

ANANT
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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO.314 OF 2022
WITH
INTERIM APPLICATION NO.2235 OF 2022
IN
SECOND APPEAL NO.314 OF 2022**

- | | | | |
|---|---------------------------------|---|---------------|
| 1 | Anil Anantrao Naik |) | |
| | Age: 80 years, Occ: Pensioner |) | |
| | R/o. Blot No. 4, "Anant" |) | |
| | Plot No. 99, S. No. 585, |) | |
| | Salisbury Park, Market Yard, |) | |
| | Gultekadi, Pune - 411037 |) | |
| 2 | Mrs. Ratnamala Anil Naik |) | |
| | Age: 70 years, Occ: Household |) | |
| 3 | Mr. Tejal Anil Naik |) | |
| | Age: 47 years, Occ: Nil |) | |
| 4 | Miss Minal Anil Naik |) | |
| | Age: 40 years, Occ: Nil |) | |
| 5 | Mr. Yogesh Anil Naik |) | |
| | Age: 35 years, Occ: Service |) | |
| | Nos. 2 to 5, R/at. Block No. 4, |) | |
| | "Anant" Plot No 99, S. No. 585, |) | |
| | Salisbury Park, Market Yard, |) | |
| | Gultekadi, Pune - 411037 |) | .. Appellants |

Versus

- | | | |
|---|------------------------------------|---|
| 1 | Smt. Indumati Anantrao Naik (dead) |) |
| | (Represented by her legal |) |
| | representatives and heirs) |) |

- 1A Dr. Amar Anantrao Naik)
 Age 84 years, Occ: Well to do)
 R/at San Antonia Texas USA)
- 1B Bhausahab Anantrao Naik)
 Age 87 years, Occ : Retired)
- 1C Suhas Anantrao Naik)
 Age 77 years, Occ: Service)
 Both R/at Plot No. 99,)
 A. No. 585, Salisbury Park,)
 Market Yard, Gultekadi,)
 Pune - 411037) .. Respondents

**WITH
 SECOND APPEAL NO.315 OF 2022**

- 1 Anil Anantrao Naik)
 Age: 80 years, Occ: Pensioner)
 R/o. Blot No. 4, "Anant")
 Plot No. 99, S. No. 585,)
 Salisbury Park, Market Yard,)
 Gultekadi, Pune - 411037)
- 2 Mrs. Ratnamala Anil Naik)
 Age: 70 years, Occ: Household)
- 3 Mr. Tejal Anil Naik)
 Age: 47 years, Occ: Nil)
- 4 Miss Minal Anil Naik)
 Age: 40 years, Occ: Nil)
- 5 Mr. Yogesh Anil Naik)
 Age: 35 years, Occ: Service)
 Nos. 2 to 5, R/at. Block No. 4,)
 "Anant" Plot No 99, S. No. 585,)
 Salisbury Park, Market Yard,)

Gultekadi, Pune - 411037) .. Appellants

Versus

1 Smt. Indumati Anantrao Naik (dead))
(Represented by her legal)
representatives and heirs))

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Age 77 years, Occ: Service)
Both R/at Plot No. 99,)
A. No. 585, Salisbury Park,)
Market Yard, Gultekadi,)
Pune - 411037) .. Respondents

Mr. S. N. Chandrachood for the Appellants in both the Appeals.

Mr. Niranjan A. Mogre a/w. Siddhesh S. Borkar for the Respondents

CORAM : SANDEEP V. MARNE, J.

