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A.S(MD)No.39 of 2011

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 19.01.2023

Delivered on : 30.01.2023

CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

AND

THE HONOURABLE MR.JUSTICE SUNDER MOHAN

A.S.(MD)No.39 of 2011

and

M.P.(MD)No.3 of 2011

G.Felshia Vasanthi

... Appellant/Defendant

Vs.

R.Sekar @ Gunasekar

...Respondent/Plaintiff

PRAYER: This Appeal Suit has been filed under Section 96 of the Code of Civil Procedure against the Judgment and Decree dated 06.12.2010 passed in O.S.No.20 of 2004 on the file of the Family Court, Madurai.

For Appellant : Mr.M.Ajmalkhan
Senior Counsel for
Mr.R.Alagumani

For Respondent : Mr.J.Barathan



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JUDGMENT

WEB C **SUNDER MOHAN, J.**

The appeal is preferred by the wife challenging the Judgment and Decree in O.S.No.20 of 2004, by which, the learned Judge, Family Court, Chennai, declared that the suit schedule properties purchased in her name by the husband/respondent are benami properties purchased for the interest of the respondent and not for her beneficial interest.

2. The respondent filed the suit for the declaration that Item Nos.1 to 6 of the suit properties were benami properties purchased by him in the name of the appellant and that she had no beneficial interest in the suit properties.

3. The averments in the plaint filed by the respondent briefly are as follows:

The respondent and the appellant are Christians and got married on 28.05.1990. The respondent was well to do and owned vast extents of agricultural lands besides carrying on the business of the money lending. In the year 1992, he had purchased item Nos.1 and 2 of the suit schedule properties from his own income and had constructed building from his agricultural income



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and his own savings. He had paid property tax and electricity consumption charges for those properties and for all practical purposes, he was maintaining the properties as its owner. Thereafter, in the year 1994, he purchased Item Nos. 3 to 6 of the suit schedule properties again from his own savings. A male child was born to the respondent and the appellant on 02.02.2000. The appellant returned after delivery of the child to the matrimonial home in May 2000. Differences arose between the appellant and the respondent thereafter. The appellant prevented the respondent from attending his mother's funeral. She did not breast-feed the child. The respondent came to know that even prior to the marriage, she had association with a third person, who was residing opposite to her parents' house at Tuticorin. While so, on 05.09.2003, the respondent found that the appellant and the child were missing from her home. Thereafter, the respondent came to know that she had gone to her parents' home. When the respondent lodged a police complaint, she had sent back the child through her relatives to the respondent and thereafter, the respondent had been taking care of the child. The respondent also filed O.P.No.34 of 2003 before the Family Court at Madurai for divorce. The properties were purchased solely for the benefit of the respondent from the funds possessed by him. He had been maintaining the properties and the documents relating to all the properties which are in his possession. The properties were purchased in the



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name of the appellant since an Astrologer had advised the respondent not to purchase any property in his name. Further, he had purchased the properties in his name to avoid payment of wealth tax. Hence, he filed the suit.

4. The appellant filed written statement denying all the averments made in the plaint. She had denied specifically the averments that she had association with a third person prior to marriage. She had stated that the properties were purchased out of the funds given by her father, who was well to do and the respondent had not contributed any money for the purchase of the properties in her name. She was a dutiful wife and all the allegations accusing her of being irresponsible were invented for the purpose of the suit.

5. Before the Trial Court, the respondent examined 6 witnesses and had marked Exs.P.1 to P.31. The appellant examined 2 witnesses on her side and she did not mark any document. The Trial Court framed 6 issues and held in favour of the respondent in all the 6 issues. Aggrieved over the same, the appellant filed the above appeal.

6(a). The learned Senior Counsel for the appellant submitted that the properties were purchased in the name of the appellant by the appellant's father.



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The respondent had not contributed in any manner for the purchase of the properties.

