A OM PRAKASH SHARMA @ O.P. JOSHI

v.

RAJENDRA PRASAD SHEWDA & ORS.

(Civil Appeal Nos.8609-8610 of 2009)

B OCTOBER 09, 2015

[RANJAN GOGOI AND N.V. RAMANA, JJ.]

Hindu law: Property dispute – Purchase of property by husband in the name of wife – Held: In the instant case, property was purchased from the funds of husband for the benefit of his wife and therefore she was the real owner of the property – This was in accordance with the practice prevailing in a Hindu family where husband normally looks after and manages the property of the wife – Benami transaction – Hindu Women's Right to Property Act, 1937.

Adoption: Claim over property by plaintiff on the ground that the said property devolved upon her husband who was adopted by the owner of the said property -- Defendant no.1 was also the adopted son of daughter of the owner of the property – Dispute regarding such adoptions – Held: Plaintiff failed to prove that his adoption was valid – Evidence of witnesses were not admissible u/s.32(5) and (6) inasmuch as on the date when the said evidence was recorded the controversy with regard to adoption of plaintiff's husband had already occurred – If plaintiff failed to prove his adoption then it must be held that suit property devolved upon the daughter of the owner of the suit property – Claim of defendant no.1 to be adopted son could have been challenged only by such legal heirs on whom the property would have devolved following the death of owner in the event the adoption of defendant no.1 is to be held to be invalid – No such challenge was made – High Court was justified in not entering into the issue of validity of adoption of defendant no.1 as such issue

had become redundant – Evidence Act, 1872 – ss.32(5) and (6). A

Dismissing the appeals, the Court

HELD: 1. The purchase of property by a husband in the name of his wife is a specie of Benami purchase that had been prevalent in India since ancient times. Such a practice appears to have been prevalent on account of the position of Hindu women to succession until the enactment of the Hindu Succession Act and the amendments made thereto from time to time. In a situation where a Hindu widow had a limited right to the estate of the deceased husband under the Hindu Women's Right to Property Act, 1937, the purchase of immovable property by a husband in the name of the wife in order to provide the wife with a secured life in the event of the death of the husband was an acknowledged and accepted feature of Indian life which even finds recognition in the explanation clause to Section 3 of the Benami Transactions (Prohibition) Act, 1988. The High Court was perfectly justified in coming to the conclusion that the property though purchased from the funds of husband was really for the benefit of his widow and therefore she was the real owner of the property. The fact that the property was managed by husband which fact accords with the practice prevailing in a Hindu family where the husband normally looks after and manages the property of the wife, is another relevant circumstance that was taken note of by the High Court to come to the conclusion that all the said established facts are wholly consistent with the ownership of the property by widow. [Paras 10, 12] [581-E-G; 584-D-H] B C D E F G

2. The plaintiff herself alongwith PW-2 were the witnesses who have testified in support of the claim of H

A adoption of her husband. Specifically, PW-2 though had stated that the adoption of husband of plaintiff took place 40 years back she could not recollect her own age; she had no recollection of number of years prior to the adoption when she got married and was unable to recall B when her sons got married and most surprisingly the age of her elder son at the time of his marriage; the present age of the elder son or even the present calendar year. The evidence of the three witnesses would be inadmissible under Section 32(5) & (6) of the Evidence C Act inasmuch as on the date when the said evidence was recorded the controversy with regard to the adoption of husband of plaintiff had already occurred. The claim of the defendant No.1 to be the adopted son of the daughter of original owner could have been D challenged only by such legal heirs on whom the property would have devolved following the death of his mother in the event the adoption of the defendant No. 1 is to be held to be invalid. In this context, the next legal heir who would have been entitled to succeed to the said E property if the adoption of defendant No.1 is to be treated as invalid would not be the original plaintiff inasmuch there was another heir who could have claimed a better title in such a situation. The High Court was fully justified in not entering into the issue of validity of the adoption F of defendant No.1 or the gift deed executed in his favour as the said issues had become redundant/ inconsequential. [Paras 17, 19 to 21] [587-F; 588-C-E; 589-G-H; 590-A-C]

