



A.S.No.78 of 2015

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON :01.09.2022

PRONOUNCED ON : .10.2022

CORAM :

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

AND

THE HONOURABLE MR.JUSTICE S.SOUNTHAR

A.S.No.78 of 2015
and M.P.Nos.1 and 2 of 2015

1.Shanthi
2.Vijaya
3.Vijayanthi

... Plaintiffs/Appellants

Vs

K.Senthil Kumar

... Respondent

Prayer: First Appeal filed under Section 96 of Civil Procedure Code, against the judgment and decree dated 20.10.2014 in O.S.No.184 of 2012, on the file of I Additional Judge, Salem, so far as it relates to the dismissal of the suit for partition in respect of A schedule (gold jewels) and 1st item of B schedule (house).

For Appellants : Mr.D.Shivakumaran

For Respondent : Mr.R.Karthikeyan



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JUDGMENT

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S.SOUNTHAR, J

The plaintiffs are appellants. They have filed a suit for partition against the respondent, who is their brother. The suit 'A' schedule property consists of movable properties namely jewels of mother. The suit 'B' schedule property consists of two items. The first item is a two storied building with ground floor and first floor and the second item consists of vacant site. The suit was decreed in favour of the appellants, in respect of second item of 'B' schedule property alone. The suit was dismissed in respect of other properties.

2. According to appellants/plaintiffs, the suit item one of 'B' schedule property was purchased by mother of the parties under sale deed dated 08.05.1998 marked as Ex.A2 and she constructed a building thereon. The mother of the parties died on 28.08.2011 and hence the appellants who are the daughters are entitled to 3/4th share and respondent, who is the son is entitled to 1/4th share. It was also claimed that second item of 'B' schedule



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property was ancestral one. The father of the parties got it by virtue of partition deed dated 20.08.1993 marked as Ex.A3 and he died on 31.05.2012, leaving behind the parties to the suit. Therefore, the appellants claimed equal share along with respondent in the suit property. It was also claimed by the appellants that the first appellant was residing in the first item of the suit 'B' schedule property and the parties are in joint possession. The appellants further claimed that the respondent tried to evict the first respondent forcefully and he was also not agreeable for partition and hence the suit for the above relief was filed by the appellants.

3. The respondent filed a written statement submitting to the decree, in respect of item 2 of 'B' schedule. As far as 'A' schedule movable properties are concerned, the respondent claimed they did not exist and sought for dismissal of the suit on that ground. The respondent specifically averred that item 1 of 'B' schedule property was purchased in the name of mother of the parties by their father out of his own earnings and further claimed that she held the property only as a Binami, but not as a rightful owner. It was further averred by the respondent that father had executed a



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settlement deed under Ex.B1 in his favour and consequently, the appellants/plaintiffs are not entitled to claim any share in the 1st item of 'B' schedule property.

4. On these pleadings, the parties went to trial, the 1st appellant/1st plaintiff was examined as PW.1 and the respondent/defendant was examined as DW.1. The appellants marked Ex.A1 to A8 on their side and the respondent marked as Exs.B1 to B5 on his side.

5. The trial Court on consideration of oral and documentary evidence found that the appellants failed to prove very existence of movable properties mentioned in suit 'A' schedule property and hence dismissed the suit in respect of 'A' schedule property.

6. As far as item 1 of 'B' schedule is concerned, the trial Court found that the consideration for purchase of property in the name of mother of the parties was paid by father of the parties and hence father was the real owner of the property. Based on the said findings, the trial Court held that



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the father was entitled to settle the same, in favour of respondent and consequently dismissed the suit for partition in respect of first item of 'B' schedule. As far as second item of 'B' schedule is concerned, the respondent himself submitted to the decree in the written statement. Consequently, the suit was partly decreed in respect of item 2 of 'B' schedule alone and the suit was dismissed in other respects. Aggrieved by the same, the appellants have come up with this appeal.

7. The learned counsel for the appellants submitted that though the appellants had not let in any evidence to prove the jewels owned by their mother described in 'A' schedule property, the respondent as DW.1, admitted that after death of mother, the appellants had removed the jewels without his knowledge and it was brought back by father through mediation. Therefore, on the death of father, the jewels in his custody should have fallen to the custody of respondent. The trial Court on the basis of said admission of DW.1 ought have granted decree for partition in respect of movable properties described in 'A' schedule property. As far as item 1 of 'B' schedule is concerned, learned counsel for the appellants contended that the



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respondent raised the plea of Benami and hence it was for him to prove that property, which was admittedly, purchased in the name of mother was not purchased for her benefit.

