the husband of the defendant signed as Manager. The learned Senior Counsel appearing for the plaintiff also relied on Exs.P-40 dated 01.07.1981, being an application for admission of the defendant's child in a crèche in which the income of the husband of the defendant was mentioned as Rs.1,000/- per annum. Thus, it is the plaintiff who paid the entire sale consideration of Rs.4 lakhs for purchasing item No.1 of the plaint described property by way of three cheques and by cash. For the purpose of

purchasing the plaint item No.1 described property, the plaintiff availed a sum of Rs.1 lakh as loan from Egmore Benefit Society, which is evident from Ex.D-41 dated 17.11.1981. The loan application was signed by all the three joint owners, namely the plaintiff, the defendant and their mother, however, the plaintiff was the real owner. Even though the defendant claimed to have paid Rs.10,000/- towards purchase of the plaint item No.1 of the properties, the amount was deposited into the account of the defendant in cash on the previous date. which was provided by the plaintiff and that the defendant issued a cheque for Rs.10,000/-.

11. As regards the property described as item No.2 of the plaint, it was purchased for Rs.1,70,000/-, out of which a sum of Rs.41,000/- was already paid on 28.06.1984 towards sale advance and the balance sum of Rs.1,29,000/- was also paid in cash. The Bank Passbook of the defendant, Ex.D-50 shows that as on 28.06.1984, there was only a sum of Rs.462.70 available in her Bank Account. Therefore, there is no scope for the defendant to have paid the advance amount of Rs.41,000/- prior to 28.06.1984. The defendant merely claimed that she borrowed money from one Vasantha, Senchu Lakshmi and James and paid Rs.1,10,000/- towards sale consideration for purchasing this property, however, those persons were not examined to prove the loan transaction. Thus, all the monies paid for purchasing the property described in item No.2 of the plaint, belong to the plaintiff. Except the salary received from the plaintiff, the defendant has no wherewithal or any other independent source of income to contribute for purchasing the property described as item No.2 of the plaint. Similarly, the defendant had made erroneous claim as if she had put up the construction in the property described as item No.2 of the plaint. While so, the finding of the learned Single Judge that the defendant has got 65% of share in the property described as item No.2 of the plaint, is untenable.

12. Insofar as the property described as item No.3 of the plaint, it is contended that the entire sale consideration of Rs.1,55,970/- was paid by the defendant by cash. To prove the source of income for purchasing this property, the defendant relied on Exs.D77, D78 and D79 and a perusal of those documents only indicates that except the income by way of salary received from the plaintiff, the defendant has no other independent source of income. At the time of purchasing the property, it was the plaintiff, who is the sole earning member in the family and the defendant was only employed under the plaintiff. In any event, it is not shown as to how the defendant could mobilise a huge sum of Rs.1,55,700/- for purchasing the plaint described item No.3 of the properties at the relevant point of time.

13. The learned Senior Counsel appearing for the plaintiff proceeded to contend that in a suit for declaration, the burden of proof may be static that on the peculiar facts of this case,

the burden of proof shifted on the defendant to prove that she had independent source of income to put up construction in the properties in question. In this context, the learned Senior Counsel appearing for the plaintiff relied on the decision of the Honourable Supreme Court Court 2006 (5) SCC 558 (Anil Rishi Vs. Gurbaksh Singh).

14. The learned Senior Counsel appearing for the plaintiff further contended that the title deeds pertaining to the property described in item No.1 of the plaint, vests with the plaintiff till date and the original title deed relating to property described in item No.2 of the plaint is with MCC Bank. The defendant attempted to raise a loan on the basis of the document mortgaged with MCC Bank and it was objected to by the plaintiff, therefore, the title deeds have been detained by MCC Bank. However, the title deed in respect of property described in item No.3 of the plaint, is with the defendant and she is holding it in trust for the plaintiff.

15. As regards possession, the plaintiff is in exclusive possession of the property described in item No.1 of the plaint. In fact, the defendant trespassed into a portion of the property described in item No.1 of the plaint to an extent of 920 square feet. As regards the property described in item No.2 of the plaint, the defendant was permitted to be in possession by the plaintiff by putting her in-charge of collecting rents from the tenant. Similarly, the defendant was permitted by the plaintiff to be in control of the property described in item No.3 of the plaint, inasmuch as she acts in a fiduciary relationship with the plaintiff and the plaintiff had reposed faith and confidence in her.

16. According to the learned Senior Counsel appearing for the plaintiff, dispute arose between the plaintiff and defendant in the year 2000, when the defendant acted detrimental to the interest of the plaintiff. When the attempt of the defendant to trespass into the property described in item No.1 of the plaint, was prevented, the defendant has given a complaint against the husband of the plaintiff and upon registration of a case, investigation was conducted and a final report was also filed in C.C.No.1309 of 2000. Ultimately, the criminal proceedings ended in acquittal of the husband of the plaintiff by an order dated 24.07.2002, marked as Ex.P46. In fact, after giving the criminal complaint, the defendant forcibly trespassed into the portion of the property measuring 920 square feet in the first floor of the property described in item No.1 of the plaint and obtained duplicate Electricity Card and Telephone connection. She has also voluntarily paid Taxes to make it appear she is the lawful owner of the property measuring 920 square feet in the first floor of the properties described in item No.1 of the plaint. Above all, the defendant also filed a suit in O.S.No.2374 of 2000 against the plaintiff, her husband and her mother for bare injunction to restrain the plaintiff, her husband and mother,

which was also dismissed by a Judgment and Decree dated 22.07.2003, marked as Exs. P47 and P48. In the said Judgment and Decree dated 22.07.2003, it was specifically observed that the plaintiff cannot seek for the relief of permanent injunction, when she is not in possession of the property in question prior to 2000. Thus, the defendant had forcibly occupied the property measuring 920 square feet in the first floor of the properties described in item No.1 of the plaint and that the plaintiff is entitled to recover the possession of the same. The contention of the defendant that she is the co-owner of this property, cannot be countenanced. According to the learned Senior Counsel appearing for the plaintiff, as per the decision of the Honourable Supreme Court in the case of Tanusree Basu and others Vs. Ishani Prasad Basu and others, reported in 2008 (4) SCC 791, even a co-owner cannot forcibly enter into the property, which is in exclusive possession of another co-owner. Further, in Ex.P33, registered Will dated 19.06.1991, the defendant has given her address as No.21, Beemanna Mudali Street, Alwarpet. On the contrary, the address given under Ex.P9, sale deed dated 27.08.1981 in respect of plaint described item No.1 of the properties is North Street, Kanyakumari. The address given by the defendant in Ex.P11, sale deed dated 28.06.1984 relating to plaint described item No.2 property and Ex.P12, sale deed dated 05.05.1989 pertaining to plaint described item No.3 property is No.3, Dr.Radhakrishnan Salai. Even though the defendant relied on Exs.D63, D65, D67, D68, D70, D71, D72 and D73, those documents have been disbelieved as untrue by the Civil Court in the suit filed by the defendant herself in O.S.No.2374 of 2000. Therefore, the learned Senior Counsel appearing for the plaintiff submitted that the plaintiff is entitled for recovery of possession of item No.1 of the plaint described property measuring 920 square feet from the defendant. Even the defendant herself admits that the plaintiff is entitled for declaration of 2/3rd share in item No.1 and half share in item No.2 and thereby, she admitted the title of the plaintiff.

17. As regards the law of limitation, it is contended by the learned Senior Counsel appearing for the plaintiff that the cause of action for institution of the suit arose on 25.08.2000 when the defendant forcibly trespassed into the property measuring 920 square feet in the first floor of the property described in item No.1 of the plaint and within three years therefrom, the suit was filed. The suit was filed on the basis of title and therefore, Article 58 of the Limitation Act has no application to this case, on the other hand, Article 65 of the Limitation Act alone will apply, as per which, the suit can be instituted within a period of twelve years.

18. Per contra, Mr.B.Kumar, learned Senior Counsel appearing for the respondent/defendant contended that it is not as though the plaintiff alone learnt the nuances of Bharata Natyam and

earned substantially. The defendant also learnt the art and she was also performing Nattuvangam and singing in all the dance performances in India and 52 countries abroad. Exs.D1 to D10 and D12 to D25 marked on behalf of the defendant clearly proves that the defendant is also an artist and she is well versed with the nuances in the said art. The defendant also earned substantially and was assessed to payment of Income Tax from the year 1978. Therefore, it is futile on the part of the plaintiff to contend that the defendant had no wherewithal and she was not resourceful enough to either contribute or purchase the plaintiff described properties. The property described in the plaint as item No.1 was purchased in the joint name of the plaintiff, defendant and their mother in the year 1981. Therefore, the defendant is a co-owner of the property described in the plaint as item No.1. Ex.P9, sale deed expressly states that all the three purchasers have contributed equally for purchasing this property. In fact, the defendant has paid a sum of Rs.10,000/- as advance for purchasing the property described in the plaint as item No.1, which is evident from Ex.D-50, Bank Passbook. From the date of purchase of the property described in the plaint as item No.1, the defendant is in occupation of a portion of the property measuring 920 square feet in the first floor and therefore, it is futile to contend that the defendant trespassed into the property described in the plaint as item No.1 on 25.08.2000 and the question of trespass will not arise. Even as per Ex.D78, Statement of Income Tax for the assessment year 1990-1991, it was stated that the plaintiff described item No.1 property was self-occupied by the defendant. In fact, PW2, mother of the defendant had not even stated that the plaintiff contributed for the purchase of the plaintiff described properties or the recitals in the sale deeds are incorrect.