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Jaydayal Poddar (Deceased) through L. Rs. & Anr. v. Mst. Bibi Hazra & Ors. AIR 1974 SC 171: 1974 (1) SCR 70; *Binapani Paul v. Pratima Ghosh & Ors.* 2007 (5) SCR 946: 2007 (6) SCC 100; H *Kanakarathanammal v. S.Loganatha Mudaliar &*

Anr. **AIR 1965 SC 271: 1964 SCR 1;** *Rahasa Pandiani by L.Rs. & Ors. v. Gokulananda Panda & Ors.* **AIR 1987 SC 962;** *Kalindindi Venkata Subbaraju & Ors. v. Chintalapati Subbaraju & Ors.* **AIR 1968 SC 947:1968 SCR 292 – relied on.**

Case Law Reference

1974 (1) SCR 70	**relied on.**	**para 10**
2007 (5) SCR 946	**relied on.**	**para 11**
1964 SCR 1	**relied on.**	**para 12**
AIR 1987 SC 962	**relied on.**	**para 15**
1968 SCR 292	**relied on.**	**para 19**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 8609-8610 of 2009.

From the Judgment and Order dated 04.11.2008 of the High Court at Calcutta in F. A. No. 160 of 1992 with COT No. 878 of 1996.

Pranab Kumar Mullick for the Appellant.

M. N. Krishnamani, Ranjan Mukherjee, Abhijit Sengupta, Dibya Dyuti Banerjee, Konark Tyagi for the Respondents.

The Judgment of the Court was delivered by

RANJAN GOGOI, J. 1. The suit property comprises of land and building covered by holding No. L-395 on the Thana Lane within the Purulia Municipality, District Purulia, West Bengal.

2. The following genealogical table may be set out for ready reference and clarity of the facts that will be required to

be noticed.

Jagannath Joshi (Died October 1953) = Moni Debi (Died August 1963)

Brijlal Shewda = Gomati Debi (Daughter) (Died 1967)	Sitaram Joshi (adopted son-1942) (Died 1946)	= Kishori Debi Joshi (Original plaintiff) (Married to Sitaram in 1945) (Since deceased)
Rajendra Pd. Shewda (allegedly adopted son) (Respondent No.1)		Om Prakash Sharma @ Joshi (adopted son) (Petitioner No.1)

3. According to the original plaintiff, Kishori Debi Joshi, (since deceased), the suit property was purchased by Jagannath Joshi with his funds in the name of his wife Moni Debi. Moni Debi, according to the plaintiff, was the name lender though in the Municipal and Land Revenue records the name of Moni Debi was entered as the owner of the suit property. The said entries were a mere pretence. The plaintiff further pleaded that she is the wife of one Sitaram Joshi who was adopted by Jagannath Joshi and Moni Debi in the year 1942. After the marriage of Sitaram Joshi and the deceased plaintiff Kishori Debi Joshi in the year 1945, Sitaram Joshi died a few months later. According to the plaintiff, Jagannath Joshi the owner of the suit property died in the year 1953 and on his death, one half of the suit property devolved on his wife Moni Debi and the remaining half on the deceased plaintiff as the widow of the predeceased son. The plaintiff further pleaded that Moni Debi died in the year 1963 and on her death her half share in the suit property devolved on her daughter Gomati Debi. On the death of Gomati Debi in the year 1967 her half share in the property devolved on the original/deceased plaintiff Kishori Debi Joshi. Accordingly, the plaintiff became the absolute owner of the entire suit property. In this regard, the plaintiff further pleaded that respondent No.1 Rajendra Prasad

Shewda who claimed to be the adopted son of Gomati Debi had no basis to make any such claim as no such adoption took place.

