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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% RESERVED ON: 18.07.2016
PRONOUNCED ON: 27.07.2016

\+ MAT.APP. (F.C.) 7/2014

YOGITA DASGUPTA ..... Appellant
Through: Mr. Gaurav Mitra with Mr. Adarsh Rai, Ms. Swati Bhardwaj and Ms. Bina Madhwan, Advocates.

versus

KAUSTAV DASGUPTA ..... Respondent
Through: Ms. Kiran Singh, Advocate.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MS. JUSTICE DEEPA SHARMA

S.RAVINDRA BHAT, J.

1. This defendant's appeal is directed against the judgment of the Family Court dated 01.11.2013 passed in CS No.13/2010. The impugned judgment decreed the husband's suit for declaration and permanent injunction in respect of flat Nos.H-2/21 & H-2/21D, First Floor, Mahavir Enclave, New Delhi - 110 045, which is hereby referred to as "suit property".

2. The brief facts are that the parties to the suit solemnized their marriage on 12.05.1999. Two children, i.e., a boy and a girl were born out of the wedlock. The suit property was purchased through a sale deed executed on 06.12.2006, which reflected the appellant as owner of the property. The parties started living separately in 2010;

eventually their marriage was dissolved by mutual consent under Section 13B of the Hindu Marriage Act by order dated 05.07.2014. The husband (hereafter referred to as "the plaintiff") filed a suit claiming to be real and true owner of the suit property.

3. The suit contended *inter alia* that since parties were living in a rented accommodation in Dwarka, in 2006, the husband purchased the suit property in the name of the appellant wife "out of love and affection". The suit also leveled certain allegations of matrimonial misbehavior against the wife, i.e., intimacy with one Rajnish Thakur, owner of the chartered bus, which the wife used for travelling to her office. It was alleged that the wife left the matrimonial home of her own accord after quarrelling with the plaintiff and later she attempted to sell the property. The appellant in the written statement objected to the maintainability of the suit and alleged that the husband plaintiff has concealed the facts. She asserted that she paid the consideration for the suit property and she was discharging the liability towards monthly installment payments for clearing the loan liability. She also alleged that the husband forced her out of the matrimonial home. The written statement even attributed acts of forgery to the plaintiff.

4. In support of the suit claim, the plaintiff led his evidence including the oral testimonies of three other witnesses. This included the testimonies of PW-2 and PW-3 who were bank officials and who brought the certified copies of statement of accounts for the period 01.10.2006 to 31.03.2013. Likewise the defendant relied upon the testimonies of three witnesses which included the evidence of DW-2 from State Bank of India which had produced the bank statement for the period 01.06.2006 - 31.07.2007 (Ex.DW-2/3) and the bank

account statement for the period 01.05.2006 - 31.07.2006 (Ex.DW-2/4).

5. The first issue framed by the Family Court was whether the plaintiff proved that he was owner of the property. While considering this, the Family Court took into account the provisions of the Benami Transactions (Prohibition) Act, 1988 (hereafter referred to as "Benami Act") and the judgments of the Supreme Court reported as*Nand Kishore Mehra v. Sushila Mehra*, AIR 1995 SC 215; *Jaydal Poddar v. Mst. Bibi Hazra*, AIR 1974 SC 171; *Gapadibai v. State of Madhya Pradesh* (1980) 2 SCC 327. The impugned judgment after noticing the relevant provisions specially Section 3 of the Benami Act as well as the ruling in *Nand Kishore Mehra(supra)* held that the onus to prove that the property was not for the benefit of the wife was upon the plaintiff/husband and that he was yet to prove it strictly. The Family Court thereafter observed as follows: **-**

> *"32. In the present case, it is not in dispute that the parties were married according to Hindu Customs and Rites on 12-05-99 and they have resided together till 27-02-2010.The suit property has been purchased on 06-12-2006 from its erstwhile owner. It is not in dispute that the Sale Deed had been executed in the name of the defendant. DW-4 was a witness to the registered Sale Deed and he has also deposed about the Sale Deed being executed in the name of the defendant without any force, pressure or coercion and he having signed the same in the presence of the Sub Registrar and the parties as a witness. It is further deposed by him that the Demand Draft for a sum of Rs.9 lakhs drawn on Central Bank of India, Janakpuri was also given at the time of execution of the Sale Deed.*
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> *33. The plaintiff, in his plaint had alleged that he had executed the Sale Deed in the name of the defendant out of love and affection as they were having a relationship as husband*

and wife. In his testimony as PW-1, he has clarified that the Sale Deed was registered in the name of the wife purely because the Stamp Duty was less if the property was registered in the name of the lady. The testimony of the plaintiff on this aspect has not been challenged by the defendant either in her written statement or at the stage of evidence. The sole defence that has been put forth by the defendant is that the sale consideration for the flat had been paid by her.