19. The learned Senior Counsel appearing for the defendant also contends that the settlement deeds executed by the mother of the plaintiff and defendant, in favour of the plaintiff, will not partake the character of the transaction in question as a "benami transaction". The recitals contained in the settlement deeds under Exs. P13 to P16 would only indicate that it was executed out of love and affection the mother (PW2) had towards the plaintiff and there is no indication to the effect that pursuant to an understanding between the plaintiff and her mother at the time of purchasing the properties in question, the settlement deeds were executed.

20. As regards item No.2 of the plaintiff described property, it was purchased for a total sum of Rs.1,70,000/-, out of which the defendant contributed Rs.1,10,000/- and her mother paid the remaining Rs.60,000/-. To prove that item No.2 of the properties was purchased by the defendant, Ex.D79, assessment order has been produced, which clearly indicates that the defendant is a co-owner in respect of item No.2 of the property. Ex.D79 further indicate that the defendant has raised a loan of

Rs.1,75,000/- with the Life Insurance Corporation of India, another sum of Rs.2,65,000/- was raised by pledging her jewels and Rs.60,000/- was kept as her savings and utilised these amounts for putting up the construction. In fact, the part of the sale consideration paid by the defendant for purchasing item No.2 of the plaint schedule, was duly disclosed in the Income Tax Returns under Exs.D77, D78 and D79. Therefore, the learned Single Judge is right in holding that the plaintiff is not entitled for more than 35% of the undivided right in the land in the plaint schedule item No.2 of the properties.

21. The learned Senior Counsel appearing for the defendant further contended that, similarly, the plaint item No.3 of the properties was purchased exclusively by the defendant out of her own funds. In order to show the income of the defendant, she has filed Exs.D77 and D78, assessment orders for the assessment year 1990-1991 and therefore, it cannot be said that the defendant has no independent source of income. The sale deed, Ex.P12 in respect of the property described as item No.3 in the plaint, exclusively stands in the name of the defendant. Therefore, the allegation that plaintiff had contributed the entire money for purchasing the properties mentioned in the plaint schedule, does not arise. Further, even though the plaintiff had asserted that she is an Income Tax Assessee, she has not produced any document to prove the same. The plaintiff has not even produced her Bank Passbook to show her total income. The plaintiff has not taken any effort to show that it is she, who paid the entire sale consideration for purchasing the properties described in the plaint. Therefore, the learned Single Judge ought to have drawn an adverse inference against the plaintiff while passing the impugned judgment and decree.

22. The learned Senior Counsel appearing for the defendant also contended that Section 4 (1) of the Act clearly states that no suit or claim or action to enforce any right in respect of any property held "benami" against the person in whose name the property is held, shall lie by or on behalf of a person claiming to be the real owner of the property. According to the learned Senior Counsel appearing for the defendant, the prohibition contained under Section 4 of the Act would apply to all suits which are instituted after coming into force of the 1988 Act, even though the transaction which is the subject matter of the suit, had taken place prior to the coming into force of the Act. In this context, the learned Senior Counsel appearing for the defendant placed reliance on the decision of the Apex Court rendered in the case of R. Rajagopal Reddy (dead) by Legal heirs and others Vs. Padmini Chandrasekharan (dead) by legal heirs, reported in 1995 (2) SCC 630 to contend that Section 4 of the Act will apply retrospectively and it would also cover the past transaction between the "real owner" and the "benamidar". Therefore, according to the learned Senior Counsel appearing for the defendant, Section 4 of the Act is a bar to make a claim on

the ground of "benami transaction". The learned Senior Counsel appearing for the defendant proceeded to contend that to avail the benefits conferred under Section 4(3)(b) of the Act, the plaintiff must allege that the defendant, in whose name the property stands, is a "benamidar" and that the plaintiff is the "real owner". After establishing this fact, the plaintiff has to prove that such a holding by the "benamidar" was in a fiduciary capacity for and on behalf of the plaintiff. However, in the present case, in the plaint, the plaintiff did not allege that the defendant is the "benamidar" and that the plaintiff is the "real owner". Even otherwise, nowhere in the plaint, the defendant was referred as "benamidar" of the plaintiff, which was rightly taken note of by the learned Single Judge to hold that there is no pleading relating to the provisions of the Act. In this context, reliance was placed on the Judgment of the Honourable Supreme Court in the case of *Marchel Mortein Vs. M. Printer*, reported in 2012 (5) SCC 342, which was also relied on by the learned Senior Counsel appearing for the plaintiff to contend that in order to prove that the transaction in this case is a "benami", the plaintiff must show that there was an intention between the parties at the time of the sale transaction to the effect that the transaction is a "benami transaction". Further, it must be shown as to why the plaintiff proceeded to purchase the properties in question "benami". According to the learned Senior Counsel appearing for the defendant, the motive for the transaction must be proved at the earliest point of time and it cannot be made at a later point of time after creation of the documents. In this case, there is no reference made in the plaint that the defendant is the "benamidar" of the plaintiff and the plaintiff has not let in any evidence to prove the motive with which the properties were purchased. On the contrary, the plaintiff in her evidence admitted that she had separate Bank Account which she operated; she did not authorise the defendant to operate her Bank Account; she was assessed to Income Tax from 1978 onwards and that the assessment was on her individual account; that she did not execute any Power of Attorney in favour of the defendant, but only executed a Power of Attorney in favour of her mother during the year 1991 under Ex.D52. Above all, the plaintiff admitted that she had purchased several properties having greater value in her individual name and maintained it by herself. In this context, reference was made by the learned Senior Counsel appearing for the defendant, to the decision of the Honourable Supreme Court in the case of *Jayadayaal Poddar Vs. Bibi*, reported in AIR 1974 SC 171 = 1974 (1) SCC 3, which was also relied on by the learned Senior Counsel appearing for the plaintiff, wherein it was held that the essence of a "benami" is the intention of the party or parties concerned at the time of entering into the transaction. According to the learned Senior Counsel appearing for the defendant, the plaintiff in this case,

has failed to prove the intention at the time of purchasing the property. The plaintiff has not let in any evidence to show as to what is the necessity to purchase the property in the name of herself, defendant and their mother. In fact, the property in plaint item No.1 was purchased jointly in the name of the plaintiff, defendant and their mother. Under Ex.D41, all the three co-owners have mortgaged the property for Rs.1 lakh with Egmore Benefit Society. The mortgage was discharged by all the co-owners by equal contribution of money. In fact, the plaintiff attempted to have the property tax in respect of the item No.1 of the property in her name exclusively, but it was refused by the Corporation on the ground that the property stands in the name of three owners, jointly.

23. The learned Senior Counsel appearing for the defendant also contended that the defendant is in possession and enjoyment of the properties described as item Nos.1 to 3 in the plaint. In order to prove the possession, the defendant has filed Ex.D64 letter from Civil Supplies Department and Ex.D65 Ration Card. The defendant also filed Exs. D66 to D73, cash memo issued by the Indian Oil Corporation Limited for having supplied LPG Cylinders, payment receipts issued by Electricity Board authorities and payment receipt issued by Telephone Department, as the case may be. These documents clinchingly prove that it is the defendant who is in possession of the properties in question. Therefore, it is contended by the learned Senior Counsel appearing for the defendant that the learned Single Judge is right in coming to a conclusion that the plaintiff is only entitled for 1/2 share in item No.1 of the plaint schedule and 35% undivided right in the land in plaint schedule item No.2.

