



A.S.No.1079 of 1989

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 16.06.2023

PRONOUNCED ON : 26.06.2023

CORAM:

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

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S.Palanichamy

...Plaintiff/Appellant

Vs.

1.Nagajothi
2.Babu Sridhar
3.Deepa Sri
4.Sathis Kumar
5.Muthumamundi
6.J.Palaniappan
7.T.M.Asarabh
8.Janeba Beevi

...Defendants/Respondents

[R2 to R4 were declared as major and discharged from guardianship vide order dated 24.11.2004]

PRAYER: This Appeal Suit is filed under Section 96 of the Civil Procedure Code against the decree and judgment dated 31.03.1989 in O.S.No.581 of 1987 on the file of the Subordinate Court, Madurai.

For Appellant : Mr. T.M.Hariharan
For R1 to R4 : Mr.H.Lakshmi Shankar



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JUDGMENT

Aggrieved over dismissal of the suit filed by the plaintiff for recovery of possession and also the accounts, the present appeal came to be filed.

2.For the sake of convenience, the parties are referred to herein, as per their rank before the trial Court.

3. The brief facts, leading to the filing of this Appeal Suit, are as follows:-

(i)the suit property was purchased by the plaintiff by a registered sale deed, dated 01.02.1969 for a total consideration of Rs.46,000/-. The defendants 5 to 8 are the tenants in the suit properties.

(ii)the plaintiff is the younger brother of Subramanian and Natarajan. The defendants 1 to 4 are the children of the said Subramanian. The said Subramanian was a lawyer by profession and he was practicing at Madurai. Suruliandi Asari is the father of the plaintiff. All of them were the members of



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the joint Hindu family. Apart from the joint family properties, Suruliandi Asari had a jewelry business on his own at Cumbum. The business ended up on his death on 13.01.1976. During the lifetime of the plaintiff's father, the properties were divided. The plaintiff also had the jewelry business on his own in the Agrakaram street at Cumbum, even during the lifetime of his father.

(iii)the eldest brother of the plaintiff was a lawyer by profession. His income from and out of said profession was very meager. He was depending upon the income from the landed properties and whatsoever was given by his father Suruliandi Asari. Considering the relationship between the plaintiff and his eldest brother and considering the legal qualification of his brother, the plaintiff relied on him naturally. After the purchase of the suit property, Subramanian requested the plaintiff to permit him to shift himself to the suit property for his residence and office. Accordingly, the said Subramanian was inducted as permissive occupant of the suit property. After the purchase of the property, the electricity and water service and house tax assessment also changed in the name of the plaintiff.



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(iv)thereafter, the plaintiff intended to reconstruct the building and make it as an income yielding property. Since the plaintiff was mostly at Cumbum and his brother, Subramanian was residing in the siut property, the plaintiff relied upon him for getting plan approval. Therefore, the plan for reconstruction was prepared in the year 1983 with the assistance of the plaintiff's brother and submitted before the Madurai Corporation for approval. In the expectation that the approval of the plan would be received in due course, the work of reconstruction of the building was taken up by the plaintiff. The portions in the ground floor were constructed for non residential purpose and the first and second floor construction were also made. All the construction was put up with the funds of the plaintiff.

(v)on account of deviations in the construction from the approved plan and certain difficulties experienced in retaining the same, the brother of the plaintiff advised the plaintiff that the matter had to be taken up to the Director of Town Planning, Madras. For that purpose, the said Subramanian required the plaintiff to hand over the sale deed, dated 01.02.1969 together with all the earlier documents for gathering materials to prepare necessary representation. Accordingly, since the plaintiff totally relied upon him, he handed over the original sale deed, dated 01.02.1969 with all the relevant records to his brother



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Subramanian. As the plaintiff was living away from the suit property at Cumbum, Subramanian informed the plaintiff that his signatures are necessary for preparation of representation. As such the said Subramanian obtained several signatures of the plaintiff on several blank papers. The plaintiff had no reason to suspect his brother and hence, he put signatures in the blank papers.

(vi)all of a sudden, on 09.07.1986, the brother of the plaintiff, Subramanian died, leaving behind the defendants 1 to 4 as his legal heirs. The first defendant is the wife of the said Subramanian. She had no siblings. Her father also died. With a fraudulent motive, the first defendant made a publication in “Dinathanthi”, dated 10.01.1987 as if the plaint schedule property was purchased as benami by Subramanian in the name of the plaintiff and on his death, she and her children are entitled to it. The said publication was also repudiated by the plaintiff by making another publication on 26.01.1987.