34. The plaintiff has explained in his testimony as PW-1 that the cost of the flat was Rs.15 lakhs and out of the Rs.15 lakhs, he had to pay Rs.10 lakhs by the end of December and remaining Rs.10 lakhs were to be paid after taking loan from the bank. There was no schedule for making payment of Rs.5 lakhs but they were to be paid by December, 2001. It was further deposed by him that he could not pay the entire amount of Rs.5 lakhs till December, 2006 but he took a personal loan of Rs.3,50,000/- from Syndicate Bank to pay the part consideration towards the cost of the flat. The remaining Rs.1,50,000/- was paid by him in the year 2007-08 as he had good relations and understanding with the builder. Whether the entire consideration amount vis-a-vis the builder was paid in 2006 or 2007 as little significance having regard to the fact that the Sale Deed was duly executed in the year 2006 and the possession of the flat was taken by the parties. It is evident from the testimony of the parties that the motive of giving this transaction a benami colour was to pay the stamp duty which can be done legitimately by having the property registered in the name of the wife."

6. It was also held by the Family Court that the intention of the parties was relevant and that the materials on record did not establish that the husband wished that the property was to belong to the wife. As regards consideration it was held that even though the loan was obtained jointly, it was for the reason that the sale deed was executed in favour of the wife. After considering the materials on record, i.e., Ex.PW-2/1, PW-3/1 and PW-3/2, it was held that the husband alone

repaid the loan and that the wife at no stage made any payments to discharge the liability for payment of consideration to acquire the suit property. With respect to the defendant's evidence it was noticed that she had secured a personal loan of Rs.1,96,000/- but there was nothing to show that any amount was used to discharge the liability on account of the flat. It was also noticed that the appellant wife had admitted that the entire loan was for the purchase of the flat and the plaintiff was repaying the loan advanced by the bank.

7. In the light of these considerations, the Trial Court held as follows: -

> *"42. Even if the plaintiff had been able to establish that he had purchased the flat for himself though in the name of his wife the defendant could have still succeeded in defeating the ownership claim of the plaintiff if she could have established that the property had been purchased for her benefit. Neither this plea had been taken nor any evidence has been led in this regard by the defendant. The conduct of the parties also does not establish that the flat had been purchased by the plaintiff for the benefit of the defendant/wife.*
>
> *43. The plaintiff has therefore, been able to successfully establish from the nature of the transaction and the surrounding circumstance that he is the actual owner of the suit property that had been purchased benami in the name of the plaintiff."*

In view of the above findings, the Court decreed the suit and held that the plaintiff husband was the real and true owner and was entitled to the injunctive relief claimed.

8. It is urged on behalf of the appellant by Mr. Gaurav Mitra that the Trial Court fell into error in not appreciating that the husband did not discharge the onus cast upon him to prove that the suit property

was not acquired for the benefit of the wife. It is submitted that a fair reading of Section 3 of the Benami Act would show that in the first instance property acquired in the name of the wife is not deemed to be *benami* property [Section 3 (2)] but - yet there is a statutory presumption in law that the property is for the benefit of wife. The expression "*unless the contrary is proved*" clearly places the onus of proving that this property was acquired not for the benefit of wife, upon the husband. It was urged that nowhere in the suit the plaintiff urged that the property though in the name of the wife was not for her benefit. Counsel emphasized repeatedly that the husband stated that the property was acquired in 2006 *"out of love and affection"* for the wife.

9. Learned counsel relied upon the observations and ruling in *Nand Kishore Mehra (supra)* specially the following portion of the judgment: -

> *"Further, we find it difficult to hold that a person permitted to purchase a property in the name of his wife or unmarried daughter under sub-section (2) of Section 3 notwithstanding the prohibition to enter into a benami transaction contained in sub-section (1) of Section 3 cannot enforce his rights arising therefrom, for to hold so would amount to holding that the Statute which allows creation of rights by a benami transaction also prohibits the enforcement of such rights, a contradiction which can never be attributed to a Statute. If that be so, there can be no valid reason to deny to a person, enforcement of his rights validly acquired even in the cast by purchase of property in the name of his wife or unmarried daughter, by making applicable the prohibition contained in respect of filing of suits or taking up of defences imposed in respect of benami transactions in general by sub-sections (1) and (2) of Section 4 of the Act. 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."