RESERVED ON : 17 JANUARY 2024

PRONOUNCED ON : 23 JANUARY 2024

JUDGMENT:

1. These Appeals are filed by the Appellants challenging the common Judgment and Order dated 3 September 2021 passed

by District Judge, Pune in Regular Civil Appeal No. 669 of 2008 and Regular Civil Appeal No. 366 of 2017. Subject matter of challenge in Regular Civil Appeal No. 669 of 2008 was Decree dated 17 July 2008 passed by the Civil Judge Senior Division, Pune rejecting the counterclaim filed by the Appellants seeking a declaration that the Plaintiffs do not have right to claim possession of the suit properties from the Defendants therein, as Plaintiff is merely a Benamidar and trustee of the suit properties. After rejecting the counterclaim filed by the Defendants/Appellants, the Court of Civil Judge, Senior Division returned the Plaint for presentation to the Small Causes Court, Pune under Order 7 Rule 10 of the Civil Procedure Code, 1908 **(Code)** by holding that it did not have jurisdiction to decide Plaintiff's prayer for recovery of the possession from gratuitous licensees. Regular Civil Appeal No. 669 of 2008 was thus instituted by the Appellants to the extent of rejection of their counterclaim. Regular Civil Appeal No. 366 of 2017 was filed by the Appellants challenging the decree dated 24 April 2017 passed by the Small Causes Court, Pune decreeing the Plaintiff's suit and directing the Defendants/Appellants to hand over the possession of the suit property to the Plaintiff. Since both the Appeals arise of the same proceedings between the parties, the learned counsel appearing for rival parties have requested for hearing of both the appeals together.

2. Facts of the case as pleaded in the Plaint, are that the Plaintiff-Indumati Anantrao Naik purchased Plot No. 99,

Survey No. 585 situated at Gultekdi, Pune by registered Sale Deed dated 3 June 1975. That she applied for the development permission to Pune Municipal Corporation for construction of building on the plot and that Pune Municipal Corporation issued Commencement Certificate dated 24 April 1986 in her name. That she constructed ground plus two stored building with two flats on each floor. Completion Certificate in respect of the construction was issued on 25 November 1991. That construction was carried out by her through contributions given by her three sons Amar, Bhausahab and Suhas. Thus, Plaintiff claims ownership in respect of Plot as well as the constructed structure. That she allowed her sons-Bhausahab to occupy Flat no. 1 on ground floor and Suhas to occupy the Block No. 2 on the ground floor. That the Plaintiff herself resided in the Flat no. 5 on the first floor. That the entire second floor remained in the possession of her son - Amar, who was Anesthetist by profession and has been settled in USA. That the Plaintiff was also using the Flat No. 4 on the first floor, which was in her possession.

3. Plaintiff further pleaded that Defendant No. 1-Anil is also her son and he was serving in the Department of National Highways Department of Government of Maharashtra and was allotted a government quarter. That Anil retired in July 1997 but continued to occupy the government quarter for considerable period of time. He requested Plaintiff to allow him to reside in one of the flats in the constructed building by Plaintiff. The Plaintiff therefore allowed Anil to occupy Flat no.

4 on the first floor temporarily and this is how, Anil shifted in the said Flat no. 4 alongwith his family on 1 March 1998.

4. Plaintiff claims that after entering into Flat no. 4, Anil started harassing Plaintiff and her other sons. The Plaintiff, therefore, decided to withdraw temporary permission given to Anil to occupy Flat no. 4 and accordingly issued Notice dated 21 December 1999 to Anil terminating the gratuitous license and called upon Anil to vacate Flat No. 4. That Anil, however, replied to the Notice and refused to vacate Flat no. 4. This led to filing of Special Civil Suit No. 174 of 2000 by Plaintiff-Indumati in the Court of Civil Judge, Senior Division, Pune for recovery of possession of suit property from the Defendant-Anil and for awarding future *mesne profit*. The suit property in the Plaintiff was described as Block/Flat no. 4 on the first floor in the house named as "Anant", constructed on Plot no. 99 at Survey No. 585, City Survey No. 3277 of Village Munjeri, at Gultekdi, Pune. Alongwith Anil, his wife - Ratnamala, daughters-Tejal and Meenal and son-Yogesh were also impleaded as the Defendant Nos. 2 to 5 to the suit.