24. The learned Senior Counsel appearing for the defendant further contended that the property described in the plaint as item No.1 was purchased under Ex.P9 dated 27.08.1981, however, the suit was filed after 21 years thereof. Similarly, the property described in the plaint as item No.2 was purchased under Ex.P11 dated 28.06.1984 and the suit was filed after 18 years thereof. The property described in the plaint as item No.3 was purchased under Ex.P12 dated 05.05.1989, but the suit was filed during July 2002, after 13 years therefrom and therefore, the suit is hopelessly barred by limitation. Furthermore, the cause of action disclosed in the plaint shows that the defendant had allegedly trespassed into the property described in the plaint as item No.1 on 25.08.2000. However, only during July 2002, the suit was instituted and it is barred by Section 6 of the Specific Relief Act. As per Section 6(2) of the Specific Relief Act, a person who is dispossessed from a property, has to file a suit for recovery of possession within six months and in this case, the suit was filed after 18 months and therefore, the suit is barred by Section 6(2) of The Specific Relief Act. Further, the suit is based on title and

therefore, the provisions of Section 34 of The Specific Relief Act alone would apply, as per which, apart from declaration, the consequential relief could also be sought. However, if the plaintiff fails to substantiate that she is entitled for the relief of declaration, the consequential relief of recovery of possession will not arise. The suit for declaration of title stands on a different footing and the onus of proving the title vests with the plaintiff by letting in acceptable evidence, however, in the present case, the plaintiff failed to discharge her burden to show that the suit was filed in time. Therefore, according to the learned Senior Counsel appearing for the defendant, the suit is barred by limitation and it is not maintainable. In this context, the learned Senior Counsel appearing for the defendant relied on the decision of the Honourable Supreme Court in the case of C.Hanumanthappa Vs. Shivakumar, reported in 2016 (1) SCC 332, to contend that a suit filed for recovery of possession beyond the period of six months from the date of dispossession is not maintainable. In any event, according to the learned Senior Counsel appearing for the defendant, the learned Single Judge has rightly appreciated the evidence made available and came to a correct conclusion, over which interference of this Court is not warranted and he prayed for dismissal of the appeal.

25. By way of reply, with respect to Section 6 of the Specific Relief Act, it is the contention of the learned Senior Counsel for the appellant that the contention of the defendant that Section 6 of the Specific Relief Act, will apply to this case and that the suit ought to have been filed within six months from the date on which cause of action arose, cannot be sustained. A person dispossessed from his possession of immovable property, can invoke Section 6 of the Specific Relief Act and file a suit within six months, but it is optional. Section 6 of the Specific Relief Act does not contain any non-obstante clause such as "notwithstanding any other law for the time being in force". Further, in a suit under Section 6 of the Specific Relief Act, the question of title cannot be gone into and the person who feels that he has got title, is always at liberty to file a suit for declaration of title and for recovery of possession. For possession of immovable property, resort can be made to file a suit under Article 65 of the Limitation Act within a period of twelve years. The provisions contained under Article 64 of the Limitation Act, as contended by the defendant, will not be applicable to this case. For possession of immovable property based on previous possession and not title and when the plaintiff, while in possession of the property has been dispossessed, a suit can be filed under Article 64 of The Limitation Act. In this context, the learned Senior Counsel appearing for the plaintiff relied on the decision of the Honourable Supreme Court in the case of 2018 (10) SCC 588 (Ghewarchand Vs. Mahendra Singh). Therefore, the learned Senior

Counsel for the plaintiff prayed for setting aside the Judgment and Decree of the learned Single Judge and to decree the suit as prayed for.

26. We have heard the learned Senior Counsel appearing for the plaintiff as well as the learned Senior Counsel appearing for the defendant at great length and perused the materials placed on record. As we have dealt with the factual matrix of the case in detail, we refrain ourselves from reiterating the same any further in this appeal. However, certain facts which are essential for disposal of this appeal, are elucidated in this appeal for disposal.

27. Pending appeal, the appellant/plaintiff has filed M.P.No.1 of 2009 for reception of additional documents and by order dated 23.11.2017, they were marked as Ex.P51 to P109. The respondent/defendant also filed M.P.No.1 of 2013 for reception of additional documents and by order dated 23.11.2017, the additional documents were ordered to be exhibited as Exs.D-82 to 88.

28. In the light of the above rival submissions, the following points arise for consideration :-

(i) Whether the plaintiff had established that Exs. P9, P11 and P12 were taken "benami" in the name of the defendant and her mother and that the plaintiff is the real owner of the properties described in item Nos. 1 to 3 of the plaint schedule ?

(ii) Whether the defendant trespassed into item No.1 of the plaint described property and if so, whether the plaintiff is entitled to recover the same ?

(iii) Whether the plaintiff is entitled for a declaration in respect of the properties described in item Nos. 1 to 3 of the plaint schedule? and

(iv) Whether the suit filed by the plaintiff is in time?

29. Point No.1:- The Plaintiff is the sister of the defendant. The plaintiff and defendant are daughters of Ranjini Bhopal, PW2. According to the plaintiff, even in her young age, she had learnt the nuances of the art of Bharata Natyam from her father and shot to fame. She had participated in several dance programmes in India and abroad and had earned accolades as one of the eminent dancers who had specialised in 108 Karanas. The plaintiff also claims herself as the unique Bharatha Natyam Dancer of that class. The expertise and specialisation of the plaintiff in the field of dance, was also acknowledged by the Government of Tamil Nadu, by conferring her the title "State Dancer" of Tamil Nadu. The plaintiff was also conferred with

the title "Kalaimaamani" by the Government of Tamil Nadu. According to the plaintiff, through her Bharatha Natyam dance performance, she had earned immensely. At the same time, due to her pre-occupation with her dance programmes, she was not in a position to deal with the money earned. At that time, the defendant was unemployed and therefore, the plaintiff appointed the defendant as her agent and entrusted all the monies she had earned to her. Subsequently, the defendant got married in the year 1978 and her husband was also asked to look after the financial affairs of the plaintiff. According to the plaintiff, the defendant and her husband were entrusted with all financial affairs, they had correspondence with the Auditors, dealt with her Bank Accounts etc., Having regard to the proximity of relationship, the plaintiff reposed absolute faith and confidence in the defendant and her husband that they would faithfully and honestly deal with the earnings of the plaintiff. It is the contention of the plaintiff that the plaintiff described item Nos.1, 2 and 3 of the properties were purchased by the defendant out of the exclusive earnings of the plaintiff. It is the further case of the plaintiff that for the purpose of Tax compliance, the plaintiff had chosen to purchase the property described as item No.1 in the plaint in her name along with the names of the defendant and their mother. Similarly, for the same purpose, the property described as item No.2 in the plaint, was purchased in the name of the defendant and their mother. In the case of the property described as item No.3 in the plaint, it was purchased by the defendant in her own name, however, the funds for purchasing the property had been provided by none other than the plaintiff. Further, either the defendant or her mother did not contribute any amount for purchasing the plaintiff described properties in item Nos.1 to 3. In other words, according to the plaintiff, the defendant was not resourceful enough and has no independent source of income to purchase the properties described in the plaint or to contribute any amount for purchase of the properties. The plaintiff was the only earning member and the defendant received a meagre salary from her for having acted as her agent. Thus, according to the plaintiff, the transaction relating to purchase of the properties described as item Nos. 1 to 3 in the plaint, is a "benami transaction". To fortify this submission, the plaintiff placed reliance on the settlement deeds executed by her mother in respect of the properties described as item Nos. 1 and 2 of the plaint and submitted that, inasmuch as the properties described as item Nos.1 and 2 of the plaint, have been purchased exclusively with the funds of the plaintiff, the mother, PW2, acknowledging the title of the plaintiff, had executed the Settlement deeds. Similarly, the defendant also executed a registered Will dated 19.06.1991 bequeathing her apparent 1/3rd share in the property described as item No.1 in the plaint, which according to the plaintiff

would only strengthen her case that the transaction in the instant case is a "benami". According to the plaintiff, even though the defendant was ready to execute necessary documents to fortify her title with respect to the properties described as plaint item Nos.2 and 3, due to misunderstanding and dispute between them, she refused to acknowledge the title of the plaintiff. Notwithstanding the same, the defendant trespassed into a portion of the item No.1 of the properties and unlawfully occupied it. This is the sum and substance with which the plaintiff has filed the suit against the defendant for declaration and recovery of possession.