10. Learned counsel also urged that the Section 3 (2) was carefully worded. In that the requirement of proving that the property was acquired for the benefit is in the past tense. In other words, the use of the terms *"had been purchased for the benefit of wife"* in Section 3 underlines that it is at the time of purchase or acquisition of the property that the intention is material and not thereafter. It was submitted that in the present case the pleadings and the evidence clearly point to husband's intention that the property was to belong to the wife and, therefore, was for her benefit. The mere change of such intention subsequently, according to the counsel, would not detract from the initial presumption or displace the onus to prove that from inception property was not purchased for the benefit of wife. It was, therefore, urged that mere fact that the husband paid installments towards discharging a loan liability in respect of the consideration paid for purchase of the property was not a sufficient indicator of the lack of intention on his part that the wife should own the property. Learned counsel also relied upon the judgment reported as *Harihar Prasad Singh and Ors. v. Balmiki Prasad Singh and Ors.* (1975) 1 SCC 212 and *Prakash Rattan Lal v. Mankey Ram*, ILR 2010 (3) Delhi

315.

11. It is argued on behalf of the husband that at no stage did the wife claim that the property was bought for her benefit. She had alleged that she paid all the consideration for acquisition of the suit property. She generally traversed and denied the averments in the suit. It was highlighted that the evidence placed on the record was with an attempt to prove that in fact the consideration was paid. It was next highlighted that though not clearly pleaded, the tenor of the suit was categorical in that the plaintiff urged that the property was purchased not only for the wife's benefit but also for the benefit of the entire family. The evidence also showed that the parties lived together with their children. In fact even as on date the plaintiff and his children live with him - it is only the appellant wife who left the family. Counsel reiterated that till date the loan liability towards payment of consideration for purchase of the property has not been discharged and the husband continues to bear it.

12. It was submitted that there cannot be general assumption that where parties live together in a matrimonial home and there is no property owned by either of them, the purchase of premises in the name of the wife, has to necessarily be for her benefit. It was suggested that the circumstances of every case have to be examined to see whether the parties intended that the property is for the benefit of the wife exclusively or for the family as a whole. If a fair inference can be drawn that the property is for the benefit of the family, the husband is deemed to have discharged the onus cast on him. Learned counsel has relied upon *Valliammal Vs. Subramaniam & Ors., (2004) 7 SCC 233; G. Mahalingappa Vs. G.M. Savitha (2005) 6 SCC 441;*

and V. Shankaranarayana Rao & Ors. Vs. Leelavathi & Ors. (2007) 10 SCC 732.

Analysis and Findings

13. The relevant provisions of the *Benami* Act, read as follows:

> *"3. Prohibition of benami transactions.- (1) No person shall enter into any benami transction.*
> *(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;*
> *(b) the securities held by a-*
> *(i) depository as registered owner under sub-section (1) of section 10 of the Depositories Act, 1996*
> *(ii) participant as an agent of a depository.*
> *Explanation- The expressions "depository" and "Participants shall have the meanings respectively assigned to them in clauses (e) and (g) of sub-section (1) of section 2 of the Depositories Act, 1996.*
> *(3) Whoever enters into any benami transaction shall be punishable with imprisonment for a term which may extend to three years or with fine or with both.*
> *(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), an offence under this section shall be non- cognizable and bailable.*

In terms of Section 4(1) no suit shall lie in respect of any property held *benami* against the person in whose name the property is held or against any other person by or on behalf of a person claiming to be the real owner of such property. Further, there cannot be any suit in respect of a property held benami against a person in whose name such property is held or any other person, if such proceeding is initiated by or on behalf of a person claiming to be the real owner thereof, prior to the coming into force of Section 4(1). Section 4 (2)

bars a claim or defence permitting the "real owner" of such property and has been held from saying that the property is *benami*.

14. The limited controversy, in the opinion of the court, arising in this appeal is whether the plaintiff proved that he was the owner of the property and overcame the presumption cast by Section 3 (2) with respect to purchase of the property inuring to his benefit, rather than to the benefit of his wife, the appellant. The appellant/wife is right in contending that what is not pleaded cannot be proved and no amount of evidence can be considered unless there is a background in the pleadings. Reliance was placed on *Hemant Satti vs Mohan Satti & Ors* (CS (OS) 824 of 2010 decided on 07-11-2013).The court had indicated in that case, that the plaintiff has to prove and discharge his onus, by first pleading it.