4. The defendant, in the written statement filed, disputed the claim of the plaintiff and asserted that though the suit property was purchased with the funds of Jagannath Joshi the said purchase was made for the benefit of Moni Debi in order to provide her with the necessary security in life as at that point of time a Hindu widow was not entitled to full ownership of property owned by a Hindu male following his death. The defendant also disputed the claim of the original plaintiff that Sitaram Joshi was the adopted son of Jagannath and Moni Debi and in this regard had asserted that there was no valid adoption, as claimed. According to the defendant on the death of Moni Debi in August 1963 the entire property devolved on her daughter Gomati Debi and upon the death of Gomati Debi the property devolved on the defendant No.1 Rajendra Prasad Shewda who was the adopted son of Gomati Debi. In this regard the defendant had also pleaded that a gift deed was executed by Gomati Debi during her life time in favour of her adopted son i.e. defendant No.1.

5. The learned trial court, on the evidence adduced before it, took the view that the property belonged to Jagannath and that the adoption of Sitaram Joshi, predeceased husband of the original plaintiff, was legal and valid. The learned trial court, therefore, held that on the death of Jagannath Joshi in 1953 the suit property devolved in equal proportions on Moni Debi and the original plaintiff who was the widow of the predeceased son. Thereafter, according to the learned trial court, on the death of Moni Debi her half share in the property devolved on Gomati Debi. The trial court further held that on the death of Gomati Debi in the year 1967 her half share in the property devolved on her adopted son defendant No.1. Accordingly, the plaintiff as well as respondent No.1 were held to be entitled to

A equal shares in the suit property.

6. The defendant No.1 appealed against the said order to the High Court. The original plaintiff filed cross objections against the part of the decree which according to her denied B her full share in the suit property. During the pendency of the appeal, the original plaintiff Kishori Debi Joshi died and she was substituted by her adopted son Om Prakash Sharma who is the appellant before us.

C 7. The High Court, on an exhaustive consideration of the issues arising for consideration and the facts and materials on record, by the impugned judgment and order dated 4.11.2008, came to the conclusion that the purchase of the property by Jagannath was not a benami purchase and that D Moni Debi for whose benefit the property was purchased was the real owner thereof. The High Court further held that the adoption of Sitaram Joshi was not proved and therefore on the death of Moni Debi in 1963 the entire suit property had devolved on her daughter Gomati Debi. The High Court did E not consider it necessary to go into the issue of validity of the adoption of the defendant No.1 Rajendra Prasad Shewda or the legality of the gift deed executed in his favour by Gomati Debi inasmuch as on the death of Gomati Debi in the year 1967 the original plaintiff had no subsisting right to the property. F In this regard it must be noticed that the said finding was recorded by the High Court on the basis that though the husband of the original plaintiff Sitaram Joshi was not the adopted son of Jagannath Joshi, the said Sitaram Joshi was the nephew of Jagannath (brother's son) and as the wife of the nephew of G Jagannath the original plaintiff did not come within the arena of consideration of being a heir legally entitled to succeed to the property of Moni Debi. This was so found as there were other legal heirs who had a better/preferential right. Accordingly the appeal filed by the defendant No. 1 was allowed and the H cross-objections filed by the plaintiff were dismissed.

Aggrieved the present appeals have been filed by the plaintiff. A

8. Three questions, delineated below, arise for consideration in the present appeals -

1) Did the suit property belong to Jagannath Joshi or his wife Moni Debi? B

2) Whether Sitaram Joshi was the legally adopted son of Jagannath Joshi and Moni Debi.?

3) Whether defendant No.1 Rajendra Prasad Shewda was the legally adopted son of Gomati Debi and whether the gift deed executed by Gomati Debi in favour of defendant No.1 was legal and valid? C

9. We have heard Shri Pranab Kumar Mullick, learned counsel for the appellant and Shri M.N. Krishnamani, learned senior counsel for the respondents. D