30. The suit was resisted by the defendant by contending that she was also a dancer by profession, besides she performed Nattuvangam and singing and thereby she earned money independently. After her marriage in the year 1978, she maintained the family along with her earnings and that of her husband who was a Diploma Engineer and employed in a Company for some time and thereafter started his own business. Therefore, according to the defendant, the allegation that the plaintiff was the only earning member in the family and that the defendant had no wherewithal or resourceful enough to either purchase the plaint described properties or to contribute for purchasing those properties, is false. The recitals in the sale deeds Exs.P9, P11 and 12, under which the properties described in the plaint as item Nos. 1 to 3 have been purchased, clearly indicates that the defendant had contributed money for purchasing the plaint item Nos. 1 and 2 of the properties and that the property described as item No.3 in the plaint was purchased exclusively with the funds of the defendant. The plaintiff, the defendant and their mother, PW2 are assesses of Income Tax and they have filed their Income Tax Returns individually and independently. The defendant also, after purchase, put up superstructure in the properties in question with her own funds and she is in possession and enjoyment of the properties described in the plaint in her own right. The settlement deeds executed by the mother, in favour of the plaintiff, cannot be a ground to construe that the transactions in question is a "benami transaction". The recitals in the settlement deeds only indicates that the mother, PW2, out of her love and affection towards PW1, had executed the settlement deeds and there is no recital to the effect that the sale consideration for purchasing the properties was made only by the plaintiff and therefore, the mother, PW2 had executed the settlement deeds. Similarly, the Will dated 19.06.1991 was executed by this defendant believing the representation of the plaintiff that she would adequately compensate the defendant if her 1/3rd share in the property described as item No.1 of the plaint, is settled in favour of the plaintiff to enable her to use the entire item No.1 of the property for evangelical purpose. Believing the representation of the plaintiff to be

true, the defendant had executed the Will dated 19.06.1991. However, since the plaintiff failed to adhere to her promise, the defendant revoked the Will and continued to remain in possession of the property described as item No.1 in the plaint. Above all, the plaintiff did not even plead in the plaint that the transaction in question is a "benami transaction". The suit was filed belatedly and it is not maintainable. The provisions contained under Section 4 of the Act is a bar for the plaintiff to institute the suit on the ground of "benami transaction" and therefore, she prayed for dismissal of the suit.

31. Having regard to the above pleadings made by the plaintiff and the defendant, it is necessary to look into the provisions of the Benami Transactions (Prohibition) Act, 1988, which reads as follows:-

"2. Definitions:- In this Act, unless the context otherwise requires,---

(a) 'Benami' transaction means any transaction in which property is transferred to one person for a consideration paid or provided by another person;

....

4. Prohibition of the right to recover property held benami:---

(1) No suit, claim or action to enforce any right 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 a person claiming to be the real owner of such property

(2) No defence based on any right in respect of any property held benami, whether against the person in whose name the property is held or against any other person, shall be allowed in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property.

(3) Nothing in this section shall apply,--

(a) where the person in whose name the property is held is a coparcener in a Hindu undivided family and the property is held for the benefit of the coparceners in the family; or

(b) where the person in whose name the property is held is a trustee or other person standing in a fiduciary capacity, and the property is held for the benefit of another person for whom he is a trustee or towards whom he stands in such capacity."

32. At the outset, before venturing to find out as to whether the provisions of the aforesaid Act would apply to this case or the suit filed by the plaintiff is maintainable or not, it is necessary to mention that the plaintiff has come forward with a plea that the transaction in this case is a "benami transaction", and the defendant acted in a fiduciary capacity as

her agent, but she committed breach of trust in making a rival claim in the properties purchased or held in her name "benami". Therefore, it is for the plaintiff to prove the averments she made in the plaint. It is well settled that the burden of proving that a particular sale is "benami " and the apparent purchaser is not the real owner, is on the person who asserts 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 the circumstances unerringly raising an inference of that fact. Above all, the essence of "benami" is the intention of the parties at the time of purchase of the property -- "benami". Section 4 of the said Act is a bar for the plaintiff to make a claim on the ground of "benami" transaction. However, for claiming the benefit under Section 4(3)(b) of the said Act, the pre-condition is that the plaintiff must allege that a person has knowledge that the defendant in whose name the property stands, is her "benamidar" and that she is a real owner. After establishing this fact, the plaintiff must further allege and prove that such a holding by the "benamidar" was in a fiduciary capacity as regards the plaintiff. In this case, the plaintiff had not alleged in the plaint that the defendant is her "benamidar" and she is the real owner. The learned Single Judge has specifically pointed out the lack of pleading that the defendant is the "benamidar" in the judgment rendered by him. Thus, the burden is heavy on the plaintiff to prove that the instant transaction is a "benami transaction" within the ambit of Section 4(3)(b) of the Act, by letting in legally acceptable evidence. Now, let us analyse as to whether the plaintiff had discharged her burden to avail the benefit under Section 4(3)(b) of the Act by letting in acceptable evidence. In the present case, the plaintiff places heavy reliance on Ex.P-8, payment receipts to contend that the defendant received salary from her for having acted as her agent and that she had no independent income of her own either to contribute or purchase the properties described in the plaint. This was repudiated by the defendant by contending that she also performed Nattuvangam and singing and earned independently. The defendant also contended that she or her husband never acted as agent of the plaintiff and that her husband earned independently. Therefore, according to the defendant, she contributed for purchasing item Nos.1 and 2 of the properties and paid the entire sale consideration for purchasing item No.3 of the plaint described property.

33. In the light of the above, it is necessary to examine as to what was the intention between the parties to the transaction at the time of purchasing the property. To prove a transaction "benami", which will fall under Section 4(3)(b) of the said Act, the intention must be clear and explicit that a person, who acted as a "benamidar", understood clearly that merely because the property is purchased in his name, the title to the property

so purchased will never vest in him and that he is not the real owner and he is required to execute necessary document such as settlement deed or release deed in favour of the real owner, at a later point of time, to fortify the title in favour of the real owner. The so-called "benamidar" must also be aware that he is only an apparent or ostensible owner at the time of purchasing the property in his name and he is not the real owner. This intention cannot be inferred from the attendant facts and circumstances of the case, rather, it has to be specifically pleaded and proved. In the present case, except the oral testimony of the plaintiff as PW1 and the mother as PW2, there is no acceptable evidence to infer the intention between the parties. The plaintiff did not examine any independent witness to prove the transaction. This is more so that the defendant denied having acted as an agent of the plaintiff and that she independently earned money by performing Nattuvangam and singing. Above all, the plaintiff, defendant and their mother were assessed to Income Tax in their own name and this only gives rise to an inference that the defendant had earned money on her own and that she is capable of either contributing or purchasing the plaintiff described properties.

34. The learned Senior Counsel appearing for the plaintiff vehemently contended that the mother, PW2 had executed two settlement deeds and fortified the title of the plaintiff in the properties described as item Nos. 1 and 2 in the plaint. Reference was also placed on the Will, dated 19.06.1991 executed by the defendant to contend that had it been true that the defendant contributed for purchasing the property described as item No.1 in the plaint, she could not have executed the registered Will, dated 19.06.1991 bequeathing the 1/3rd share in the said property. It is to be noted that the defendant has contended that on the representation made by the plaintiff to compensate the defendant in the event of bequeathing her 1/3rd share in the property described as item No.1 of the plaint, she executed the registered Will, however, since the plaintiff did not compensate her monetarily, she revoked the Will. In any event, the recitals contained in the settlement deeds executed by the mother, PW2 in favour of the plaintiff or the Will dated 19.06.1991 executed by the defendant, are not to the effect that it is the plaintiff who had paid the entire sale considerations for the properties covered therein and the defendant or her mother are only "name lenders" and therefore, they are executing those instruments to fortify the title of the plaintiff. Rather, in the settlement deeds executed by the mother, it was merely stated that she is executing the settlement deeds out of sheer love and affection that she had towards the plaintiff. Likewise, the recitals in the Will do not indicate any intention between the parties to get over the "benami colour" of the transaction. Therefore, we hold that the settlement deeds executed by the mother or the Will dated 19.06.1991 executed by

the defendant, cannot be considered to hold that at the time of purchasing the properties in question, there was an intention between the parties that the plaintiff is the real owner and the mother, PW2 and the defendant are apparent or ostensible owners within the meaning of Section 4(3)(b) of the said Act. Thus, we hold that the plaintiff has miserably failed to prove that there was an intention between the parties at the time of purchasing the properties in question and thereby prove that the transaction in this case is a "benami" to avail the benefit under Section 4(3)(b) of the said Act.

35. As regards pleading relating to benami transaction, the learned single Judge held that there is no pleading as such and without pleading, no evidence can be let in. However, the learned Senior Counsel appearing for the plaintiff vehemently contended that in para Nos.12 to 16 of the plaint, the plaintiff had clearly pleaded that the transaction is a "benami transaction" and that Section 4(3)(b) of the Act will be applicable to the present case.

36. In the light of the above submission, we have carefully gone through the averments made in the plaint. In the plaint, there is no averment to the effect that the defendant is the "benamidar" of the plaintiff. The word "benami" or "benamidar" has not been used at all in the plaint. The plaint is also silent with respect to the applicability or otherwise of the provisions of the Act. However, what was pleaded is that the plaintiff is the only earning member, and the defendant has no wherewithal or resourceful enough to contribute or purchase the properties described in the plaint, and the defendant was appointed as an agent of the plaintiff and she acted in a fiduciary capacity, etc. These averments, if read as a whole, will not be sufficient to hold that the plaintiff had in fact pleaded in the plaint as to the transaction in the case is a "benami". Therefore, we hold that the conclusion arrived at by the learned Single Judge that without pleading in the plaint, no evidence can be let in, has to be sustained.