15. The "normal" evidence rule is somewhat suspended in the case of proceedings before the Family Court. Section 14 of the governing statute, i.e., the Family Courts Act, 1984, prescribes that:

> *"14. Application of Indian Evidence Act, 1872.-A Family Court may receive as evidence any report, statement, documents, information or matter that may, in its opinion, assist it to deal effectually with a dispute, whether or not the same would be otherwise relevant or admissible under the Indian Evidence Act, 1872 (1 of 1872)."*

It is clear that the strict rules of evidence have been dispensed with in respect of proceedings before the Family Court. Whilst the general rule of pleading, as noticed earlier, undoubtedly is that no evidence can be received or appreciated, unless it is pleaded, yet the Courts have explained that the rule itself is not immutable. The authorities are clear that so long as the parties are left without doubt as to what is

required to be traversed, inexactitude in the plea is not a bar; it is the substance of the pleading that matter, rather than the text. The Supreme Court held so, in *Konda Lakshmana Bapuji v Govt of A.P.*AIR 2002 SC 1012 that:

> *"..it is a settled position that if the parties have understood the pleadings of each other correctly, an issue was also framed by the Court, the parties led evidence in support of their respective cases, then the absence of a specific plea would be no difference."*

In *Nedunari Kameshwaramma v Sampati Subba Rao*: [1963] 2SCR 208, a three-Judge Bench of the Supreme Court observed that:

> *"Though the appellant had not mentioned a Karnikam service in am parties well understood that the two cases opposed to each other were of Dharmila Sarvadumbala inam as against a Karnikam service inam. The evidence which has been led in the case clearly showed that the respondent attempted to prove that this was a Dharmila inam and to refute that this was a Karnikam service inam. No doubt, no issue was framed, and the one, which was framed, could have been more elaborate; but since the parties went to trial fully knowing the rival case and led all the evidence not only in support of their contentions but in refutation of those of the other side, it cannot be said that in absence of an issue was fatal to the case, or that there was that mis-trial which vitiates proceedings.'*

This view was approved by in *Kali Prasad (Dead) by LRS & Ors v Bharat Coking Coal Ltd & Ors*1989 (2) SCR 283. In *Sardul Singh v Pritam Singh & Ors* 1999 (2) SCR 22, it was held as follows:

> *"It is well-settled that notwithstanding the absence of pleadings before a court or authority, still if an issue is framed and the parties were conscious of it and went to trial on that issue and adduced evidence and had an opportunity to produce evidence or cross examine witnesses in relation to the said issue, no*

objection as to want of specific pleading can be permitted to be raised later…"

16. *Nand Kishore* is an authority for the proposition that a husband, to successfully claim that the property in the name of his wife is really his and that he is entitled to recover possession, or base a claim for relief in the capacity of owner, should show that at the time of purchase of the property, his intention was that the property was not for benefit of the wife. The requirements of proof in Section 3 were explained in a later judgment, *G. Mahalingappa vs G.M. Savitha*2005 (6) SCC 441 where the following findings were recorded:

> *"As noted herein earlier, the following findings of fact were arrived at by the appellate court and the trial court to conclude that the transaction in question was benami in nature :-*
> *1) the appellant had paid the purchase money.*
> *2) the original title deed was with the appellant. And*
> *3) the appellant had mortgaged the suit property for raising loan to improve the same.*
> *4) he paid taxes for the suit property.*
> *5) he had let out the suit property to defendant Nos. 2 to 5 and collecting rents from them.*
> *6) the motive for purchasing the suit property in the name of plaintiff was that the plaintiff was born on an auspicious nakshatra and the appellant believed that if the property was purchased in the name of plaintiff/respondent, the appellant would prosper.*
> *7) the circumstances surrounding the transaction, relationship of the parties and subsequent conduct of the appellant tend to show that the transaction was benami in nature.*
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> ********** *********** *********
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> *Section 3 (2) makes it abundantly clear that if a property is purchased in the name of an unmarried daughter for her benefit, that would only be a presumption but the presumption can be rebutted by the person who is alleging to be the real owner of the property by production of evidences or other*

materials before the court. In this case, the trial court as well as the appellate court concurrently found that although the suit property was purchased in the name of the respondent but the same was purchased for the interest of the appellant. We are therefore of the opinion that even if the presumption under section 3 (2) of the Act arose because of purchase of the suit property by the father (in this case appellant) in the name of his daughter (in this case respondent), that presumption got rebutted as the appellant had successfully succeeded by production of cogent evidence to prove that the suit property was purchased in the benami of the respondent for his own benefit."