5. The Defendant No. 1- Anil appeared in the suit and filed Written Statement and Counterclaim contending that the Plot was purchased by the Defendant-Anil in the name of his mother - Indumati. That the entire consideration for the purchase of the plot was paid by him. He further contended that the name of the mother-Indumati was recorded in the Sale-deed merely as a trustee and Defendant-Anil is the actual

owner of the suit property. He further contended that he constructed compound wall on the plot by incurring expenditure for the same. That in 1985 all the brothers together decided to construct their own flats on the plot and the building has been constructed by all the four brothers by incurring expenditure. That this is how Defendant-Anil is the owner of both the plot as well as flat. He therefore sought a declaration that Plaintiff did not have any right to seek possession of the suit property from the original owners since she is merely a Benamidar and trustee without possessing any title in respect of the suit property.

6. The Court of Civil Judge, Senior Division, Pune after hearing both the sides passed the judgment and order dated 17 July 2008 and only decided the Suit in part. It decided Defendants' counterclaim by framing an issue as to whether the Defendants were entitled to seek declaration of Plaintiff being only a benamidar and trustee and Defendant-Anil being the actual owner of the Plot. The issue was answered against the Defendants holding that under the provisions of Benami Transactions (Prohibition) Act, 1988, the Plaintiff is the owner of the suit property. However after deciding the issue about ownership of the Plot, the Trial Court declined to entertain Plaintiff's Suit for eviction of Defendants holding that it lacked jurisdiction to decide the suit for eviction of gratuitous licensees and that the Court of Small Causes, Pune has jurisdiction to try the suit. The Civil Court therefore returned the Plaint for being presented to the Court of Small Causes,

Pune.

7. The Defendants filed Regular Civil Appeal No. 669 of 2008 before the District Court, Pune challenging the Judgment and Order dated 17 July 2008 to the limited extent of rejection of the counterclaim filed by them. The Defendants did not question the Civil Court's finding that it lacked jurisdiction to try the Suit seeking eviction of gratuitous licensee and that only the Small Causes Court had jurisdiction to determine that prayer. The Regular Civil Appeal No. 699 of 2008 remained pending on the file of District Judge, Pune for considerable period of time.

8. In the meantime, the plaint in Special Civil Suit No. 174 of 2000, which was returned by the Civil Court, was presented by Plaintiff in the Court of Small Causes, Pune and was numbered as Civil Suit No. 556 of 2008. In that suit, Plaintiff claimed possession of the suit properties from the Defendants alongwith that future mesne profit. The Small Causes Court delivered the Judgment and Decree dated 24 April 2017 decreeing the Plaintiffs suit by directing the Defendants to handover the vacant and peaceful possession of the suit property with further direction to conduct inquiry under Order 20 Rule 12 of the Code for *mesne profit*.

9. Aggrieved by the decree dated 24 April 2017, the Defendants filed Regular Civil Appeal No. 366 of 2017 before the District Court, Pune before whom the Appeal No. 669 of 2008 was still pending. Both the Appeals were heard together

by the District Judge and by common Judgment and Order dated 3 September 2021, the first Appellate Court has proceeded to dismiss both the Appeals. Aggrieved by the decision of the first Appellate Court, the Appellants have filed the present Appeals.

10. Since both Second Appeals arise out of same proceedings between the parties, at the joint request of the learned counsel appearing for parties, Second Appeal No. 314 of 2022 and Second Appeal No. 315 of 2022 are heard and decided by this common judgment.

11. Mr. Chandrachud the learned counsel appearing for the Appellants would submit that the first Appellate Court has committed gross error in dismissing both the Appeals filed by the Appellants. He would submit that during the pendency of the Civil Suit No. 556 of 2008 before the Small Causes Court, the Plaintiff - Indumati expired and other three sons - Amar, Bhuasaheb and Suhas were erroneously brought on record as her legal representatives on the strength alleged Will executed by the mother-Indumati. That even if Defendant - Anil's claim of being exclusive owner of the plot and flat is to be defeated, he undoubtedly acquired $\frac{1}{4}$ share in the Plot and constructed structure after the death of the mother-Indumati. That to defeat such share of the Defendant-Anil, three brothers-Amar, Bhausahab and Suhas brought into existence the alleged Will of the mother - Indumati. That since they are the propounders of the Will, burden of proving the Will rested solely on their