37. Next it has to be seen as to whether the evidence adduced in this case would lead to a conclusion that the transaction in this case is a "benami transaction". In this context, in the decision of the Honourable Supreme Court in the case of Jaydayal Poddar (deceased) through LRs and another Vs. MST. Bibi Hazra and others) reported in 1974 (1) SCC 3 (cited supra), relied on by the learned Senior Counsel for the plaintiff, certain parameters have been laid down for consideration of a "benami transaction". As per the decision of the Honourable Supreme Court, to prove a particular transaction "benami," first, it must be shown with regard to the source from which the purchase money came. Further, it must be shown as to who is in possession of the property after the purchase; then, the motive, if any, for giving the transaction a "benami colour", and then, the position of the parties and their

relationship and finally the custody of the title deeds after the sale and the conduct of the parties concerned in dealing with the property.

38. Applying the above principles to the case on hand, it is the vehement contention of the plaintiff that she was the only earning member in the family, she had entrusted all her earnings to the defendant and her husband and that the defendant only acted as an agent of the plaintiff who received monthly salary from the plaintiff under Ex.P-8 series. Therefore, it is contended that the source of income for purchasing the property emanated from the plaintiff and that the defendant could not have contributed any amount for purchasing the property. On the other hand, the defendant refuted this contention by asserting that she was having independent source of income and wherewithal to purchase or contribute for purchasing the properties in question.

39. Admittedly, the first item of the properties was purchased in the joint name of the plaintiff, defendant and their mother. The second item of the properties was purchased by the defendant and her mother. The third item of the properties was purchased exclusively in the name of the defendant alone. According to the plaintiff, only for the purpose of Tax compliance, the property was purchased in the joint name of the plaintiff, defendant and their mother. However, in the recitals contained in the sale deed, Ex.P9, there is nothing to indicate that the entire sale consideration had been made only by the plaintiff. Even though several instances were quoted by the plaintiff that it is her money that was deposited by the defendant and subsequently a cheque was given by the defendant to make it as if she contributed for purchasing the property, we are not inclined to accept such submission. This is more so that even after purchasing the properties in question, there is no communication or evidence made available to show that the defendant and her mother are "name lenders" and that the entire sale consideration for purchasing the properties in question, had been paid only out of the earnings of the plaintiff. Even though the plaintiff claims that the defendant acted in a fiduciary capacity, there is no evidence made available to prove the same. In this context, the learned Senior Counsel appearing for the appellant placed reliance on the decision of the Honourable Supreme Court in the case of Marcel Martins Vs. M. Printer, reported in 2012 (5) SCC 342, wherein the Honourable Supreme Court held in para No.38 held as follows:-

"38. In determining whether a relationship is based on trust or confidence, relevant to determining whether they stand in a fiduciary capacity, the Court shall have to take into consideration the factual context in which the question arises for it is only in the factual

backdrop that the existence or otherwise of a fiduciary relationship can be deduced in a given case. Having said that, let us turn to the facts of the present case once more to determine whether the appellant stood in a fiduciary capacity vis-a-vis the respondent-plaintiffs."

40. Therefore, as held by the Honourable Supreme Court in the above decision, for examining whether a fiduciary relationship exists or not, the factual backdrop is required to be considered. In the present case, on examining the oral and documentary evidence let in by the plaintiff, it is not established that the defendant had acted in a fiduciary capacity, as has been alleged by the plaintiff. Therefore, we feel that this is not a fit case for consideration where the plaintiff will be justified in giving a "benami colour" to the transaction in question to avail the benefit under Section 4(3) (b) of the said Act and the plaintiff must fail.

41. Similarly, the plaintiff admitted that the parent documents with respect to item No.1 of the properties described in the plaint, is with her. There can be no doubt that after execution of the settlement deed by the mother with respect to item No.1 of the properties, the plaintiff became entitled to 2/3 share in the item No.1 of the properties and naturally, the title deeds vested with her. Insofar as 2nd item of the properties is concerned, it is stated that the title deeds are mortgaged with MCC Bank, but it is not made known as to at whose instance the title deeds were mortgaged. It is also an admitted fact that the title deeds relating to 3rd item of the properties mentioned in the plaint, is in possession of the defendant, however, it is claimed by the plaintiff that the defendant is in possession of the title deeds as a "trustee" on behalf of the plaintiff. There is no evidence to suggest that soon after purchasing the third item of the property during the year 1989, the plaintiff had ever made any demand to the defendant to part with the title deeds. If really the third item of property was purchased out of the funds provided by the plaintiff, it is not known as to how the title deeds could be in the possession of the defendant or as to why the plaintiff could remain silent without asserting her right. Even in the plaint, there is no convincing statement as to how the defendant had come into possession of the title deeds pertaining to the third item of the properties. In such view of the matter, we are of the view that the plaintiff has even failed to prove as to how the defendant could remain in possession of the title deeds pertaining to the property described as item No.3 in the plaint. Therefore, we hold that the plaintiff failed to prove that the properties described as item Nos.1 to 3 in the plaint, have been purchased "benami" and we answer point No.1 against the plaintiff.

42. Point No.2 and 3:- The learned Senior Counsel appearing for the plaintiff would contend that the defendant was never in possession of the property measuring 920 square feet described as item No.1. The defendant trespassed into the said property on 25.08.2000. Even the suit filed by the defendant in O.S. No. 2374 of 2000 for bare injunction against the plaintiff, her mother and the plaintiff's husband, was dismissed by a Judgment and Decree dated 22.07.2003 and it had attained a finality. The defendant did not prefer any appeal thereagainst and the Judgment and Decree dated 22.07.2003 attained finality. The Judgment and Decree dated 22.07.2003 passed in the suit filed by the defendant in O.S. No. 2374 of 2000 would bind her. However, the defendant claims herself to be a co-owner in respect of item No.1 of the properties and thereby, forcibly committed trespass on 25.08.2000. The learned Senior Counsel appearing for the plaintiff also relied on Exs. P17, P18 and P19 respectively being the Marriage Certificate, dated 25.01.1978, Receipt and the Letter written by Assistant Secretary of Sri Ramanavami Cultural Festival to the defendant dated 31.12.1983, to contend that the defendant was residing at No.32, Edward Elliot's Road, Chennai and not in the property described as item No.1 of the plaint. Even in Ex.P33, registered Will executed by the defendant on 19.06.1991, the address of the defendant was mentioned as No.21, Beemanna Mudali Street, Alwarpet, Madras - 600 018. Even in Ex.P9, sale deed dated 27.08.1981, the address of the defendant is mentioned as North Street, Kannyakumari. Similarly, in Exs.P11 and P12, respectively being the registration copy of the sale deed dated 28.06.1984 and also the registration copy of the sale deed dated 05.05.1989, the address of the defendant was mentioned as No.3, Dr.Radhakrishnan Salai, Mylapore, Madras. In this context, the learned Senior Counsel for the plaintiff relied on the decision in the case of Tanusree Basu and others Vs. Ishani Prasad Basu and others), reported in 2008 (4) SCC 791. to contend that even a co-owner cannot forcibly enter into a property, which is in exclusive possession of another co-owner. Therefore, the learned Senior Counsel appearing for the plaintiff prayed for a decree of declaration declaring that the plaintiff is the owner of the property measuring 920 square feet, morefully described as item No.1 in the plaint.

43. Per contra, the learned Senior Counsel appearing for the defendant contended that the defendant is a co-owner of the item No.1 of the property described in the plaint and as a co-owner she is entitled to remain in occupation of the property. The learned Senior Counsel appearing for the defendant also submitted that in the registered Will, dated 14.12.1989 (Ex.D-51) executed by PW2, it is stated that the defendant herein is residing at No.113, Santhome High Road, Chennai - 600 028 and this would establish the plea of the defendant that she is in occupation of the property measuring 920 square feet in item

No.1 of the suit property. Therefore, it cannot be said that the defendant had trespassed into the property measuring 920 square feet described as item No.1 in the plaint on 25.08.2000. The learned Senior Counsel appearing for the defendant also placed reliance on Exs.D-64 to D-72, Ration Cards, payment receipts issued by Sowmya Traders Gas Agency, payment receipts issued by Telephone Department and payment receipt issued by Electricity Board, to contend that the defendant was in possession of the property described as item No.1 in the plaint. Reliance was also placed on the order dated 07.11.2000 passed in W.P.No. 11525 of 2000, marked as Ex.D73 to contend that the defendant was in possession of the property at the time of filing the writ petition before this Court. Therefore, according to the learned Senior Counsel appearing for the defendant, the question of trespass by the defendant does not arise. Furthermore, the plaintiff did not plead in the plaint that she is in possession of the properties described in item Nos. 2 and 3 of the plaint. Rather, the defendant had defended that she is in exclusive possession and enjoyment of the properties described as item Nos. 1 to 3 in the plaint. Therefore, the learned Senior Counsel appearing for the defendant prayed for confirmation of the findings rendered by the learned Single Judge with regard to the property described as item No.1 in the plaint.