8. In support of his contention, the learned counsel appearing for the appellants relied on the following decisions:

(i) (2007) 6 SCC 100 reported in Binapani Paul Vs Pratima Ghosh and others;

(ii) 1997(2) LW 908 reported in Parvathi Ammal Vs Solai Ammal and another;

(iii) 2015 (15) SCC 556 reported in Om Prakash Sharma Vs Rajendra Prasad Shewda and others;

(iv) 1980 (3) SCC 72 reported in Thakur Bhim Singh and another Vs. Thakur Kan Singh.

9. The learned counsel for the appellants submitted that the respondent failed to rebut the presumption available under Section 3(2) (a) of Benami Transactions (Prohibition) Act, 1988 as it is prior to 2016



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amendments. It is his contention that in view of the presumption available under the Benami Transactions (Prohibition) Act, 1988, the property which was purchased in the name of mother of the parties shall be treated as her property and admittedly, she died intestate. Therefore, all the daughters and son are entitled to equal share or in other words, the father had no right to settle the same, in favour of respondent.

10. Per contra, the learned counsel for the respondent submitted that the appellants have not let in evidence, in support of the availability of movable property mentioned in 'A' schedule and hence the trial Court is justified in dismissing the suit in respect of movable properties. As far as item one of 'B' schedule property is concerned, the learned counsel for the respondent submitted that the mother of the parties did not have any independent source of income. The first appellant as PW.1, admitted that the 1st item of 'B' schedule was purchased by the father in the name of mother and mother of the parties did not have any independent source of income. It was contended by the learned counsel, in the light of the categorical admission by first appellant as PW.1, the consideration for purchase of



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property in the name of mother was paid by father. Therefore, it should be treated as a property of the father.

11. The learned counsel by relying on Section 2(9) of Benami Transactions (Prohibition) Act, 1988 (Act 45 of 1988) submitted that properties acquired out of known source of income by an individual in the name of his spouse cannot be termed as Benami Transaction and when it is shown that consideration for the purchase passed on from that individual the property should be treated as his property and not the property of his spouse.

12. In support of his contention, the learned counsel appearing for the respondent relied on the following decisions:

(i) (2007) 6 SCC 100 reported in Binapani Paul Vs Pratima Ghosh and others;

(ii) (2018) 16 SCC 645 reported in Vinod Kumar Dhall Vs Dharampal Dhall;

(iii) (2020) 16 SCC 411 reported in Fair Communication and Consultants and another Vs Surendra Kerdile



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13. Based on the pleadings of the parties and contentions of the learned counsel, the following points are arising for consideration in this appeal:

- (i) Whether 'A' schedule movable properties are available for partition?;
- (ii) Whether the respondent/defendant established his case that father of the parties is the real owner of item 1 of 'B' schedule property?;

14. Point No.(i):

The appellants have come up with the case that the suit 'A' schedule movable properties namely jewels of mother are in the hands of respondent. In support of the said contention that the movable properties are available in the hands of respondent, there is no acceptable evidence available on record.

15. Though the learned counsel for the appellants submitted that the respondent as DW.1 admitted that jewels of mother was in the



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custody of father and after his death it should have reached the hands of respondent, a close perusal of evidence of DW.1 would suggest that he categorically asserted that 'A' schedule movables were not available with him in his chief examination. Even though in his cross examination, he deposed that jewels of mother which were taken away by the appellants was retrieved by father through mediation, he pleaded ignorance of whereabouts of jewels and how the jewels were disbursed by his father. In view of the same, in the absence of any reliable material to show that jewels of mother had fallen to the hands of respondent/defendant, we cannot find fault with the findings of the trial Court that "A" schedule movables are not available for partition. Hence, point No.1 is answered against the appellants.

16. Point No.2:

The trial Court held that item 1 of "B" schedule property was purchased by father of the parties out of his own income and there was no material to suggest that mother of the parties had any income of her own. Relying on the admission of the first appellant who was examined as PW.1 that the said property was purchased by father in the name of mother, the trial



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Court came to the conclusion that the said property was not owned by mother of the parties. The Trial Court also relied on the recitals found in the settlement deed executed by father in favour of respondent, wherein, it was stated that property was purchased and enjoyed by father.