(vii)thereafter, the plaintiff issued notice to the first defendant and defendants 5 to 7, who are the tenants in portion of the suit schedule property. The first defendant replied to the said notice on 12.08.1987 with false allegations. The first defendant is trying to misuse the permission granted by the plaintiff to reside



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in the suit schedule property by taking advantage of the fact that the plaintiff had handed over all the title deeds with regard to the plaint schedule property to the husband of the first defendant. Hence, the plaintiff filed the suit.

(viii)admitting the relationship between the parties and denying the entire allegation, the first defendant filed a written statement stating that the plaintiff has not come to the Court with clean hands. She also denied the contention of the plaintiff that he owned the jewelry business. According to her, the joint family properties of Suruliandi Asari were orally partitioned. Subsequently in the year 1970, the oral partition came into existence under a registered partition deed. In the above said partition, all the family properties of the Suruliandi Asari were not included. On the other hand, some of the family properties were transferred in his daughter's name as a family arrangement. Though family arrangement was made, all the properties were under the possession and enjoyment of Suruliandi Asari, who died intestate on 09.07.1986.

(ix)after the death of Surliandi Asari, the plaintiff and his brothers namely, Subramanian and Natarajan inherited the properties of their father, Suriliandi Asari. The jewelry business run by Suruliandi Asari was subsequently



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run by the plaintiff and his brothers. She also denied that the plaintiff allowed Subramanian to occupy the plaint schedule property on the permission granted by him. It is the case of the defendant that Subramanian was a leading lawyer both in civil and criminal and he was earning a sum of Rs.4,000/- to Rs.5,000/- per month. In fact, he had properties at Madurai North Veli Street. From and out of his own funds earned from his profession and by selling the property at Madurai, Subramanian purchased the plaint schedule property in the name of the plaintiff. Therefore, the contention of the plaintiff that Subramanian was depending only the income of the landed properties is not at all true. Apart from his professional income, the said Subramanian was getting a sum of Rs.25,000/- every year from his landed properties at Cumbum.

(x)during the life of Suruliandi Asari, he was managing the properties of Subramanian and paying a sum of Rs.25,000/- as yearly income from that properties. After his death, the plaintiff agreed to look after the said properties, since he is permanently residing at Cumbum. Accordingly, the plaintiff was regularly paying the amount till 1984. She submitted that the plaint schedule property was purchased by her husband in the name of the plaintiff as benami.



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(xi)the specific case of the first defendant is that her husband was married to one Lakshmi on 23.01.1967. Since she was suffering from leucodima disease and suppressing the same the marriage was solemnized, the husband of the first defendant filed an application to obtain a decree of nullity of his first marriage with the said Lakshmi. In the meanwhile, he negotiated to purchase the suit property and entered into a sale agreement, dated 22.11.1968. Since the husband of the first defendant *bona fide* believed that his first wife may claim over the suit property, he decided to purchase the property in the name of anyone of his family members as benami. Hence, the husband of the first defendant purchased the suit property, in the name of the plaintiff as he was very affectionate with Subramanian.

(xii)only to escape from the claim of the first wife and in view of the faith on the plaintiff, the husband of the first defendant purchased the suit property in the name of the plaintiff. Since the property was purchased in the name of the plaintiff, the electricity service connection and water connection were assessed in his name. The allegations that the plaintiff wanted to reconstruct the building and Subramanian was managing the construction were also false. It is only Subramanian, who started the work of reconstruction in the year 1984 from



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and out of his own funds. Since the sale deed stood in the name of the plaintiff as benami, naturally and necessarily the said Subramanian applied for plan and other things in the name of the plaintiff as required under law.

(xiii) it is further submitted that on completion of reconstruction work, the husband of the first defendant only celebrated the house warming ceremony of the house on 22.01.1986. She also submitted that the contention of the plaintiff that her husband required the plaintiff to hand over the sale deed and other records to him and got signature in blank papers in order to submit a representation before the Director of Town Planning for the purpose of planning approval is false. At the moment of death of Subramanian, the plaintiff became disloyal to his family and with an intention to take the suit property from this defendant by taking advantage of the death of her husband, the plaintiff taken away all the account books and house tax receipts.

(xiv) She had also filed an additional written statement stating that the plaintiff has no separate income to purchase the property. The defendants are in continuous and uninterrupted possession for more than the prescribed year and hence, they acquired title by adverse possession. Hence, they opposed the suit.



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4. Before the trial Court, on the side of the plaintiff, P.W.1 was examined and Exs.A1 to A26 were marked. Ex.X1 to Ex.X14 were marked. On the side of the defendants, R.W.1 to R.W.6 were examined and Ex.B1 to Ex.B87 were marked.