44. As regards item No.1 of the property, it is the contention of the plaintiff that on 25.08.2000 the defendant high-handedly trespassed into a portion of the property measuring 920 square feet. Further, it is alleged by the plaintiff that in order to protect her possession, after trespass, the defendant has filed a suit in O.S.No.2374 of 2000 on the file of Ist Assistant Judge, City Civil Court, Chennai against the plaintiff, her husband and mother of the plaintiff, for bare injunction. According to the plaintiff, the defendant was never in possession of the portion measuring 920 square feet in the property described as item No.1 of the plaint before 25.08.2000 and it was the plaintiff who is in possession of the entire property described as item No.1 in the plaint. The plaintiff also would contend that even prior to the trespass by the defendant on 25.08.2000, the defendant attempted to trespass into the property described as item No.1 in the plaint on 13.02.2000 and when it was resisted by the husband of the plaintiff, the defendant has given a false complaint to the E-5, Pattinapakkam Police Station, alleging that she was physically assaulted by the husband of the plaintiff. On the basis of such complaint, a case in Crime No. 80 of 2000 was registered against the husband of the plaintiff. Subsequently, after investigation, a final report was filed and it was taken on file as C.C.No.1309 of 2000 on the file of XXIII Metropolitan Magistrate, Saidapet, Chennai. Ultimately, after conclusion of trial in the case, by order dated 24.07.2002, the said

C.C.No.1309 of 2000 was dismissed. Admittedly, as against the said order dated 24.07.2002, the defendant did not file any appeal.

45. It is seen from the records that the defendant herein, as plaintiff, has filed O.S.No.2374 of 2000 against her mother, plaintiff herein and her husband. The property described as item No.1 of the plaint filed by the plaintiff herein, was described as the suit property in O.S.No.2374 of 2000. In the pleadings in O.S.No.2374 of 2000, the plaintiff therein has contended that she is in possession of the suit property jointly along with the defendant therein. In the suit, a written statement was filed by the defendant therein by specifically contending that the plaintiff therein was never in possession of the suit property. In the written statement, reference was also made to the Will executed by the plaintiff therein on 19.06.1991, whereby she bequeathed her 1/3rd share in the suit property in favour of the first defendant therein. It was also contended that the plaintiff therein had not paid water charges from 1995 onwards for the suit property. Therefore, in the light of the above pleadings in the written statement, the Civil Court has framed a specific issue as to whether the plaintiff therein is in possession of the suit property at the time of filing the suit. After considering the oral and documentary evidence in -extenso, the Civil Court has specifically rendered a finding in para No.10 of the Judgment dated 22.07.2003 that the plaintiff therein is not residing in the suit property and trespassed into the suit property during April 2000. A further finding was rendered that the plaintiff therein, suppressing the facts, has filed the suit and obtained an order of injunction as if she was living in the suit property and she started squatting permanently into the property. The Civil Court has therefore concluded that the allegation that she is living in the suit property from the date of purchase and living jointly along with the defendants therein, cannot be sustained. Even the Ration Card, Telephone Bill and payment receipts relating to supply of LPG cylinder, were disbelieved by the Civil Court to prove that the plaintiff therein was residing in the property. It was also concluded that there was no telephone connection in the name of the plaintiff therein prior to the year 2000. On the other hand, the Civil Court concluded that the plaintiff therein was residing at No.3, Radhakrishnan Salai and subsequently at No.21, Beemanna Mudali Street, Mylapore, Chennai and not in the suit property. Thus, the Civil Court rendered a specific finding that the plaintiff therein was not residing in the suit property and she is not entitled for the relief of permanent injunction. Therefore, by the Judgment dated 22.07.2003, the suit filed by the defendant herein was dismissed with costs. However, for the reasons best known, the defendant herein did not challenge the Judgment and Decree dated 22.07.2003 passed in the suit filed by her in O.S.No.2374 of 2000 and it had attained finality. When a

specific finding was rendered as regards the possession of the defendant herein, the defendant ought to have assailed the Judgment and Decree dated 22.07.2003 by preferring an appeal. Thus, we are of the view that the Judgment and Decree dated 22.07.2003 passed in O.S.No.2374 of 2000 would only strengthen the case of the plaintiff that the defendant was not in possession of the property measuring 920 square feet described as item No.1 of the plaint at any time and she has trespassed into the suit property on 23.08.2000.

46. As rightly pointed out by the learned Senior Counsel appearing for the plaintiff, the defendant, as a co-owner, cannot forcibly exclude or dispossess another co-owner, being the plaintiff. In this context, reliance was placed in the decision of the Honourable Supreme Court in the case of Tanusree Basu and others Vs. Ishani Prasad Basu and others, reported in 2008 (4) SCC 791, wherein it was held as follows:-

"13. There cannot be any doubt or dispute as a general proposition of law that possession of one co-owner would be treated to be possession of all. This, however, in a case of this nature would not mean that where three flats have been allotted jointly to the parties, each one of them cannot be in occupation of one co-owner separately.

14. We have noticed hereinbefore that the appellant-plaintiffs themselves in no uncertain terms admitted that by reason of mutual adjustment the parties had been in separate possession of three flats, viz., Flat Nos.201, 202 and 301. If they were in possession of the separate flats, the plaintiffs as co-owners could not otherwise have made any attempt to dispossess the first respondent by putting a padlock. The padlock, according to the first respondent, as noticed hereinbefore, was put by the plaintiff-appellants immediately after the appeal preferred by them in the High Court was dismissed.

17. Strong reliance has been placed by Mr.Banerjee on a judgment of the Bombay High Court in Bhaguji Bayaji Pokale Vs. Kantilal Banan Gunjawate (AIR 1998 Bom 114 : 1998 (3) CCC 377 (Bom)), wherein it was held: (AIR p.117, para 8):

"8(7). With regard to second substantial question of law i.e. the co-owner cannot claim an order of injunction against another co-owner with regard to the property owned jointly, the learned

counsel for the appellants has relied upon the Apex Court's judgment in Mohd.Baqar Vs. Naim-un-Nisa Bibi (AIR 1956 SC 548). The Apex Court has very categorically held in para 7 as under: (AIR p.550):

"7. The parties to the action are co-sharers, and as under the law, possession of one co-sharer is possession of all co-sharers it cannot be adverse to them, unless there is a denial of their right to their knowledge by the person in possession, and exclusion and ouster following thereon for the statutory period."

It was observed: (AIR p.117, para 10):

"10. ... Similarly, the legal position that the co-owner or co-sharer of the property can never claim ownership by adverse possession of the other share. This is also a well-settled law."

18. We are concerned in this case with a question whether if a co-owner was in specific possession of the joint property, he could be dispossessed therefrom without the intervention of the court. In this case, the first respondent is not claiming title of adverse possession. The said decision has, therefore, no application to the fact of the present case.

21. In Hemanta Kumar Banerjee (Hemanta Kumar Banerjee Vs. Satish Chandra - AIR 1941 Cal 635), the question which arose for consideration was to whether the rule against partition amongst co-sharers is an elastic one. Again, we are not concerned with such a question here.

22. In Jahuri Sah (Jahuri Sah Vs. Dwarika Prasad Jhunjhunwala - AIR 1967 SC 109), this Court opined: (AIR p.112, para 12):

"12. What we have to consider then is whether the contract for payment of compensation is not

enforceable. It is no doubt true that under the law every co-owner of undivided property is entitled to enjoy the whole of the property and is not liable to pay compensation to the other co-owners who have not chosen to enjoy the property. It is also true that liability to pay compensation arises against a co-owner who deliberately excludes the other co-owners from the enjoyment of the property. It does not, however, follow that the liability to pay compensation arises only in such a case and no other. Co-owners are legally competent to come to any kind of arrangement for the enjoyment of their undivided property and are free to lay down any terms concerning the enjoyment of the property. There is no principle of law which would exclude them from providing in the agreement that those of them as are in actual occupation and enjoyment of the property shall pay to the other co-owners compensation."

These observations do not assist the case of the appellants. If parties by mutual agreement entered into possession of separate flats, no co-sharer should be permitted to act in breach thereof."

47. Therefore, in the light of the above decision of the Honourable Supreme Court and in the light of the Judgment and Decree passed dated 22.07.2003 passed in O.S.No.2374 of 2000 filed by the defendant herself, which had attained a finality, we are of the view that the plaintiff is entitled for possession of the property measuring 920 square feet described as item No.1 of the plaint and consequently she is entitled to recover possession of the same from the defendant, since the defendant had forcibly trespassed into the property, which she cannot legally do. However, it is open for the defendant to get back the possession by taking recourse to law.