(b) In any case, since the properties were purchased in the name of the appellant, who is the wife, there is a presumption under Section 3(2) of the Benami Transactions (Prohibition) Act, 1988, which says that if any property is purchased in the name of the wife, it shall be presumed that it was purchased for her benefit. The respondent has not proved that the properties were purchased for the beneficial interest of the wife. He relied upon the Judgment of the Hon'ble Supreme Court reported in *(1995)4 SCC 572 (Nand Kishore Mehra vs. Sushila Mehra)* and *(2020)17 SCC 496 (Mangathai Ammal vs. Rajeswari)* in support of the said submission.

(c) The learned Senior Counsel further submitted that the reasons given by the respondent for purchasing the properties in the name of the appellant i.e., the Astrologer had advised the respondent not to buy any property in his name and further that he bought the property to avoid wealth tax, cannot be accepted. Firstly, he had bought another property in the year 1992 in his name by sale deed dated 05.02.1992, which falsifies his case of Astrologer's advice. Secondly, avoidance of the wealth tax should not be accepted by this Court, as



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the said motive for purchase of the property in the name of his wife, is illegal.

He relied upon the Judgment of this Court reported in **AIR 2003 Madras 290 (George Thomas vs. Srividya)** for the said purpose.

(d) The learned Senior Counsel further submitted that there is a presumption in favour of the transaction being real and the burden is on the person who claims to be benami to prove the contrary. The respondent ought to have proved that his intention was to purchase the property as benami, however, the respondent has failed to do so. He relied upon the Judgment of the Hon'ble Apex Court reported in *(2020)10 SCC 816 (P.Leelavathi vs. V.Shankaranayana Rao)*, *(2004)7 SCC 233 (Valliammal vs. Subramaniam)* and *(2007)6 SCC 100 (Binapani Paul vs. Pratima Ghosh and others)* in support of the said submission.

(e) The learned Senior Counsel further submitted that merely because the respondent was in the management of the property, it does not advance his case in any manner and that does not rebut the presumption that the property was purchased for the beneficial interest of the appellant. He relied upon the Judgments of the Hon'ble Apex Court reported in *(2015)15 SCC 556 (Om. Prakash Sharma @ O.P.Joshi vs. Rajendra Prasad Shewda and others)* and



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AIR 1965 SCC 271 (Kanakarathanammal vs. Loganatha Mudaliar) in

support of his said submission.

(f) The learned Senior Counsel also submitted that the recital of the sale deeds would show that the appellant paid the sale consideration and any oral evidence contrary to the said recital is hit by Section 91 of the Indian Evidence Act.

(g) The learned Senior Counsel submitted that at the appellate stage, this Court can allow additional evidence, which would clear any doubts and enable this Court to render justice. Therefore, he pleaded for allowing the application for additional evidence permitting to file a sale deed and certain other receipts purchased in the name of the respondent in the year 1992. He relied upon the Judgment of the Hon'ble Apex Court reported in **(2022)7 SCC 247 (Sanjay Kumar Singh vs. State of Jharkhand)** in this regard.

7(a). The learned counsel for the respondent/plaintiff submitted that the conduct of the appellant would show that the properties never could have been purchased for the beneficial interest of the appellant. The appellant had abandoned the respondent on 05.09.2003. On the complaint given by the



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respondent which was registered as an FIR, the child was returned to the

respondent. Since then the respondent has been taking care of his son.

(b) The appellant though had pleaded that her father bought the property in her name, she could not establish the said fact. She had come up with a false case that the respondent had no means to purchase the property. Besides the oral evidence of the appellant and her father, which is improbable, the appellant could not produce any document to suggest that the property was purchased out of the funds given by her father.