17. The Section 3(2)(a) of Benami Transactions (Prohibition)

Act, 1988, as it stood prior to 2016 amendment reads as follows:

(a) the purchase of property by any person in the name of his wife or unmarried daughter and it shall be presumed, unless the contrary is proved, that the said property had been purchased for the benefit of the wife or the unmarried daughter;

18. Section 2 (9) (A) of amended Benami Transactions (Prohibition) Act, 2016 would suggest a rule of evidence namely, property purchased by husband in the name of his wife shall be presumed to be purchased for the benefit of wife, in other words, it creates a rebuttable presumption that property purchased by husband in the name of his wife is her property unless the contrary is proved by the person, who alleges it was not purchased for her benefit.



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19. In the decision reported in (1995) 4 SCC 572 in Nand

WEB C Kishore Mehra Vs.Sushila Mehra, the Apex Court has held as follows:

“Coming to the facts of the case on hand, the plaintiff had filed the suit in the High Court seeking relief in respect of properties alleged to have been purchased benami in the name of the defendant-his wife. 4 learned single Judge rejected the application filed by the defendant in that suit seeking rejection of the plaint on the ground that the suit was barred under [Section 4](#) of the Act. The order of rejection of that application was appealed against by the defendant in a First Appeal filed in the same court. A Division Bench of the High Court reversed the order of the learned Single Judge and granted the application of the defendant made in the suit seeking rejection of the plaint. It is that order which is now questioned by the plaintiff-husband in this appeal. Since the plaintiff is the husband who had the right to enter into a benami transaction in the matter of purchase of property in the name of his wife or unmarried daughter, as we have held earlier, he is entitled to enforce his rights in the properties concerned if he can succeed in showing that he had purchased them benami in the name of his wife. But in view of the statutory presumption incorporated in sub-section (2) of [section 3](#) of



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the Act, he can get relief sought in the suit only if he can prove that the properties concerned had not been purchased for the benefit of the wife, even if he succeeds in showing that the consideration for the purchases of the properties had been paid by him.”

20. A co-ordinate Bench of this Court in a case law reported in 1997 2(LW) 908 in Parvathi Ammal Vs.Solai Ammal and another held as follows:

it was held that the prohibition to raise the plea of benami is not applicable to the property purchased by a person in the name of his wife or unmarried daughter but at the same time, the persons so pleading must prove that the said property had not been purchased, for the benefit or welfare of such persons in order to succeed. In coming to such conclusion, their Lordships of the Apex Court adverted to Section 3(2) which provided that nothing in Sub-section (1) which in turn stipulated no person shall enter into any benami transaction, shall apply to the purchase of property by any person in the name of his wife or unmarried daughter and that it shall be presumed, unless contrary is proved, that the said property had been



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purchased for the benefit of the wife or the unmarried daughter. So far as the case on hand is concerned, the plaintiff daughter who projected the plea of benami claimed that the properties have been purchased in the name of the 1st defendant by Kesava Padayachi, the father of the plaintiff and husband of the 1st defendant. The father is no more and it is not the said Kesava Padayachi who has chosen to assert such a claim that the properties have been purchased benami. The plaintiff daughter can neither claim herself to be a co-parcener nor claim that the 1st defendant is in the position of trustee or other person standing in any fiduciary capacity vis-a-vis the plaintiff in respect of such properties. In any event, for the plaintiff to succeed, she should prove that the properties concerned had not been purchased by the father (the husband of the 1st defendant) for the benefit or the welfare of the wife even though it may be shown that the consideration for the purchase of the properties had been paid by her husband

21. The law laid down in the above case is applicable to the facts of the present case. Admittedly, the suit item 1 of 'B' schedule stands in the name of mother of the parties under Ex.A2. The first appellant, when she



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was examined as PW.1, admitted that mother was only a house wife and her family depended on income of father and father in fact purchased the property in the name of mother. After admitting so, she proceeded to state that building in the suit property was put up by her mother, even though, she did not have any income. She denied the suggestion that the respondent had put up construction with his own income. Therefore, the appellant side witnesses admitted that consideration for purchase of property in the name of mother was paid by father.

22. As per law laid down by above decisions, merely, because, father paid consideration for purchase of property in the name of mother, we cannot come to a conclusion that father is the real owner because there is a statutory presumption that property was purchased in the name of mother for her benefit. When respondent alleges that property was not purchased for the benefit of mother it is for him to prove the same. There is no evidence available on record to suggest that the property was not purchased for the benefit of mother, but it was purchased for the benefit of father. In fact in Ex.B1 settlement deed executed by father in favour of respondent, there is a



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recital which says subsequent to purchase, property was enjoyed by mother Suseela along with other members of the family. Therefore, the respondent document itself proves after purchase Suseela continued to enjoy the property. Therefore, absolutely, there is no evidence available on record to show that property was not purchased for the benefit of mother Suseela. In view of the above, the statutory presumption remains unconquered.