48. As regards the property described as item No.2 in the plaint, the learned Single Judge proceeded to hold that the defendant had contributed a sum of Rs.1,10,000/- out of Rs.1,70,000/- towards sale consideration payable for item No.2 of the property. On that basis, the learned Single Judge held

that the plaintiff is entitled to 35% share in the item No.2 and the defendant is entitled for 65% share. This finding, in our view, cannot be sustained. At the outset, even though the defendant defended the suit by contending that she had contributed a sum of Rs.1,10,000/- out of Rs.1,70,000/-, it was disputed by the plaintiff by contending that the amount was provided by her in cash and it was deposited in the Bank the previous day by the defendant and on the next day, the defendant issued a cheque towards sale consideration. In effect, it was the vehement contention of the plaintiff that the sale consideration for purchasing item No.2 of the properties, was paid by her. Be that as it may, in the sale deed, Ex.P11 relating to the property described as item No.2 of the plaint, there is no recital to the effect that the defendant had paid Rs.1,10,000/- and the remaining sum of Rs.60,000/- was paid by the mother, PW2. Further, the mother, PW2 had executed a settlement deed dated 03.03.2000, Ex.P14 in favour of the plaintiff. In the settlement deed dated 03.03.2000, the mother, PW2, had specifically recited that "whereas the Settlor hereby declare that she has got 50% undivided right, title and interest over the schedule property." and this recital only indicates that the item No.2 of the property was purchased jointly by the defendant and her mother, in which, each of them have 50% share. As mentioned above, subsequently, the mother, PW2 had executed the settlement deed dated 03.03.2000 in favour of the plaintiff, whereby the plaintiff has become entitled to 50% share in the item No.2 of the property. Therefore, we are of the view that the finding rendered by the learned Single Judge that the plaintiff is entitled only to 35% of the share in item No.2 of the property, has to be set aside.

49. As regards the property described as item No. 3 in the plaint, the sale deed dated 05.05.1989, Ex.P12 only disclose that it was purchased by the defendant in her name and out of her own funds. There is no contra evidence made available on the side of the plaint except by stating that the funds for purchase of the item No.3 of the properties, was provided by the plaintiff. As we have already held that the plaintiff has failed to prove that the transaction in the instant case is "benami", we are only inclined to confirm the findings rendered by the learned Single Judge with respect to the property described as item No.3 of the plaint.

50. Accordingly, we answer point Nos.2 and 3 to the extent that the plaintiff is not entitled for declaration in so far as it relates to the portion of the property measuring 920 square feet described as item No.1 of the plaint, however, the plaintiff is only entitled for recovery of possession of the same from the defendant inasmuch as the defendant had trespassed into the property described as item No.1 in the plaint. Thereafter, it is open to the defendant to get back possession of the property measuring 920 square feet from the plaintiff,

morefully described in item No.1 of the property, by taking appropriate proceedings in the manner known to law. As regards item No.2 of the property, the plaintiff is entitled for a declaratory decree declaring that she is entitled for half share in item No.2 of the property described in the plaint. However, the relief of declaration and possession in respect of item No.3 of the plaint is hereby rejected.

51. Point No.4. It is vehemently contended by the learned Senior Counsel appearing for the defendant that the suit filed by the plaintiff, as such, is not maintainable and it is barred by the "Law of Limitation". According to the learned Senior Counsel appearing for the defendant, the cause of action said to have arisen for the plaintiff to file the suit was on 23.08.2000, when the defendant had allegedly trespassed into a portion of the property measuring 920 square feet described as item No.1 in the plaint. The date of alleged trespass is imaginary and it will not give rise to a cause of action to institute the suit. Further, the suit was filed 21 years after the property described as item No.1 was purchased, 18 years and 13 years after the property described as item Nos. 2 and 3 respectively are purchased. Therefore, the declaratory relief sought for by the plaintiff in the suit is not maintainable at all. The suit was filed during July 2002 by alleging that the defendant trespassed into the suit property on 23.08.2000. Even otherwise, as per Section 6(2) of the Specific Relief Act, a person who is alleged to have been dispossessed, must file a suit for recovery of possession within a period of six months. In this context, reliance has been placed on Sections 6 and 34 of the Specific Relief Act, which reads as follows:-

"6. Suit by person dispossessed of immovable property:--

(1) If any person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person claiming through him may, by suit, recover possession thereof, notwithstanding any other title that may be set up in such suit.

(2) No suit under this section shall be brought--

(a) after the expiry of six months from the date of dispossession; or

(b) against the Government

(3) No appeal shall lie from any order or decree passed in any suit instituted under this section, nor shall any review of any such order or decree be allowed.

(4) Nothing in this section shall bar any person from suing to establish his title to such property and to recover possession thereof."

"34. Discretion of Court as to declaration of status or right:-- Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief.

Provided that no Court shall make any such declaration where the plaintiff being able to seek further relief than a mere declaration of title, omits to do so."

52. Therefore, according to the learned Senior Counsel appearing for the defendant, the plaintiff ought to have filed the suit within six months from the date of alleged trespass by the defendant on 25.08.2000 and that the suit was filed during July 2002, after 18 months, and it is hopelessly barred by Section 6(2) of the Specific Relief Act. In this context, the learned Senior Counsel appearing for the defendant placed reliance on the decision of the Honourable Supreme Court in the case of Tirumala Tirupati Devasthanams Vs. K.M.Krishnaiah, reported in AIR 1998 SC 1132, wherein it was held as follows:-

"18. In the present case before us, the principles laid down in Nair Service Society's case are squarely applicable with this difference namely that inasmuch as, in view of our finding in point 1, title of the defendant TTD has not been extinguished and is subsisting as of today in respect of the suit property, the plaintiff-respondent who was dispossessed on 30.08.1969 - but who applied for possession on 25.07.1970 beyond 6 months from date of dispossession would not be able to recover possession. The TTD could remain and retain its possession. We hold accordingly point 3 in favour of the appellant."

53. Per contra, the learned Senior Counsel appearing for the plaintiff would contend that invocation of Section 6 of the Specific Relief Act, which envisages a summary trial, will not help the plaintiff herein to get her title to the property in question declared. At any rate, Section 6 of the Specific Relief Act can be invoked subject to the option of a litigant and it is not mandatory. There is no compulsion for a person who is wrongly dispossessed to invoke Section 6 of the Specific Relief Act, as it is only a summary procedure in nature.

Further, Section 6 of the Specific Relief Act does not contain any non-obstante clause and the proceedings under Section 6 are summary in nature. Therefore, the question of title in a summary proceedings under Section 6 of The Specific Relief Act cannot be gone into. According to the learned Senior Counsel appearing for the plaintiff, the suit was not filed for recovery of possession, but the suit was filed based on the title of the plaintiff with a consequential relief of recovery of possession. In such event, according to the learned Senior Counsel appearing for the plaintiff, Articles 64 and 65 of The Limitation Act, 1963 alone will apply. Article 64 deals with institution of suit for possession of immovable property based on previous possession and not on title, when the plaintiff, while in possession has been dispossessed and limitation period therein is twelve years from the date of dispossession. Article 65 of the Limitation Act deals with institution of suits for possession of immovable property or any interest therein based on title and the limitation period is twelve years, when the possession of the defendant becomes adverse to the plaintiff. In this context, the learned Senior counsel appearing for the plaintiff placed reliance on the decision of the Honourable Supreme Court in the case of Ghewarchand and others Vs. Mahendra Singh and others, reported in 2018 (10) SCC 588, to contend that when the suit was instituted for recovery of possession on the basis of the title, it can be instituted within a period of 12 years from the date on which cause of action arose, as per Article 65 of the Limitation Act. Useful reference can be made to the said Judgment wherein in para Nos.15 to 18 it was held thus:-

"15. Without going into any factual controversy and the lengthy pleadings, which we consider not necessary, the High Court, in our view, was factually not correct in observing that the suit was filed for declaration and injunction only and "not for possession".

16. In our view, mere perusal of the relief in clause 26.3 of the plaint quoted in para 5 above would show that the plaintiff had also prayed for decree of possession of the suit property from the defendants.

17. It is not in dispute as the pleadings would go to show that the suit property was the subject-matter of the proceedings under Section 145 of the Criminal Procedure Code, 1973 (hereinafter referred to as "Cr.PC") between the parties before the City Magistrate wherein both the parties were claiming their right, title and interest including asserting their possession over the suit property against each other. It is also not in dispute that the City Magistrate vide his order dated 23-12-1996

attached the suit property.

18. The plaintiffs, therefore, filed a civil suit on 19.12.1978 for claiming a declaration of their title on the suit property, injunction and possession against the defendants. Since the suit was for declaration, permanent injunction and possession, Article 65 of The Limitation Act was applicable which provides a limitation of 12 years for filing the suit which is to be counted from the date when the possession of the defendant become adverse to the plaintiffs."