5. Based on the above pleadings, the trial Court had framed the issues:

- 1) Whether the suit property was purchased by Subramanian in the name of the plaintiff as benami?*
- 2) Whether the plaintiff is entitled to recovery of possession?*
- 3) Whether the first defendant is liable to submit statement of accounts?*
- 4) To what other reliefs?*

The following additional issues were framed:

- 1. Whether the defendants are permissive occupants of the suit property?*
- 2. Whether the purchase of the suit property attracts Section 4(3)(a) of Act 45 of 1988)*
- 3. Whether the defendants perfected title by adverse possession?*

6. On the basis of the evidence and materials, the trial Court dismissed the suit on the ground that the plaintiff has not proved his income to purchase the



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suit property. Further, the property had been purchased in favour of other coparcener by another coparcener and the defendants are also perfected title by adverse possession and non suited plaintiff by dismissing the suit. Aggrieved over the same, the present appeal came to be filed.

7.1.The learned counsel for the appellant submitted that the suit property was purchased by the plaintiff under Ex.B1, dated 01.02.1969. The very fact itself clearly shows that the entire consideration has been paid by the plaintiff. Therefore, the allegation that the husband of the first defendant, viz., Subramanian had paid the consideration cannot be countenanced. According to him, the trial Court had placed the entire burden on the plaintiff to prove his source of income to pay the sale consideration, instead of placing the burden on the defendants to establish the plea of benami transaction. One of the attesting witnesses, viz., Karuppiah, who was also a leading Lawyer, was very much alive during trial. The defendants have not chosen to examine him to disprove the consideration paid by the plaintiff. Therefore, when the document clearly indicates that the suit property was purchased by the plaintiff, it is for the persons, who plead benami transaction to establish the same. However, the trial Court had placed the entire burden on the plaintiff to show his income or source to purchase the suit property.



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7.2.It is the further contention that even prior to the purchase of the property, the plaintiff had borrowed a sum of Rs.20,000/- under Ex.A5, a promissory note to pay the advance amount and on the date of registration, the remaining sale consideration was also paid. That apart, the defence of the defendants that the property was purchased in the name of the plaintiff as benami only to avoid the possible claim of the first wife of Subramanian cannot be countenanced. Even such contention is taken as true, the person, who is a party to such proceedings, cannot set up a plea of binami later.

7.3.It is his contention that if really the properties have been purchased in benami, Subramanian, the brother of the plaintiff, who is a lawyer by profession would not have kept quiet. On the contrary, he had filed an application on behalf of the plaintiff as a lawyer and appeared on behalf of the plaintiff before the planning authorities. The documents marked as Ex.X8, Ex.X9, Ex.X10 clearly indicate that infact as a lawyer, the said Subramanian had appeared for the plaintiff. If really the motive for the said purchase is only to avoid the liability or the possible claim of the first wife, there was no reason as to why Subramanian had not taken any steps to reconvey the property in his favour after the divorce



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proceedings were over. Ex.A7, dated 01.09.1971 makes it very clear that first wife had already executed a release deed in favour of Subramanian relinquishing her right. Such being the position, Subramanian ought to have sought for reconveyance, if the property is purchased by him in the name of the plaintiff as benami. On the other hand, even in 1983, when an application was filed before the planning authorities, Subramanian had appeared as a lawyer on behalf his brother/plaintiff. These facts clearly show that Subramanian never asserted during his life time that the property was purchased by him in the name of his brother as benami. Therefore, the contention of the defendant that the property was purchased in the name of the plaintiff as benami cannot be countenanced.

7.4. That apart, it is his further contention that even the first defendant herself addressed a letter under Ex.A8, to his uncle informing about the rejection of the plan approval. Therefore, it is submitted that the defendants had failed to establish the plea of benami transaction. The plaintiff produced the documents under Ex.A9 to Ex.A12, bank account passbook, to show that he had withdrawn a sum of Rs.3,50,000/- during the renovation work in the year 1983. Whereas the defendants have clearly admitted that no amount whatsoever had been withdrawn from the Bank account of her husband to meet out the renovation expenses.



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Hence, it is the contention that since Subramanian, who was the eldest brother of the plaintiff and residing in the suit property, was in fact monitoring the construction stage by stage, the plaintiff had withdrawn his money from his bank account and given it to his brother.