10. The purchase of property by a husband in the name of his wife is a specie of Benami purchase that had been prevalent in India since ancient times. Such a practice appears to have been prevalent on account of the position of Hindu women to succession until the enactment of the Hindu Succession Act and the amendments made thereto from time to time. In a situation where a Hindu widow had a limited right to the estate of the deceased husband under the Hindu Women's Right to Property Act, 1937, the purchase of immovable property by a husband in the name of the wife in order to provide the wife with a secured life in the event of the death of the husband was an acknowledged and accepted feature of Indian life which even finds recognition in the explanation clause to Section 3 of the Benami Transactions (Prohibition) Act, 1988. This is a fundamental feature that must be kept in mind while determining the nature of a sale/purchase transaction of immoveable property by a husband in the name E F G H

A of his wife along with other facts and circumstances which has to be taken into account in determining what essentially is a question of fact, namely, whether the property has been purchased Benami. The "other" relevant circumstances that should go into the process of determination of the nature of
B transaction can be found in ***Jaydayal Poddar (Deceased) through L. Rs. & Anr. vs. Mst. Bibi Hazra & Ors.***[1] which may be usefully extracted below :-

> "6. It is well settled that the burden of proving that a
> C particular sale is *benami* and the apparent purchaser is not the real owner, always rests on the person asserting it to be so. This 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
> D circumstances unerringly and reasonably raising an inference of that fact. 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
> E 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
> F 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
> G 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

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H [1] AIR 1974 SC 171 para 6

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, it any, between the claimant and the alleged *benamidar*; (5) the custody of the title-deeds after the sale and (6) the conduct of the parties concerned in dealing with the property after the sale.

The above indicia are not exhaustive and their efficacy varies according to the facts of each case. Nevertheless No. 1 viz. the source, whence the purchase money came, is by far the most important test for determining whether the sale standing in the name of one person, is in reality for the benefit of another" (Emphasis is ours)

11. The reiteration of the aforesaid principles has been made in **Binapani Paul vs. Pratima Ghosh & Ors**.[2]. The relevant part of the views expressed (Paras 26 and 27) may be profitably recollected at this stage.

> **"26.** The learned counsel for both the parties have relied on a decision of this Court in *Thakur Bhim Singh* v. *Thakur Kan Singh* wherein it has been held that the true character of a transaction is governed by the intention of the person who contributed the purchase money and the question as to what his intention was, has to be decided by:
>
> (*a*) surrounding circumstances,
>
> (*b*) relationship of the parties,

[2] 2007 (6) SCC 100

A (*c*) motives governing their action in bringing about the transaction, and

(*d*) their subsequent conduct.

B 27. All the four factors stated may have to be considered cumulatively. The relationship between the parties was husband and wife. Primary motive of the transaction was security for the wife and seven minor daughters as they were not protected by the law as then prevailing. The C legal position obtaining at the relevant time may be considered to be a relevant factor for proving peculiar circumstances existing and the conduct of Dr. Ghosh which is demonstrated by his having signed the registered power of attorney."

D 12. Applying the aforesaid principles to the facts of the present case we find that the High Court was perfectly justified in coming to the conclusion that the property though purchased from the funds of Jagannath was really for the benefit of his E widow Moni Debi and therefore Moni Debi was the real owner of the property. In this regard the entries of the name of Moni Debi in Municipal and Land Revenue records; the fact that the brothers of Jagannath were no longer alive (according to the plaintiff the property was purchased by Jagannath in the name F of his wife to protect the same from his brothers) are relevant facts that have been rightly taken into account by the High Court. The fact that the property was managed by Jagannath which fact accords with the practice prevailing in a Hindu family where the husband normally looks after and manages the property of G the wife, is another relevant circumstance that was taken note of by the High Court to come to the conclusion that all the said established facts are wholly consistent with the ownership of the property by Moni Debi. In fact the aforesaid view taken by the High Court finds adequate support from the views H expressed by this Court in ***Kanakarathanammal vs.***

S.Loganatha Mudaliar & Anr.[3] the relevant part of which is extracted below:

> "It is true that the actual management of the property was done by the appellant's father; but that would inevitably be so having regard to the fact that in ordinary Hindu families, the property belonging exclusively to a female member would also be normally managed by the Manager of the family; so that the fact that appellant's mother did not take actual part in the management of the property would not materially affect the appellant's case that the property belonged to her mother. The rent was paid by the tenants and accepted by the appellant's father; but that, again, would be consistent with what ordinarily happens in such matters in an undivided Hindu family. If the property belongs to the wife and the husband manages the property on her behalf, it would be idle to contend that the management by the husband of the properties is inconsistent with the title of his wife to the said properties. What we have said about the management of the properties would be equally true about the actual possession of the properties, because even if the wife was the owner of the properties, possession may continue with the husband as a matter of convenience. We are satisfied that the High Court did not correctly appreciate the effect of the several admissions made by the appellant's father in respect of the title of his wife to the property in question. Therefore, we hold that the property had been purchased by the appellant's mother in her own name though the consideration which was paid by her for the said transaction had been received by her from her husband." (Underlining is ours)

13. On the basis of the above, we have no reason to

[3] AIR 1965 SC 271

A disagree with the conclusion of the High Court that the property was owned by Moni Debi although consideration money for the same may have been made available by her husband, Jagannath.

B 14. The next question to be decided is the legality/validity of the adoption of Sitaram, the husband of the original plaintiff, as claimed by the plaintiff in the suit. This Court, almost over 5 decades back, had sounded a note of caution to be followed by courts while deciding a claim of adoption in the following C terms :

> "As an adoption results in changing the course of succession, depriving wives and daughters of their rights and transferring properties to comparative strangers or D more remote relations it is necessary that the evidence to support it should be such that it is free from all suspicion of fraud and so consistent and probable as to leave no occasion for doubting its truth."[4]

E 15. Reiterating the above view in ***Rahasa Pandiani by L. Rs. & Ors. vs. Gokulananda Panda & Ors.***[5], this Court went on to further dilate on the matter in the following terms :

> "When the plaintiff relies on oral evidence in support of F the claim that he was adopted by the adoptive father in accordance with the Hindu rites, and it is not supported by any registered document to establish that such an adoption had really and as a matter of fact taken place, the court has to act with a great deal of caution and G circumspection. Be it realized that setting up a spurious adoption is not less frequent than concocting a spurious will, and equally, if not more difficult to unmask. And the court has to be extremely alert and vigilant to guard against being ensnared by schemers who indulge in

H [4] AIR 1959 SC 504 [Kishori Lal Vs. Mst. Chaltibai]
[5] AIR 1987 SC 962

unscrupulous practices out of their lust for property. If there are any suspicious circumstances, just as the propounder of the will is obliged to dispel the cloud of suspicion, the burden is on one who claims to have been adopted to dispel the same beyond reasonable doubt. In the case of an adoption which is not supported by a registered document or any other evidence of a clinching nature if there exist suspicious circumstances, the same must be explained to the satisfaction of the conscience of the court by the party contending that there was such an adoption. Such is the position as an adoption would divert the normal and natural course of succession. Experience of life shows that just as there have been spurious claims about execution of a will, there have been spurious claims about adoption having taken place. And the court has therefore to be aware of the risk involved in upholding the claim of adoption if there are circumstances which arouse the suspicion of the court and the conscience of the court is not satisfied that the evidence preferred to support such an adoption is beyond reproach." A B C D E

16. It is keeping in mind the above principles that we will have to proceed in the present matter.

17. The plaintiff herself alongwith one Rukmini Joshi (PW 2) are the witnesses who have testified in support of the claim of adoption of Sitaram by Jagannath. The testimony of the aforesaid two witnesses are sought to be corroborated by the statements of three other persons (since deceased) who had deposed on the subject in another suit being R.S. No.206/1967 filed by defendant No.1 against one of the tenants in occupation of a part of the suit property. The aforesaid three witnesses i.e. Neth Ram Khedia, Sib Prasad Rajgoria and Sadayee Devi have deposed in the aforesaid suit that Sitaram had been adopted by Jagannath. F G H

A 18. Besides the above evidence there is a letter dated 20.7.1945 written on the letterhead of M/s. Bisandayal Ramjiwan (Exb.2) by one Jagannath Sitaram. It is urged on behalf of the plaintiff that the said letter sent from Purulia shows that Sitaram was the adopted son of Jagannath as the sender B of the letter has been described as Jagannath Sitaram.