23. Hence, we have no hesitation in holding that the property which stands in the name of mother Suseela is available for partition on her death and father of the parties is not entitled to execute settlement, in respect of the said property. However, on death of Suseela, father of the parties is also entitled to 1/5th share along with children in his capacity as heir of Suseela. Therefore, we hold that the settlement executed by father is valid to the extent of his 1/5th share.

24. We have already held that this is a property owned by female member of the family and hence it will devolve upon her heirs under Section 15 of Hindu Succession Act on her death. It is not the Coparcenary property. Therefore, the principle in Hindu law that undivided share cannot



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be the subject matter of the gift will not get attracted.

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25. It was brought to our notice that presumption under Section 3(2) of Benami Transactions (Prohibition) Act was deleted by 2016 amendment Act and hence the statutory presumption is no longer available. However, the suit was filed on 28.09.2012, when the rule of evidence under Section 3(2) of Benami Transactions (Prohibition) Act was very much available. The suit has to be decided based on the law that was in operation on the date of presentation of the suit. In fact the judgment was also delivered in the suit property after coming into force of 2016 amendments. The Hon'ble Apex Court in a case law reported in (2020) 17 SCC 496 in Mangathai Ammal (died) through legal representatives and other Vs Rajeswari and others, held that 2016 amendment is only prospective in nature. The above case was decided on the basis of the date of presentation of the suit and hence we hold that the respondent is not entitled to rely on 2016 amendment, which has taken away the rebuttable presumption created by Section 3(2) of the Original Act.

26. The learned counsel for the respondent relying on (2018) 16



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SCC 645 in Vinod Kumar Dhall Vs Dharampal Dhall (deceased) through his

legal representatives and others, submitted that burden of proof is not static and it may shift during the course of evidence. In the case on hand, the moment PW.1 admitted that the mother has no source of income and the property was purchased by father in the name of mother, the initial burden on the respondent/defendant got shifted. We are unable to agree with the learned counsel for the respondent, the admission on the part of PW.1 can at the most only infer that consideration for purchase of the property in the name of mother was paid by father. However, from the admission relied on by the learned counsel for the respondent, we cannot jump to a conclusion that PW.1 admitted that the property was not purchased for the benefit of mother.

27. It is pertinent to point out in view of Prohibition contained in Section 4(2) of Benami Prohibition Act, the respondent/defendant is not entitled to raise the plea of Benami as a defence to the suit for partition laid by appellants. The Section 4 of Benami Prohibition Act, reads as follows:

Prohibition of the right to recover property held benami.—



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(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.*

In view of express provision under Section 4(2) referred above, the respondent/defendant, who claims under his father (alleged real owner) is not



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entitled to raise the plea of Binami as a defence in a suit which was filed subsequent to coming into force of 1988 Act. Hence, we hold that the respondent is not entitled to contend that his father was the real owner of the property and consequently deny the right of mother on whose name originally property was purchased. Therefore, on this ground also the appellants are entitled to succeed and claim share in the property that stood in the name of mother, namely suit item one of suit 'B' schedule.

28. The Section 3(1) of Benami Prohibition Act, prohibits Benami Transaction. The Section 3(3) talks about penal consequences for violating Section 3(1). The Section 3(2) carve out certain exception to prohibition contained in Section 3(1). It also speaks about Rule of evidence. The rule of evidence contained in Section 3(2) has to be understood in the context of Section 3(3). But in the case on hand, the rule of evidence under Section 3(2) may not be of much use in view of total prohibition under Section 4(2) of Act to raise Benami as a defence.



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29. In view of the above discussions, we hold that item 1 of "B" schedule property is available for partition and the settlement deed executed by father, in favour of his son namely respondent is valid to the extent of his $1/5^{\text{th}}$ share. Therefore, the appellants/plaintiffs are entitled to decree for partition of $1/5^{\text{th}}$ share each.

30. In nutshell:

(i) The appeal is partly allowed by setting aside the judgment and decree passed in O.S.No.184 of 2012 on the file of First Additional District Judge, Salem, in respect of first item of 'B' schedule property;

(ii) The appellants/plaintiffs are entitled to $3/5^{\text{th}}$ share in the suit item 1 of "B" schedule property. In other respects, the decree passed by the trial Court is confirmed.

(ii) There shall be no order as to costs.

(iii) Consequently, connected miscellaneous petitions are closed.

(V.M.V.J) (S.S.J)

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V.M.VELUMANI , J.

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To

The I Additional Judge,
Salem.

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