7.5.Further, taking advantage of the fact that all the original documents have been handed over by the plaintiff to his brother, Subramanian to prepare an application to be filed before the planning authorities, now the defendants had set up a plea of benami on the sole ground that all the original documents are with her. Further, mere payment of taxes by the first defendant's husband will not prove the benami transaction. Admittedly, Subramanian was in permissive possession and naturally, the receipts of payment of taxes will be with him only. Therefore, production of the tax receipts will not prove the defendants' case. The trial Court failed to consider the entire documents properly. It is his further contention that the plaintiff is residing at Cumbum. This fact is admitted. Only Subramanian being the eldest brother of the plaintiff, who is the lawyer by profession and practicing at Madurai, was occupying the suit property. Therefore, merely because the electricity receipts were in possession of Subramanian or his family members, the same will not prove the plea of benami transaction.



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7.6.The plaintiff clearly established the circumstances, under which all the original documents came into the possession of Subramanian. The defendants had not even examined the attester of the documents and the original vendor to prove their claim. Merely, on the basis of Ex.A10 to B23, which are the photographs taken during the house warming ceremony of the suit mentioned house, benami transaction cannot be presumed. Admittedly, it is the stand of the plaintiff that even after renovation work, since his brother requested to continue to be in possession of the suit property, house warming ceremony was done and hence, the house was named as Sridhar Illam. That has also been done only since Subramanian was the eldest brother of the family. Merely because, the house warming ceremony was conducted by Subramanian, that will not be sufficient to come to the conclusion that the entire purchase was binami.

7.7.It is the further contention of the learned counsel for the appellant that the first defendant herself admitted in her evidence that she was married in the year 1977 and prior to that, she does not aware of anything about the family affairs. Such being the position, setting up a plea of benami transaction cannot be countenanced and it is not the case of the defendants that the property was



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purchased by the coparcener in the name of another coparcener. Therefore, the plea of the defendants that they are entitled to the benefit under Section 4(3)(a) of Act 45 of 1988 does not arise at all.

7.8. In respect of his submission, the learned counsel for the appellant had relied upon the following judgments:

1. *Jaydayal Poddar (deceased) through lrs., and another vs. MST.BIBI Hazra and others* [(1974) 1 SCC 3]

2. *Koppula Kotayya Naidu and others vs. Chitrapu Mahalakshamma* [1933 L.W. 645]

8.1. Whereas, it is the contention of the learned counsel for the respondents that the plea of benami transaction was raised in the written statement filed on 20.01.1988, which is much prior to The Benami Transactions (Prohibition) Act, 1988. Therefore, the plea of benami transaction is not bared by the provisions of the said Act. It is submitted that Subramanian was admittedly practicing as a lawyer at Madurai from the year 1961 and he also had family agricultural lands, estates and buildings. He was also doing jewelry business.



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8.2.The plaintiff also admitted that Subramanian had already purchased a house in North Veli Street at Madurai and that was sold before the purchase of the suit property under Ex.B1. Therefore, it is the contention that Subramanian had money to purchase the property, which has also been established from the admission of P.W.1. That apart the agreement, dated 22.11.1968 with the original owner of the property establishes the fact that Subramanian had in fact entered into a sale agreement. Besides, Subramanian had also obtained encumbrance certificate on 23.01.1969, under Ex.B84.

8.3.It is further contended that the plaintiff had not produced any evidence to show that he had independent source of income or means to purchase the suit property. In fact, the plaintiff had admitted that he had no money to pay the advance, therefore, he had borrowed the same on pro-note. The person, who is said to have advanced the amount on pro-note to the plaintiff is also not examined. When the plaintiff is claiming that he is running the jewelry business, the submission that he had borrowed some amount to pay the advance is highly improbable. The plaintiff was only 26 years old at the time of purchase of the suit property and he was unmarried. He had no money from his business even to pay



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the advance amount. Therefore, his contention that he had paid the entire sale consideration for purchasing the suit property under Ex.B1 cannot be countenanced.

8.4.After the purchase of the property under Ex.B1, Subramanian was not only residing and also running his office in the suit property. He continued to do so even after his remarriage with the first defendant in the year 1977, even after the reconstruction of the house in the year 1984-1985 till his death on 09.07.1986. The plaintiff had not produced any evidence to show that Subramanian was residing as only a licensee. All the house tax and water tax has been paid by Subramanian and receipts have been retained by him. The plaintiff has not at all produced any payment receipts and he did not remember when the house tax assessment and electricity connection was changed in his name.