17. An earlier decision, *Jayadayal Poddar v Bibi Hazra,* AIR 1979 SC 171, explained the factors which are to be considered while deciding whether a property is *benami* or not:

> *"the essence of a benami is the intention of the party or parties concerned; and not unoften such intention is shrouded in a thick veil which cannot be easily pierced through. But such difficulties do not relieve the person asserting the transaction to be benami of any part of the serious onus that rests on him; nor justify the acceptance of mere conjectures or surmises, as a substitute for proof. The reason is that a deed is a solemn document prepared and executed after considerable deliberation, and the person expressly shown as the purchaser or transferee in the deed, starts with the initial presumption in his favour that the apparent state of affairs is the real state of affairs. Though the question, whether a particular sale is benami or not, is largely one of fact, and for determining this question, no absolute formulae or acid test, uniformly applicable in all situations, can be laid down; yet in weighing the probabilities and for gathering the relevant indicia, the courts are usually guided by these circumstances : (1) the source from which the purchase money came; (2) the nature and possession of the property, after the purchase; (3) motive, if any, for giving the transaction a benami colour; (4) the position of the parties and the relationship, if any, between the claimant and the alleged benamidar; (5) the custody of the*

> *conduct of the parties concerned in dealing with the property after the sale. ...”*

These tests were reiterated in *Thakur Bhim Singh (Dead) by LRs & Anr v Thakur Kan Singh* 1980 (3) SCC 72 and *Binapani Paul vs Pratima Ghosh* 2007 (6) SCC 100.

18. Here it would be important to recognize that a plain interpretation of Section 3 would be firstly, that *benami* transactions are barred; the exception would be, *inter alia,* where the husband acquires the property in the wife’s name. Secondly, this exception has an attendant presumption that the property had been purchased for the wife’s benefit. However, the presumption is rebuttable, as the contrary (i.e. that the property was not for the benefit or the wife, or was for the benefit of another or others) can be proved. What is the net result if the contrary is proved? Would the property then be treated as *benami* and suffer the bar under Section 4? We think not. The structure of Section 3 is such that two categories of what would otherwise be *benami* acquisitions are kept out from its sweep-purchase in the name of wife, and purchase in the name of unmarried daughter. It would indeed be anomalous if it were held that Parliament intended that in case the husband did not prove that the property was for the benefit of someone not the wife, it would be hers and at the same time, *also* intended that in case he did prove that it was for someone else’s benefit, he would be unable to secure a decree as he would be remediless because of Section 4. The correct interpretation would be, in our opinion that the class of transactions covered by Section 3 is treated as a class apart. It is only the *inter se* rights of the disputing parties, which is dependent upon the party asserting that the

acquisition was not for the benefit of the wife/daughter, proving it to be so. Thus, for instance, if a dishonest debtor were to use all or substantial monies under threat of imminent legal action by the creditors to recover dues, for the purchase of property in his wife's name, and the creditor were to prove that it was not for the benefit of the wife, but to defeat *their* rights, Section 4 cannot be said to bar the relief. In such event, the relief of securing a decree to recover money, which can be traced to the purchase of property, or an appropriate decree of cancellation or declaration and sale, would lie. Therefore, in any given case if the party asserts that the purchase was not for the benefit of the wife or unmarried daughter, it only means that he discharges the onus of proof and qualifies for the relief he seeks, because the controlling part of Section 3 (2) operates and treats the transaction as not a *benami* transaction. The second salient feature, which needs to be underlined, is that unlike the pre-Benami Act era- where the party had to assert and prove that the property was purchased *benami,* now the situation has reversed due to a paradigm shift under the Act. The endeavor of the party seeking relief would be to fall within Section 3(2), i.e., that the purchase is not deemed to be *benami,* to qualify for relief.

19. In this case, the overall effect of the pleadings and evidence is that:

(1) The suit property was purchased with the husband's money, in the wife's name.

(2) The husband secured a Bank loan for the purchase of the property. This would mean that the property is mortgaged to the bank.

(3) The husband continues to be liable for the loan and is making

repayment towards installments.

(4) The suit property became the family home as long as parties were married.

(5) The appellant wife left the property in 2010 and never returned. The parties later dissolved their marriage by mutual consent

(6) The two children live with the husband, in the suit property.

(7) Though the defendant/wife stated that she was repaying the loan, she was unable to prove that allegation.

(8) The husband, in the cross examination stated that since stamp duty payable was at a lower rate if the vendees were women, he decided to purchase stamp paper in the wife's name, and complete the transaction. On the basis of the above it can clearly be held that the plaintiff discharged the onus which lay upon him to prove that the property was purchased not for the wife's benefit, but for that of the family as a whole.

20. By reason of the foregoing analysis, it is held that the appeal is meritless. It is therefore dismissed without order as to costs.

S. RAVINDRA BHAT
(JUDGE)

DEEPA SHARMA
(JUDGE)

JULY 27, 2016