shoulder. That the Will was sought to be proved by Amar, Bhausahab and Suhas by leading evidence of Nitant Narayan Surve, who is claimed to be the attesting witness to the Indumati's Will. That after recording examination-in-chief of Nitant Narayan Surve, though the Court passed "No Cross" order, the same was subsequently set aside on 12 February 2015 permitting Defendants to cross examine the witness on payment of cost of Rs. 800/-. That despite payment of costs, the witness did not turn up and the Plaintiffs did not make any efforts to present the said witness for the cross examination. That since the evidence of Nitant Narayan Surve has gone on record in absence of cross-examination, the same has no evidentiary value and the Will is not proved. Therefore, the Defendant-Anil has automatically acquired $\frac{1}{4}$ share in the plot as well as constructed structure.

12. Mr. Chandrachud would further submit that though the order dated 12 February 2015 directed the payment of Bhatta (process fees), the practice of depositing the Bhatta before issuance of witness Summons has long since been discontinued and the practice that is followed is to pay Bhatta to the witness after recording of his deposition. That therefore non-payment of Bhatta could not have been the reason for absence of witness for the cross-examination.

13. Mr. Chandrachud would further submit that the Civil Court has grossly erred in rejecting Defendant's counterclaim by which the declaration was sought about Anil being the sole

owner of Plot. That Anil led sufficient evidence to prove that he had means to purchase the plot and that he actually collected and paid the amount of consideration for the purchase of Plot. That on the other hand, mother – Indumati did not have any independent income. That she did not produce the passbook entries prior to the year 1988 to show any entries of income earned by her or contribution paid by Amar. That withholding passbook entries prior to 1988 must lead to adverse inference against Plaintiff of not having sufficient means to arrange funds for the purchase of Plot. That various entries placed on record about Amar's bank account depicts transfer of only minuscule amounts to Indumati, which were insufficient for the payment of consideration for the purchase of plot. Mr. Chandrachood would further submit that the Defendant-Anil proved before the Civil Court that mother – Indumati was mere benamidar and trustee under the provisions of section 4(3)(b) of the Benami Transactions (Prohibition) Act, 1988. In support of his contentions Mr. Chandrachood has relied upon the judgments of the Apex Court in the matter of ***Binapani Paul vs. Pratima Ghosh and Others*** reported in **(2007) 6 SCC 100** and of this Court in the matter of ***Milan Madhukar Korgaonkar vs. Shashank Shrikrishna Gandhi*** reported in **2010 (3) Bom. C.R. 704**

14. Mr. Chandrachood would further submit that both the Courts ought to have appreciated the fact that only one son (Anil) is sought to be excluded from the estate of the mother – Indumati, which is highly improbable. That the Defendant-Anil

has been residing in the suit property for a considerable time before the death of the mother and it is impossible that he alone can be excluded without any share in the plot or in the constructed portion. That Defendant-Anil is at advanced age of 81 years and has absolutely no other place to stay. That despite spending substantial amounts, both for purchase of the plot as well as construction of the building, the Defendant-Anil and his family members cannot be thrown out of the house while other three brothers, one of whom is settled in USA, are allowed to enjoy the property. Mr. Chandrachud would therefore submit that there is substantial questions of law recorded in the Appeals warranting their admission and setting aside the Orders passed by Civil Court, Small Causes Court as well as the District Court.

15. *Per contra*, Mr. Mogre the learned Counsel appearing for the Respondents would oppose both the Appeals. He would submit that the Defendants themselves are responsible for non-conduct of cross examination of attesting witness. That "No Cross" order was subject to twin conditions of payment of costs of Rs. 800/- and payment of Bhatta. That on the account of non-payment of Bhatta, Witness Summon was not issued to attesting witness and therefore Defendants are solely responsible for non-issuance of Witness Summon to the witness. He would rely on the provisions of Section 33 of the Indian Evidence Act, 1872 in support of his contention that if a party keeps away a witness, his deposition recorded in same proceedings can be relied upon. He would rely on provisions of

Order 48 Rule 1 of the Code in support of his contention that process to the witness in the present case was required to be served at the expense of the Defendants.