8.5.Admittedly, the old building was demolished and new building was constructed in the year 1984. Application for planning approval and other statutory formalities were done in the plaintiff's name. According to the learned counsel for the respondents, the entire expenditure was met by Subramanian. He had produced Ex.B5, Ex.B9 and Ex.B20, which are various receipts, bills,



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vouchers in respect of floor lying, electrical work and other works to substantiate the same. The said receipts establishes the fact that only Subramanian had met all the expenses. Evidence of D.W.3 to D.W.6 had not been disproved.

8.6.The allegation of the plaintiff is that the old house was demolished by one Kandasamy and Jeyaraman from Jaihind Puram, but they were also not examined. P.W.1, though claims that he had printed the invitation card for house warming ceremony, the very fact that the house was named as Sridar Illam, indicates that Sbramanian continued to be in possession as absolute owner. It is also established by producing photographs under Ex.B23 and B24 that Gruhapravesam was performed in the name of the owner of the house. Therefore, the contention of the learned counsel for the appellant that since Subramanian was the eldest brother, he was allowed to perform Kirkaprevesha cannot be countenanced. Subramanian enjoyed the property as absolute owner.

8.7. Ex.A3 and Ex.A4 are the certified copies of the order and decree in the matrimonial case. It was finally decided and decreed on 31.08.1971. Ex.X7 is the release deed executed by the first wife in favour of Subramanian. The motive for benami purchase is only to avoid the possible claim of the first wife during the



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pendency of the matrimonial home. Whereas, the claim of the plaintiff, who claims to have purchased the property and engaged Subramanian for the purpose of managing the property, cannot be countenanced. The plaintiff got married in the year 1977 and no one was examined to prove the contention of the plaintiff that he had enquired about the suit property with his uncle.

8.8.The plaintiff, who had no real connection with Madurai and being unmarried, would have no reason to purchase the property at Madurai. Subramanian was the lawyer by profession and practicing at Madurai and he had also owned a house in North Veli Street, Madurai and he had sold the same before the purchase of the suit property, under Ex.B1. The said fact probablise the defendants' case that the Subramanian is the real owner of the property. The plaintiff claims right over all the family properties and he was in enjoyment of the properties of other co-owners also. Hence, submitted that the trial Court was right in dismissing the suit.

8.9.In respect of his submission he had relied upon the following judgments:



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1.Thakur Bhim Singh (died) by lrs vs. Thakur Kan Singh [AIR 1980 SC

727]

2.Rajagopal Reddy vs.Padmini Chandrasekharan [AIR 1996 SC 238]

3.Gangadara Ayyar Vs. Subramania Sastrigal [AIR 1949 FC 88]

4.P.Krishna Bhatta vs. Mundila Ganapathi Bhatta [AIR 1955 MAD 648]

5.Chanchal devi vs. Puri Bank ltd., [AIR 1951 Ori 22]

6.Union of India vs. Mokesh Builders Financiers Ltd., [AIR 1977 SC

409]

7.Madhusudan Das vs. Narayanibai (died by lrs [AIR 1983 SC 114]

8.Nazir Mohamed Vs. J.Kamala [AIR 2020 SC 4321]

9.In the light of the above submission, now the points arise for consideration in this appeal are as follows:

1.Whether the defendants, who set up a plea of benami, had discharged their burden by establishing all the ingredients to satisfy the benami transaction?

2.Whether the defendants had perfected title by way of adverse possession?



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3. Whether the defendants' transaction is saved under Section 4 (3)

(a) of Act 45 of 1998?

10. Heard the learned counsel appearing on either side and perused the materials available on record.

11. It is not in dispute that the plaintiff and the first defendant's husband are brothers. The first defendant's husband one Subramanian was the lawyer by profession and he was practicing at Madurai from the year 1961. This fact is also not in dispute. It is also admitted by both sides that Subramanian married one Lakshmi and he had also filed an application under Hind Marriage Act to annul the marriage on the ground of suppression of material facts. Ex.A3 and Ex.A4, proceedings clearly shows that the marriage has been annulled by a decree of nullity dated 31.08.1971. After that, Lakshmi also executed a deed of relinquishment in favour Subramanian, which is marked as Ex.X7. The motive for benami purchase was that Lakshmi, first wife of Subramanian may make a claim over the suit property. Therefore, the suit property was purchased in the name of the plaintiff as benami.