(c). The respondent had filed Income Tax Returns which were marked as Ex.P.13, which would establish the fact that the respondent had sufficient means to purchase the properties in question. Further, the respondent had examined the vendors of the property and their evidence also supported the case of the respondent. The respondent managed the property and the title deeds relating to the properties and other documents evidencing payment of the property tax, water charges and electricity charges, are in possession of the respondent. He had bought those properties since the name of the appellant “Felshia” means luck. Further, he would manage the wealth tax if the purchase was made in different names.



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(d). As regards the additional documents filed by the appellant, namely, the sale deed dated 05.02.1992 purchased by the respondent, the respondent has no valid objection for marking of the same. He would further contend that this property was purchased contrary to the advice of the Astrologer. That would not therefore render the reasons given by him for purchasing the suit schedule properties in the name of the appellant as false.

(e). The respondent has been taking care of his son and the appellant has never been a dutiful wife and/or a dutiful mother. The learned counsel relied upon the Judgment of the Hon'ble Apex Court in **(1997)11 SCC 714 (Rebti Devi vs. Ram Dutt and another)** in support of his submission that though initial burden lies on the person claiming that the property is benami, but when the parties adduce oral and documentary evidence, the question of burden pales into insignificance.

8. Heard the learned counsels and perused the evidence and documents available on record.

9. Before we deal with the rival contentions, we propose to decide M.P(MD)No.3 of 2011 filed by the appellant under Order 41 Rule 27 C.P.C to



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accept 10 documents as additional evidence in the above appeal. Out of the said 10 documents, the first document is a sale deed, dated 05.02.1992 registered in favour of the respondent. The learned counsel for the appellant has no serious objection to the said document. The said document, according to the appellant, is essential for deciding the above appeal, since it can remove the doubt in the case and it may have a direct bearing on the main issues. The other documents are relating to certain tax receipts, which may not be relevant for the purpose of the case. Therefore, we allow the sale deed bearing Doc.No.538 of 1992 dated 05.01.1992 to be taken as additional document on the side of the appellant. Since the respondent has no serious objection, the said document is taken on record without formal proof. Therefore, M.P(MD)No.3 of 2011 is partly allowed only in respect of the above said sale deed. The Judgment of the Hon'ble Apex Court reported in **(2022)7 SCC 247 (Sanjay Kumar Singh vs. State of Jharkhand)** is squarely applicable to the fact of the case. The relevant portion is extracted hereunder:

“.....However, at the same time, where the additional evidence sought to be adduced removes the cloud of doubt over the case and the evidence has a direct and important bearing on the main issue in the suit and interest of justice clearly renders it imperative that it may be allowed to be permitted on record, such application may be allowed. Even, one of the circumstances in which the production of additional evidence



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under Order 41 Rule 27 CPC by the appellate court is to be considered is, whether or not the appellate court requires the additional evidence so as to enable it to pronounce judgment or for any other substantial cause of like nature.....”

10. The points that arise for consideration in the above appeal, are:

(1) Whether the respondent had established that the properties were purchased in the name of the appellant from his funds?

(2) If the properties were purchased from the funds of the respondent, whether the respondent had rebutted the statutory presumption under Section 3(2) of the Benami Transactions (Prohibition) Act, 1988 that the purchase of properties in the name of the wife is presumed to be for her beneficial interest?

Point No.1:

11. The admitted facts are that the respondent and the appellant got married in the year 1990. The suit schedule properties were purchased in the name of the appellant. A child was born to the appellant and the respondent in the year 2000. The appellant and the respondent are living separately since 2003. The son was brought up by the respondent. The documents of title relating to the properties are in possession of the respondent and he is managing all the properties.



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12(a). The first factual controversy is as regards who made the payments for the purchase of the suit schedule properties and for construction of buildings in item Nos.1 and 2 of the suit schedule properties. The respondent had produced Ex.P.13 income tax receipts and certain account books which are marked as Exs.P.14 to P.17, to substantiate his case that he funded the purchase of property and construction of the buildings. He had also produced the income derived from the agricultural properties during the relevant time through Ex.P. 20-File containing details of income. Further, he has produced Exs.P.21 to 23, which are the house tax receipts and water charges receipts and kist receipts and approved plan for the building in item Nos.1 and 2 of the suit schedule properties evidencing that they were paid by him. Besides the above documents, the respondent had produced money lending license dated 06.04.1993. Thus, from the above documents, the respondent sought to establish that he had sufficient funds to purchase the property as benami in the name of the appellant.