54. By placing reliance on the above decision, the learned Senior counsel appearing for the plaintiff contended that the present suit was filed for declaration and consequential recovery of possession and therefore, as per Article 65 of The Limitation Act, the plaint filed by the plaintiff is well within the period of limitation. The learned Senior Counsel appearing for the plaintiff also submitted that the learned Single Judge also framed an issue No.8 in the suit and concluded that the suit is filed in time. According to the learned Senior counsel for the plaintiff, assuming that a person trespassed into the property of another and prevented him somehow or other to institute a suit within six months, then such a person will be rendered remediless by reason of Section 6 of Specific Relief Act. If such a situation exists, it would be against the spirit of the law of limitation and it would give rise to spate of litigations.

55. We have given our anxious consideration to the plea of limitation made by the learned Senior Counsel appearing on both sides. Section 6(2) of the Specific Relief Act uses the words "no suit" and under this Section, Section 6(3) is important, which says that no appeal shall lie from any order of decree passed in any suit instituted under this Section, nor shall any review of any such order or decree be allowed. Section 6(4) therein says that nothing in this Section shall bar any person from suing to establish his title to such property and to recover possession thereof. The object of Section 6 is to discourage people from taking law into their own hands.

56. The relevant Articles of the Limitation Act are Articles 64 and 65. Article 64 is based upon previous possession. Article 65 is based upon title. Here, the plaintiff has sought for recovery of possession based on title and admittedly, she is having 2/3 share in item No.1 of the suit properties even according to the defendant. So, the period of limitation is 12 years. The decision of the Supreme Court reported in 2018 (10) SCC 588 (Ghewarchand and others Vs. Mahendra Singh and others) and of the Karnataka High Court reported in AIR 1991 Karnataka 273 (Seshumull M.Shah Vs. Syed Abdul Rashid and others), make it clear.

57. Admittedly, the suit was filed by the plaintiff during July 2002 by alleging that the defendant trespassed into the suit property on 23.08.2000. In the suit, the plaintiff also pleaded that the relationship between the plaintiff and the defendant was cordial till 2000 and their relationship got strained only thereafter and therefore, there is no necessity for her to file the suit earlier. The plaintiff has filed the suit for declaration of her title to three items of properties mentioned in the plaint and for recovering the possession of those properties from the defendant. In such event, as rightly pointed out by the learned Senior Counsel appearing for the plaintiff, Section 6 of the Specific Relief Act deals only with a summary procedure and it will not deal with the title to the property, and as such, it cannot be expected to be invoked by the plaintiff. On the other hand, the plaintiff can file the suit within 12 years as per Section 65 of the Limitation Act to assert her right to title and to recover possession of the property from the defendant. Further, as pointed out by the learned Senior Counsel appearing for the plaintiff, if, in case of this nature, Section 6 of the Specific Relief Act is made mandatory, a gullible litigant, after trespassing into the property, may prevent the real owner from approaching the Court or for some reason, the real owner did not approach the Court and file a Criminal Complaint against the trespasser and in that process, lost the period of six months within which the suit has to be filed, a real owner will lose his or her right over a property, which is not the object within which our Legislators have intended while framing the Limitation Act. The object of the Limitation Act is not to oust genuine litigants from seeking redressal, rather, it will be a bar only for those persons who have slept over his or her right to seek redressal at the earliest point of time. Section 6 of the Specific Relief Act can be invoked only if a person, whose title is not disputed and he intended only to recover the possession from the so-called trespasser by invoking the summary procedure. In the present case, there is a cloud created over the title of the plaintiff by the defendant and therefore, the plaintiff cannot be expected to invoke Section 6 of the Specific Relief Act and file the suit within six months. Therefore, the suit filed by the plaintiff during July 2002 by stating that the defendant had trespassed into the portion of the property in item No.1 of the plaint, on 23.08.2000, is well within the period of limitation.

58. The decision relied on by the learned Senior Counsel appearing for the defendant in Tirumala Tirupati Devasthanams case (cited supra), cannot be made applicable to this case for the simple reason that the suit in that case was filed for a permanent injunction against the defendant therein. Further, in that case, it was held that the plaintiff, who trespassed into the property on 30.08.1969, filed the suit for bare injunction on 25.07.1970 for injunction against the true owner and

therefore, it was held that the summary suit filed by the plaintiff therein is not maintainable. In this case, it was complained by the plaintiff that the defendant, who was never in possession, much less joint possession in respect of a portion of the property measuring 920 square feet in item No.1 barged and stormed into the said property on 25.08.2000 and to strengthen her so-called possession filed a suit in O.S. No. 2374 of 2000 for bare injunction and it was dismissed, against which she has not filed any appeal. In the said suit, a clear finding was given that the plaintiff therein (defendant herein) was not in possession of the suit property at the time of filing the suit. Therefore, as per the decision of the Honourable Supreme Court in Tanusree Case (cited supra), a co-owner cannot forcibly dispossess another co-owner, which is squarely applicable to this case. Therefore, the decision cited by the learned Senior Counsel appearing for the defendant in Tirumala Tirupathi Devasthanam's case (cited supra) is factually distinguishable and it cannot help the defendant to strengthen her case. Therefore, we answer point No.4 in favour of the plaintiff and against the defendant.

59. In the result, the Original Side Appeal is partly allowed by modifying the Judgment and Decree dated 28.04.2008 passed by the learned Single Judge in C.S.No.500 of 2002 as follows:

(i) There shall be a declaration declaring 2/3rd of the title of the property described as item No.1 of the plaint in favour of the plaintiff;

(ii) The plaintiff is entitled to the relief of recovery of possession in respect of the property to an extent of 920 Sq.Ft. described as item No.1 of the plaint from the defendant, which is presently occupied by the defendant, since she had dispossessed the plaintiff by forcibly trespassing into item No.1 of the properties and occupied to the said extent of 920 Sq.Ft.

(iii) The plaintiff is also entitled for a declaratory decree declaring that she is entitled to 50% in item No.2 of the properties described in the plaint.

(iv) The plaintiff is not entitled to a declaratory decree in respect of item No.3 of the plaint described property.

(v) In all other respects, we confirm the Judgment and Decree dated 28.04.2008 passed by the learned single Judge.

No costs.

Sd/-

Assistant Registrar(Insp.cell)

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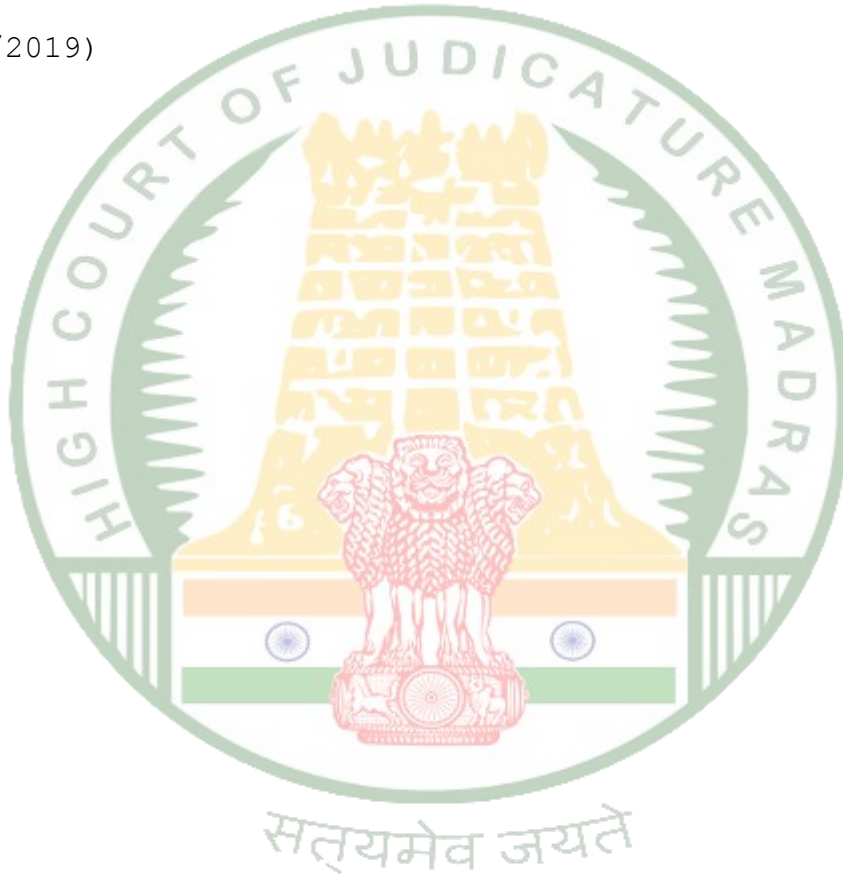
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OSA No. 209 of 2008

PP (CO)
GMY (12/07/2019)



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