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12.The motive for purchase of the property in the name of the plaintiff as alleged by the defendants is that Subramanian had *bona fidely* believed that his first wife may claim right over the property. Therefore, he had purchased the property in the name of his brother. Whereas, the learned counsel for the plaintiff had relied upon the judgment of this Court in ***Koppula Kotayya Naidu and others vs. Chitrapu Mahalakshamma*** [1933 L.W. 645], in which it has been held that that a person who has conveyed the property benami to another for the purpose of effecting a fraud on his creditors cannot, where the fraud has been effected, set up the benami character of the transaction by way of defence in a suit by the transferee for possession under conveyance. It is relevant to note that such view of the Hon'ble Division Bench of this Court was dealt by the Hon'ble Supreme Court in the case of Immani Appa Rao and others vs. Gollapalli Ramalingamurthi and others [1969 AIR 370], wherein the Hon'ble Apex court in para No.17 of that judgment, did not agree with the view of the Division Bench of this Court. Therefore, the above judgment relied upon by the appellant cannot be pressed into service.



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13. With regard to the plea that the defendants are entitled to protection under Section 4 (3) (a) of Act 45 of 1988, it is relevant to note that the person, in whose name, the property is held as a coparcener in a Hindu undivided family and the property is held for the benefit of the coparceners in the family, such transaction is saved under Section 4(3)(a) of the Benami Transactions (Prohibition) Act, 1988, prior to amendment of 2016. It is also relevant to note that it is not the case of the defendants that the property was purchased in the name of the coparcener as benami, therefore, this is only a plea taken in additional written statement which was filed after the Act came into force. Even assuming that the property was purchased in the name of the coparcener as benami, the same should have been reflected in the partition deed executed between the parties in the year 1970. Ex.A1, registered partition deed of the year 1970 makes it very clear the the family properties have been divided orally on 20.05.1959 itself. If really the property was purchased under Ex.B1 on 01.02.1969, the same should have been reflected in the partition deed. But, the same is not found place. This itself clearly indicates that the theory of the defendants that the property was purchased in the name of the coparcener for the benefit of other coparcener cannot be countenanced. Further, there is no plea in the written statement to the effect that



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the property was purchased for the benefit of the coparcener in the name of the plaintiff.

14. Whereas, the specific defence of the first defendant is that the property has been purchased as benami in the name of the plaintiff only to avoid the possible claim of the first wife of Subramanian. It is relevant to note that Subramanian was a lawyer by profession. Ex.B1, sale deed produced by the defendants, when carefully perused, the same clearly shows that the properties have been sold absolutely in favour of the plaintiff. In Ex.B1, two attesting witnesses had signed. One of the attesting witnesses is stated to be a Lawyer namely, Karuppiah, Advocate. The sale deed clearly shows that the entire consideration has been paid by the plaintiff.

15. The first defendant in her evidence also admitted that she married Subramanian only on 27.01.1977 and she does not know about the circumstances prior to her marriage. Only after the marriage, she came to know about the family affairs. The evidence of the parties clearly shows that one of the attesting witnesses in Ex.B1, sale deed, is a Lawyer and he was very much alive during trial, but he was not examined to prove the claim of the defendants that the



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entire sale consideration was paid by Subramanian. It is relevant to note that it is well settled that the burden of proving the particular sale as benami and the apparent purchaser is not the real owner, always rests on the person asserting such plea. The 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 to the said fact. Once the sale deed is executed and registered, there is a legal presumption that every other act is done properly. When the person goes against the registered document and asserted different transaction, the burden is on him to establish the same.

16. In the light of the above settled legal position of law, now it has to be seen whether the defendants established plea of benami transaction and the fact that the entire sale consideration was paid by the husband of the first defendant. The evidence of D.W.1 clearly shows that her husband is not an income tax assessee and no account statement is produced to show that her husband had paid the sale consideration. Ex.B82 is the unregistered agreement said to have been executed by the owner in favour of her husband on 22.11.1968. It is relevant to note that no steps whatsoever had been taken to prove the said document. The



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stamp papers was also not purchased in the name of the husband of the first defendant.

17.Be that as it may, one of the circumstances that have been emphasized is that the first defendant's husband had obtained encumbrance certificate in respect of the suit property, which is marked as Ex.B84. No doubt, Ex.B84 is the encumbrance certificate and was obtained by the brother of the plaintiff. It is relevant to note that the brother of the plaintiff was a practicing Lawyer at Madurai and a resident of Madurai. Therefore, applying for encumbrance certificate in his name to verify the document of the property, which is going to be purchased by his own brother, is quite normal. That alone cannot be taken as one of the circumstances to show that benami transaction has been proved.