16. Mr. Mogre would further submit that the Trial and the first Appellate Court had recorded findings of the fact based on evidence on record that the suit property is not the benami property of the Defendant-Anil. That both the Courts have held that Plot has been purchased by mother - Indumati through her savings through funds provided by her son-Amar. That such finding of fact needs no interference at the hands of this Court in exercise of jurisdiction under Section 100 of the Code. So far eviction of Defendant - Anil from the suit property is concerned, Mr. Mogre would submit that the Defendants do not have right to continue to occupy the suit premises, the license in respect of which has been validly revoked by Plaintiff. That the Defendants are trespassers in the suit property. He would therefore further submit that no substantial question of law is involved in the present Appeals and would pray for their dismissal.

17. Rival contentions of the parties now fall for my consideration.

18. It must be borne in mind at the very outset that concurrent findings are recorded against the Appellants in both set of proceedings. The Defendant-Anil's counterclaim is rejected by the Civil Court holding that he is not the owner of

the plot, and the said finding has been upheld by the first Appellate Court. Similarly, the Small Causes Court has held that the Defendants' gratuitous licensee has been validly revoked by the Plaintiffs and they are the trespassers in the suit property. This finding is also upheld by the first Appellate Court. In the light of the concurrent findings of the Trial and the first Appellate Court, the scope of inquiry by this Court is in a narrow compass and must be restricted to examination of involvement of any substantial question of law.

19. Mr. Chandrachood has made strenuous efforts to impress upon me that both the suits deserve remand for the purpose of offering an opportunity to Appellants to cross-examine the attesting witness - Nitant Narayan Survey. According to him, such remand is warranted as non-grant of opportunity to the Defendants to cross-examine the attesting witness has resulted in miscarriage of justice. As a matter of fact, Will executed by the mother - Indumati was never the subject matter of the issue either before the Civil Court or before the Small Causes Court. The Will was brought on record only on account of Indumati's death during the pendency of the Civil Suit No. 556 of 2008 before the Small Causes Court. After Indumati's death, her three children Amar, Bhausahab and Suhas were brought on record as her legal heirs. They placed on record Indumati's Will registered on 05 June 1998. Though issue of validity of the Will was not directly or substantially the issue in the proceedings before the Small Causes Court, the Defendants expected Amar, Bhausahab and Suhas to prove the Will.

20. Mr. Nitant Narayan Surve was examined by the legal heirs of the Plaintiff to prove the Will by filing his Affidavit of evidence. The Examination-in-Chief of the attesting witness was conducted on 7 January 2015. Since the Defendants and their Advocate remained absent, cross-examination was adjourned to 17 January 2015. Though witness remained present on 17 January 2015, the Defendants and their Advocate once again remained absent. Therefore, the Court passed the order of closure of the cross-examination of the witness. The Defendants filed an application on 4 February 2015 seeking recall of "No Cross" order. It appears that "No Cross" order was also passed in respect of two other witnesses examined by the Plaintiffs. Therefore, a composite application was filed by the Defendants on 4 February 2015 for recall of "No Cross" order passed in respect of P.W. Nos. 1, 2 and 3. The Application was allowed by the Small Causes Court by the Order dated 12 February 2015 granting permission for cross-examination of the witness subject to the payment of Bhatta and cost of Rs.800/-. It appears that the Defendants paid cost of Rs.800/- to the Plaintiffs. However, Bhatta was not paid. Thereafter, the Advocate for the Defendants cross examined P.W. No. 1-Amar on 07 March 2015, who happened to remain present in Court in absence of issuance of process. However, Defendants did not take any steps for the attendance of the P.W. No. 3 - Nitant Surve by paying process charges (Bhatta) for issuance of the witness summons to him. Ordinarily, under the provisions of Order 48 Rule 1 of the Code, process charges

are required to be paid by the parties at whose instance the process is to be issued. The Order 48 Rule 1 reads thus:

"1. Process to be served at the expense of party issuing -

(1) Every process issued under this Code shall be served at the expense of the party on whose behalf it is issued, unless the Court otherwise directs.