(b) That apart the respondent had examined PW.3 who sold one of the suit schedule properties, to support his case that the property was purchased in the name of the appellant by the respondent only because the Astrologer had



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advised him to do so and name of the appellant 'Felshia' means luck. He had also bought the properties to reduce the burden of paying wealth tax. P.W.4 is the builder, who constructed the building at the instance of the respondent. He would state that the respondent approached him for the construction. P.W.5 is the other vendor, who sold the properties by sale deeds marked as Exs.A.8 and A.9 in favour of the respondent. He would also state that the respondent negotiated the transaction and paid the sale consideration. P.W.6 is the lessee in the agricultural land bought in the name of the appellant and he would also state that he had been paying rents to the respondent. Though the appellant had claimed that the properties were purchased from the funds given by the father, she had not filed documents to substantiate the said claim. Further, the evidence of the appellant and D.W.2-her father appear to be improbable for one more reason. The details of the properties and the nature of expenses and the amount of expenses incurred for purchase of the property, paying stamp papers and for construction, could not be stated by both the appellant and her father. Further, the appellant's father has three daughters. There is nothing to suggest as to why he chose only the appellant to purchase the properties in her favour. Therefore, we are of the view that the respondent had established that he had purchased the property from his funds in her name. Hence, for the above said reasons, we hold Point No.1 in favour of the respondent.



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WEB C Point No.2:

13. It is the case of the appellant that merely because the respondent was managing properties and paying taxes, it cannot be inferred that the properties were not purchased for the beneficial interest of the appellant. We are in agreement with the said proposition. It is the matter of common knowledge that in an Indian family, the husband normally looks after the property which is in the name of the wife. This alone cannot determine that the husband bought the property for his interest benami in the name of his wife. The Hon'ble Apex Court in **(2015)15 SCC 556** (cited supra) and **AIR 1965 SCC 271** (cited supra) had held that merely because the husband is managing the property, it cannot be held that the properties were purchased for his benefit.

14. Likewise, we are of the view that the reason given by the respondent for purchase of the property in the name of the wife was to avoid wealth tax, cannot be countenanced. An illegality cannot be endorsed by the Court. Evasion of the tax is an illegality and that reason cited by the respondent cannot be accepted. We agree with the view taken by this Court in **AIR 2003 Madras 290** (cited supra) on this aspect.



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15. The next question is whether the respondent has proved that the property was not purchased for the beneficial interest of the wife and rebutted the presumption under Section 3(2) of the unamended Benami Transactions (Prohibition) Act, which is applicable to the facts of the present case. Section 3(2) of the Act prior to the amendment reads as follows:

“(2) Nothing in sub-section (1) shall apply to --

(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;”

16. The learned counsel for the appellant relied upon the Judgments of the Apex Court in **(1995)4 SCC 572** (cited supra) and **(2020)17 SCC 496** (cited supra) in support of his submission that there is a presumption under Section 3(2) of the Act and a person claiming that the property was purchased by benami in the name of his wife cannot succeed in a suit or defence, unless he proves that the same was not purchased for the benefit of the wife. The following observation of the Hon'ble Apex Court made in **(1995)4 SCC 572** (cited supra) is in support of his submission:



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“.....But, it has to be made clear that when a suit is filed or defence is taken in respect of such benami transaction involving purchase of property by any person in the name of his wife or unmarried daughter, he cannot succeed in such suit or defence unless he proves that the property although purchased in the name of his wife or unmarried daughter, the same had not been purchased for the benefit of either the wife or the unmarried daughter, as the case may be, because of the statutory presumption contained in sub-section (2) of [Section 3](#) that unless a contrary is proved that the purchase of property by the person in the name of his wife or his unmarried daughter, as the case may be, was for her benefit.”