18.It is relevant to note that another circumstance that was pleaded to show that the husband of the first defendant has sufficient income to purchase the property is that Subramanian had another house in the North Veli Street, Madurai and he had sold the same, out of which the sale consideration of Ex.B1 was paid. Though it is admitted by both sides that Subramanian had a house at Madurai and it has been sold prior to the purchase of the suit property under Ex.B1, the



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defendants had not produced any document or the copy of the document to show the nature of the sale consideration derived from the said house. Whereas, Ex.X7, release deed executed by the first wife also indicates that a sum of Rs.5,500/- was paid towards permanent alimony and after receiving the entire amount, the release deed had been executed. Therefore, in the absence of any evidence in this regard to show that the husband of the first defendant derived the consideration amount by selling an another house, it cannot be presumed that only by selling the said house, the first defendant's husband purchased the present suit property.

19.Further, it is to be noted that the very motive for benami purchase is to avoid the possible claim of the first wife. The proceedings had culminated in the year 1971 and the release deed was also executed by the first wife in favour of Subramanian under Ex.X7, in the year 1971. Therefore, when the said proceedings was culminated, the normal conduct of the person, who purchased the property in benami, particularly the person, who was a lawyer by profession and not an illiterate, would be either to demand reconveyance or settlement of the property in his name. It has not been done so. This aspect also creates serious doubt about the benami transaction.



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20.It is the specific contention of the plaintiff that he had decided to renovate the house property and convert the portion of the same into non residential area. In this regard, he had applied for getting permission from the planning authorities. It is relevant to note that Ex.X8, is an application for the purpose of getting approval for renovation, submitted to the Corporation by the plaintiff. Ex.X9 is the plan for approval. Ex.X10 is the undertaking of the plaintiff to the Corporation. Ex.X11 is the proceedings from the Madurai Corporation to the plaintiff refusing to accord approval on account of deviation. Ex.X12 is the proceedings initiated before the Commissioner of Corporation, Madurai. Ex.X13 is the vakalat.

21.In the petition submitted before the Commissioner, Madurai Corporation for restoration of electricity, water and sewage connection, the husband of the first defendant, Subramanian had appeared on behalf of the plaintiff as a Lawyer. D.W.1 also admitted about the signature of her husband in the vakalt and also the petition filed by her husband. Further, Ex.C1 is the postal card sent by the first defendant. She admitted that the post card had been sent by the first defendant, in which the rubber stamp of her husband is also affixed. It had been addressed to her uncle indicating about the denial of permission. These



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facts clearly show that if the property was purchased in benami in the name of the plaintiff by his brother Subramanian, when the planning permission was refused and all the proceedings have been taken before the concerned authorities, being a Lawyer Subramanian would not have prepared those applications in the name of his brother alone. He would have infact acted on his behalf. He had only appeared as a Lawyer. This conduct of the brother not making any claim or not asserting his right over the suit property at the relevant point of time makes it very clear that the plea of benami transaction by the wife and children of Subramanian after his death cannot be countenanced.

22.At the relevant point of time, the application filed before the concerned authority on behalf of the plaintiff by Subramanian only as a Lawyer clearly shows that he had not shown any animus or shown any hostile intention to treat the suit property as his absolute property. These facts had not even been considered by the trial Court. It is the specific case of the plaintiff that a sum of Rs.3,50,000/- had been spent by him to renovate the house. To substantiate the same, he had also filed his bank accounts under Ex.A9 to Ex.A12. The said documents clearly shows the withdrawal of the amount from the said account at the relevant point of time. It is also the contention of the plaintiff that since his



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brother was living in the suit property, he had handed over the money to his brother and his brother was monitoring all the construction work.

23.Though the defendants claim that entire amount had been spent by the husband of the first defendant, the evidence of the first defendant clearly shows that her husband did not have any account and he had not withdrawn any amount from his bank account at the relevant point of time. Besides, she also admitted in her evidence that he had not even received any amount from the third party. These facts create serious doubt about the plea of benami transaction. Ex.A9 to Ex.A20 clearly show that during the period of renovation, nearly a sum of Rs.3 lakhs had been withdrawn by the plaintiff. Therefore, the plaintiff's contention that he had handed over the amount to his brother, who is the eldest brother in the family is more probable.

24.Admittedly the plaintiff was residing far away from Madurai and his brother was looking after all the matters and the renovation work was done at his supervision. Merely on the basis of the evidence of D.W.2 to D.W.6, who had done some civil works under the instructions of Subramanian, the plea of benami transaction cannot be established. When Subramanian being the eldest brother



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and he was already residing in the house, it is normal for him to engage the workers to carry out renovation works. Therefore, that fact alone will not be a ground to hold that benami transaction has been established.