19. A consideration of the evidence of PW-2 Rukmini Joshi as a whole leaves us satisfied that in view of certain inherent inconsistencies therein the testimony of the said witness is C not worthy of acceptance. Specifically, PW-2 though had stated that the adoption of Sitaram took place 40 years back she could not recollect her own age; she had no recollection of number of years prior to the adoption when she got married and was unable to recall when her sons got married and most D surprisingly the age of her elder son at the time of his marriage; the present age of the elder son or even the present calendar year. The evidence of the three witnesses examined in R.S. No. 206/1967 (Ext. 17, 17A and 17C) would be inadmissible under Section 32(5) & (6) of the Evidence Act inasmuch as on E the date when the said evidence was recorded the controversy with regard to the adoption of Sitaram had already occurred. The aforesaid question i.e. admissibility of the evidence in question would stand concluded by views F expressed by this Court in ***Kalindindi Venkata Subbaraju & Ors. Vs. Chintalapati Subbaraju & Ors.***[6] wherein in Para 12 (quoted below), it has been clearly laid down that, "*in order to be admissible the statement relied on must be made* ***ante litem motam*** *by persons who are dead i.e. before the* G *commencement of any controversy actual or legal upon the same point.*" In the same backdrop the principle of ante litem motam as stated in Halsbury's Laws of England, 3rd Edn. Vol.15 p.308 has also been noticed.

H [6] AIR 1968 SC 947

"**12.** As regards the written statement of Surayamma the position of her declaration therein is somewhat different. Both sub-sections 5 and 6 of Section 32, as aforesaid, declare that in order to be admissible the statement relied on must be made *ante litem motam* by persons who are dead i.e. before the commencement of any controversy actual or legal upon the same point. The words "before the question in issue was raised" do not necessarily mean before it was raised in the particular litigation in which such a statement is sought to be adduced in evidence. The principle on which this restriction is based is succinctly stated in *Halsbury's Laws of England*, 3rd Ed. Vol. 15, p. 308 in these words:

"To obviate bias the declarations are required to have been made *ante litem motam* which means not merely before the commencement of legal proceedings but before even the existence of any actual controversy concerning the subject-matter of the declarations".

20. The letter dated 20.7.1945 (Exb.2) does not lead to any clear/firm conclusion with regard to the adoption of Sitaram and had been rightly discarded by the High Court. In the above conspectus of facts the evidence of the plaintiff regarding the adoption of her husband stands isolated and cannot, on its own, sustain a positive conclusion that her husband Sitaram was adopted by Jagannath. If the suit property was owned by Moni Debi and not by Jagannath and Sitaram was not the adopted son of Moni Debi and Jagannath it must be held that the suit property devolved on Gomati on the death of Moni Debi. The claim of the defendant No.1 to be the adopted son of Gomati could have been challenged only by such legal heirs on whom the property would have devolved following the death of Gomati in the event the adoption of the defendant No. 1 is to be held to be invalid. In this context, the next legal heir who

A would have been entitled to succeed to the property of Gomati Debi if the adoption of defendant No.1 is to be treated as invalid would not be the original plaintiff inasmuch there was another heir who could have claimed a better title in such a situation, namely, one Chouthamal Sharma, the son of one of
B the brother's of Sitaram. No such challenge was made by the aforesaid legal heir who had a better/preferential claim.

21. In view of the above position demonstrated by the evidence on record the High Court was fully justified in not
C entering into the issue of validity of the adoption of defendant No.1 or the gift deed executed in his favour by Gomati as the said issues had become redundant/inconsequential for the reasons noted above.

D 22. For all the aforesaid reasons and in the light of what has been found and stated as above, we have to hold that these appeals are without any merit. Accordingly, the order of the High Court is affirmed and the present appeals are dismissed. However, there will be no order as to costs.

E

Devika Gujral Appeals dismissed.