(2) Costs of service - The court-fee chargeable for such service shall be paid within a time to be fixed-before the process is issued."

21. However, in the event of the Court directing otherwise, the usual procedure to incur of expenditure for the service of process by the party on whose behalf the witness is examined is not followed. In the present case, the Court directed otherwise while passing the order dated 12 February 2015. It directed the Defendants to pay both costs as well as Bhatta. The Defendants partly complied with the order by paying costs, but did not take any steps for payment of Bhatta, on account of which witness summons to P.W. No. 3 - Nitant Narayan Surve was not issued. Thus, the Defendants cannot be permitted to blame Plaintiffs for non-conduct of the cross-examination of the P.W. No. 3.

22. Mr. Chadrachood has strenuously attempted to urge before me that practice of deposit of Bhatta charges before issuance of the witness summons has long been discontinued in the Trial Court. He has submitted that usual practice is to

pay the Bhatta to the witness in cash. I am unable to agree. The Bhatta charges directed to be paid by the Court by order dated 12 February 2015 was for issuance of the process to the witness. The registry of the Court was not expected to issue witness summons to the P.W. No. 3 in absence of compliance with the order dated 12 February 2015 by the Defendants.

23. Even if objection of non-payment of Bhatta by the Defendants is to be ignored as hyper-technical, Defendants cannot run away from the fact that the suit remained pending on the file of the Small Causes Judge for two long years after passing of Order dated 12 February 2015. It had been decided on 24 April 2017. While making hue and cry about the denial of the opportunity of cross-examination of P.W. No. 3 – Nitin Narayan Surve, the Defendants have not placed on record any efforts made by them or any complaint made to the Trial Court about non-presence of P.W. No. 3 to conduct cross-examination. In my view, the Defendants ought to have insisted before the Trial Court that conduct of the cross examination of P.W. No. 3 was of vital importance. The Defendants ought not to have proceeded to argue the suit without first cross-examining the P.W. No. 3. Considering the fact that the Application dated 4 February 2015 was made for recall of all three Plaintiff's witnesses and the fact that the Defendants conducted cross-examination of Plaintiff's main witness, an inference can safely be drawn that they apparently were not interested in cross-examining the attesting witness or deliberately avoided the cross-examination so as to leave a possible technical lacuna in

the trial. It must be borne in mind that procedural niceties are provided to ensure fair trial and not for deliberate misuse to frustrate the trial.

24. Also of relevance is the fact that the issue of validity of Will had relevance only to the aspect of Amar, Bhausahab and Suhas representing Indumati as her legal heirs. Beyond this issue, validity of the Will is not relevant to the dispute involved before the Small Causes Court. If it was really the issue involved in the Trial Court, the Defendants ought to have made application to the Small Causes Court for framing of an additional issue relating to validity of Will. For that purpose the amendment in the Suit would have been necessary by claiming $\frac{1}{4}$ share in the plot by challenging the Will. Having not done so, the Defendants cannot now insist that the validity of the Will ought to have been framed as an issue by the Small Causes Court.

25. Both the Small Causes Court as well as the first Appellate Court have recorded finding of the fact that the Defendants did not made efforts to issue process for ensuing attendance of the P.W. No. 3. It is also required to be borne in mind that remit of inquiry before the Small Causes Court was only with regard to the eviction of the Defendants in their capacity as gratuitous licensee. The issue of ownership of suit property was already concluded by the Civil Court by the Order dated 17 July 2008. In my view therefore, no question of law arises for this Court to entertain the present Appeals on the aspect of non-conduct

of cross examination by the Defendants of P.W No. 3 - Nitant Narayan Surve.