24. Another circumstances, which had been pleaded by the first defendant is that after the renovation work the husband of the first defendant conducted Gragapravesam in the house and the invitation and photographs were also filed to substantiate the same. It is the contention of the defendants that normally the owners of the house only will perform Gragapravesam and the said fact clearly proves the benami transaction. The plaintiff in his evidence clearly spoken that since Subramanian was the eldest brother of the family and residing in the suit property, the invitation was printed in the name of the husband of the first defendant and house warming ceremony was performed in his name and the same cannot be a ground to hold that the entire benami transaction is proved.

25. The plaintiff also clearly explained how the custody of the original documents came to his brother. The specific case of the plaintiff is that during the proceedings before the planning authorities, the first defendant's husband required all the original documents. Therefore, the plaintiff had handed over all the original



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documents of the property to his brother Subramanian. The very fact that the first defendant's husband had appeared in that proceedings as a Lawyer and he had not claimed any right or shown any animus or hostile intention at the relevant point of time to hold that the suit property is his absolute property. The explanation given by the plaintiff with regard to the custody of the original documents is more probable. If really the plaintiff is not having any right over the property what was the necessity for the first defendant to send Ex.A8 postal card to her uncle. Therefore, the contention of the defendants the suit property was all along treated as absolute property of Subramanian cannot be countenanced.

26.The other submission made by the learned counsel for the defendants is that the plaintiff got married in the year 1977. Therefore, his contention that he made enquiry through his father-in-law before purchasing the property on 01.02.1969 is highly improbable. The evidence and records shows that the plaintiff had married his sister's daughter and his sister was residing in Madurai at the relevant point of time. Therefore, making enquiry through his uncle even before his marriage is quite possible. Hence, that cannot be a ground to hold that the entire transaction is benami transaction.



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27.From the entire evidence, the defendants had not established the source for the purchase of the property by the first defendant's husband. The fact that how the custody of the documents came to the hands of the first defendant's husband was also clearly established by the plaintiff. Subramanian was in fiduciary relationship with his younger brother, since he is the eldest brother of the family and also he is a Lawyer by profession. Therefore, keeping the documents in his custody particularly, when he had prosecuted certain matters before the authorities on behalf of the plaintiff is quite possible.

28.As far as the motive is concerned, the very motive for benami transaction is to defeat the rights of the first wife. Even such motive is true, the first defendant's husband kept silent even after his first wife relinquished her right in the year 1971 and he had not asserted his right independently as a owner. Whereas, he stood only as an agent of the plaintiff. Therefore, the plea of benami transaction has to fail. Further, merely because the defendants are in possession of the suit property and paying the house tax in their name, that will not be sufficient to prove the benami transaction. Admittedly, the first defendant was a practicing Lawyer and he was inducted into the suit property and he was residing there. Hence, it is normal for him to pay house tax and water tax and keeping the receipts



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with him. Therefore, merely on the basis of production of these receipts by the defendants, it cannot be concluded that the entire transaction is benami transaction.

29.Further, it was also urged before this Court that the plaintiff had not established the so called pro-note, under which he had borrowed the amount to pay the advance amount. When Ex.B1, sale deed was perused, it makes it clear that only the plaintiff had paid the entire sale consideration. To establish the contention of the defendants that the plaintiff has no income to pay the sale consideration, one of the attesting witnesses was alive even during trial, but the defendants had not even taken any steps to examine him. Similarly, the vendor of the suit property was also not examined.

30.Considering these aspects, this Court is of the view that the finding of the trial Court that the defendants perfected title by adverse possession is also not correct. In order to prove the plea of adverse possession, hostile intention and animus on the part of the defendant's husband has to be established. When Subramanian himself has not shown any animus and hostile intention to hold that the suit property is his absolute property, the plea of adverse possession has to



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necessarily fail. Though various judgments have been placed by the learned counsel for the defendants with regard to his contentions, the fact remains that the above judgments are not applicable to the facts of the present case. The plea of benami transaction has not been established by the defendants.

31.Accordingly, all the points are answered. The judgment of the trial Court is set aside and the suit is decreed for declaration and recovery of possession and also the accounts as prayed for. The defendants 1 to 4 are directed to hand over the possession of the suit property within a period of three months from the date of receipt of a copy of this judgment.

32.In the result, the Appeal Suit is allowed. No costs.

26.06.2023

NCC : Yes/NO
Index : Yes/No
Internet : Yes/No
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To

- 1.The Subordinate Court,
Madurai.
- 2.The Section Officer,
Vernacular Section,
Madruai Bench of Madras High Court,
Madurai.



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N.SATHISH KUMAR, J.

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Judgment made in
A.S.No.1079 of 1989

26.06.2023