The following observation in **(2020)17 SCC 496** (cited supra) is relied upon by the learned Senior Counsel for the appellant.

“12. It is required to be noted that the benami transaction came to be amended in the year 2016. As per [Section 3](#) of the Benami Transaction (Prohibition) Act 1988, there was a presumption that the transaction made in the name of the wife and children is for their benefit. By Benami Amendment Act, 2016, [Section 3 \(2\)](#) of the [Benami Transaction Act, 1988](#) the statutory presumption, which was rebuttable, has been omitted. It is the case on behalf of the respondents that therefore in view of omission of [Section 3\(2\)](#) of the Benami Transaction Act, the plea of statutory transaction that the purchase made in the name of



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wife or children is for their benefit would not be available in the present case. Aforesaid cannot be accepted. As held by this Court in the case of Binapani Paul (Supra) the Benami Transaction (Prohibition) Act would not be applicable retrospectively.....”

17. Thus, we have to examine whether the respondent has proved that the property was purchased by him for his interest in the name of the appellant and not for the beneficial interest of the appellant. It is well established that the statutory presumption can be rebutted either by adducing independent evidence or by showing inherent improbabilities in the case of the person who is claiming benefit of presumption. It is not the case of the appellant that the property was purchased by the respondent for her beneficial interest. On the other hand, it is her case that she purchased the property with the use of funds provided by her father. As we have held already, the said version of the appellant is improbable. On the other hand, the respondent has clearly established that he had bought the property in the name of the appellant. While that being the case, the plea of the appellant that the respondent bought the property only for her beneficial interest, is a contrary stand. She herself has taken a stand which is contrary to the statutory presumption. We may also refer to the judgment cited by the appellant to impress upon us the guidelines issued by the Hon'ble Apex Court to determine whether particular transaction is



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benami or not. There cannot be any dispute with regard to the proposition of

law laid down in **(2020)17 SCC 496** (cited supra) which reiterates the following principles laid down in **(2007)6 SCC 100** (cited supra).

“The six circumstances that can be taken as a guide to determine the said issue, as laid down earlier by Supreme Court are: “(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; (v) the custody of the title deeds after the sale; and (vi) the conduct of the parties concerned in dealing with the property after the sale.”

18. These are the principles laid down not only for purchase of the property in the name of the wife but for determining whether the transaction is benami bought in the name of the third parties as well. But the real issue in this case, as stated earlier, is whether the presumption under Section 3(2) of the said Act has been rebutted by the respondent. We find that once the appellant herself has taken a stand that it was her own property purchased from the funds given by her father, which is now held to be improbable by us, the presumption under Section 3(2) of the Act cannot enure in her favour. We also accept the stand taken by the respondent that the properties were purchased in the



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appellant's name only because he felt that it would bring luck to him as admittedly 'Felshia' means luck. Therefore, we hold Point No.2 in favour of the respondent.

19. For the above said reasons, we find no reasons to interfere with the Judgment of the Trial Court. Accordingly, the Appeal Suit is dismissed and the Judgment and Decree dated 06.12.2010 made in O.S.No.20 of 2004 on the file of the Family Court, Madurai, is confirmed. No costs.

[G.J.,J.] & [S.M.,J.]
30.01.2023

skn

NCC : Yes

Index : Yes

Internet : Yes / No

Note: Registry is directed to mark the sale deed bearing Doc.No.538 of 1992, dated 05.01.1992 as additional document on the side of the appellant.

To,

1.The Judge, Family Court, Madurai.

2.The Section Officer,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai.



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DR.G.JAYACHANDRAN, J.
AND
SUNDER MOHAN, J.

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Judgment made in
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