26. So far as the aspect of Defendant-Anil being a sole owner of the plot and Indumati being mere Benamidar and trustee is concerned, both the Civil Court as well as the first Appellate Court have recorded findings of the fact after evaluation of the evidence that the Plaintiff-Indumati possessed funds for purchase of the plot. Perusal of the findings recorded by the Civil Court in the order dated 17 July 2008 and the first Appellate Court would indicate that various amounts were remitted from time to time by Amar to Indumati. While Mr. Chandrachood has attempted to suggest that the total of the said remittance is minuscule as compared to the consideration paid for purchase of the plot, it is seen that the first Appellate Court has recorded a finding of fact that Amar was 'continuously' sending money from his account to Indumati. There is thus evidence to show that Indumati was receiving foreign currency remittances continuously since the year 1970 onwards. Mere failure on the part of the Indumati to produce entries in the pass book prior to the year 1988 does not and cannot nullify the entries in the bank account of Amar reflecting the payments being made in the account of Indumati. The Defendant No. 1 thus failed to prove that Indumati lacked any means to purchase plot. It must be borne in mind here that purchase of plot is in the name of Indumati, which gives rise to the strong presumption that she paid the consideration for the purchase of the plot. Such presumption is

sought to be dispelled by the Defendant-Anil by taking a defence that Indumati did not have any means to purchase the plot. Therefore, the burden shifted on the Defendant-Anil to prove that Indumati had no funds for purchase of the plot. Far from above discharging the burden, Indumati proved before the Civil Court that she received remittances continuously from Amar showing thereby that she had some means for arranging funds for the purchase of the plot.

27. The Defendant-Anil set up a case that the transaction was Benami. However there is prohibition on recoevty of property which is claimed to be held benami under section 4 of the Benami Transactions (Prohibition) Act, 1988 reads thus:

"Section 4. Prohibition of the right to recover property held benami.

(1) No suit, claim or action to enforce any right in respect of any property held *benami* against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property.

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

(3) Nothing in this section shall apply-

(a) where the person in whose name the property is held is a coparcener in a Hindu undivided family and the property is held for

the benefit of the coparceners in the family;
or

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

28. Reliance is placed by the Defendant - Anil on the clause (b) Section (3) of Section (4) of the Benami Property Transactions Act by taking a stand that Indumati was merely a trustee holding the property belonging to Defendant-Anil. The first Appellate Court has relied on the judgment of Apex Court in the matter **Jaydayal Vs. Bibi Hazara** reported in **1974 (1) SCC 3** laying down the tests for determining the nature of transactions. After applying the said tests, the first Appellate Court has recorded findings of fact that the Indumati is the real owner of the plot. It is seen that the Indumati had source of fund, she was in possession of the plot, she applied for development permission and procured it in her name, she continued to possess title deeds of the plot. Therefore, after the applying the tests laid down by the Apex Court, it is difficult to suggest that Indumati was not real owner of the plot.

29. Mr. Chandrachud has placed reliance on the judgment of the Apex Court in the matter of **Binapani Paul** (supra). In my view the said judgment has no application to the facts of the present case. In that case, issue involved before the Apex

Court was about practice of purchasing property in the name of the wife out of the funds provided by the husband. In the present case, purchase of the property is by mother and evidence shows that she had funds to purchase the same. Reliance of Mr. Chandrachood on the judgment of this Court in the ***Milan Madhukar Korgaonkar*** (supra) again would not assist the case of the Appellants as the said case again involves issue of applicability of prohibition against the Benami transactions where property is purchased in the name of the wife or unmarried daughter.

30. Mr. Chandrachood has criticized the first Appellate Court for taking into consideration the point of applicability of Section 14 of the Hindu Succession Act which according to Mr. Chandrachood was never raised by the Plaintiffs before the Trial Court. The Appellate Court has treated applicability of provisions of Section 14 of the Hindu Succession Act as a pure question of law requiring no pleading. Applying the provisions of Section 14 of the Hindu Succession Act, the first Appellate Court has held that the property purchased by the Hindu woman is her absolute property. In my view, though the first Appellate Court cannot be entirely faulted for having relied upon the Section 14 of the Hindu Succession Act in absence of pleadings or findings by the Trial Court, even if the said point is to be ignored, the conclusion of Indumati being rightful owner of the plot cannot be altered. The said conclusion is reached by repelling contention of the Defendant-Anil of transaction being Benami.

31. After considering the overall prospectus of the case, I am of the view that no substantial question of law is involved in the present Appeals. Remanding the suit for fresh trial for conduct of cross-examination of the attesting witness is unnecessary in the light of validity of the Will not being the issue both before the Trial and the first Appellate Court. The issues answered by the Civil Court and Small Causes Court are as under:

1. Do the plaintiffs prove that they are owners of the suit premises, as described in plaint Para No. 1?
2. Do the plaintiffs prove that they have contributed towards the construction of the property bearing CTS No. 3277 Gultekadi, Pune-37?
3. Do the plaintiffs prove that the defendant no. 1 is a gratuitous licensee in the suit premises as granted by their mother Indumati.
4. Do the plaintiffs prove that the license of the defendant no. 1 has been revoked legally and he is now a trespasser?
5. Does the defendant no. 1 prove that he has constructed the first floor (i.e. suit premises) out of his own fund and is owner of the same?
6. Does the defendant no. 1 prove that the Sale-Deed of Plot No. 99, vide Sale - Deed dated 03/06/1975 is a benami transaction?
7. Whether plaintiffs are entitled for the possession of the suit property as claimed?
8. Whether plaintiffs are entitled for the mesne profits, as claimed?
9. Whether this Court has jurisdiction to entertain, try and decide the present suit?
10. What order and decree?

32. Similarly, the issues framed and answered by the first

Appellate Court are as under:

1. Whether the plaintiff Indumati is the exclusive owner of the plot bearing City Survey No. 3277, situated at Village Munjeri?
2. Whether the defendant no. 1 purchased the said plot in the name of his mother Indumati out of his own money?
3. Whether the defendants are the gratuitous licensee of the suit premises?
4. Whether the plaintiff is entitled to the relief of possession of the suit premises as claimed?
5. Whether judgment and decree call for any interference?
6. What order?

33. Thus Defendant-Anil's entitlement to ½ share in the Plot or validity of Indumati's Will was not subject matter of issue both before the Trial and first Appellate Court. Remanding the Suit for fresh trial at this stage, would indefinitely extend the length of litigation, which has ensued between the parties since the year 2000. Time has come to give full stop to the litigation *qua* the issue of Indumati's ownership of plot and construction and the Defendants' status as gratuitous licensee. If the Appellants / Defendants believe that the Will executed by the mother - Indumati is not valid, they would at liberty to initiate appropriate proceedings in that regard. The Defendants cannot expect the declaration about invalidity of the Will by way of sidewind in the suit relating to eviction of gratuitous licensee. Also in counterclaim filed for seeking declaration of absolute title by branding the transaction as benami, Defendants cannot now say that they must be given an

opportunity to claim $\frac{1}{4}$ share in the suit property by indirectly challenging the will. The remit of inquiry is the counterclaim was restricted to determination of nature of transaction, which was branded by Defendants as benami. Now Anil want to take up a plea that he owns $\frac{1}{4}$ share in the plot, which plea is based on admission that Indumati had exclusive title in the Plot. Defendant-Anil has failed to prove that he is the sole owner of the Plot. This however would not preclude Defendant-Anil from admitting Indumati as the sole owner and claiming $\frac{1}{4}$ share in the Plot and construction by challenging validity of the Will. Therefore, no opinion is expressed on the issue of validity of Will executed by Indumati and Appellants/Defendants are granted liberty to pursue the said issue by filing appropriate proceedings before appropriate Court.

34. Since no substantial question of law is involved in the Appeals, both Second Appeals are **dismissed**. There shall be no order as to costs.

35. With dismissal of appeals, pending Interim Applications also stand disposed of.

(SANDEEP V. MARNE, J.)

36. After the judgment is pronounced, the learned Counsel appearing for the Appellant would seek extension of interim order dated 12/10/2023 passed by this Court by which the Executing Court was restrained from proceeding with the

execution of the decree till the next date of hearing. The learned Counsel appearing for Respondents would submit that such protection was granted on account of mediation talks going on between the parties. Be that as it may. The interim order dated 12/10/2023 shall continue to operate for a period of 8 (eight) weeks from today.

(SANDEEP V. MARNE, J.)