

Chanan Kaur and ors Vs. Ajit Singh (Deceased) Through Lrs

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SooperKanoon Citation : sooperkanoon.com/1088525

Court : Delhi

Decided On : Sep-18-2013

Judge : Rajiv Sahai Endlaw

Appellant : Chanan Kaur and ors

Respondent : Ajit Singh (Deceased) Through Lrs

Advocate for Def. : Mr. S.K. Kalia, Mr. K.K. Bhalla

Advocate for Pet/Ap. : Mr. Sanjeev Sindhawani, Mr. Sanjay Dua

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI Date of decision:

18. h September, 2013 + RFA3291997 CHANAN KAUR & ORS Through: Appellants Mr. Sanjeev Sindhawani, Sr. Adv. with Mr. Sanjay Dua, Advocate. Versus AJIT SINGH (DECEASED) THROUGH LRS Respondent Through: Mr. S.K. Kalia and Mr. K.K. Bhalla, Advocates. CORAM: HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW RAJIV SAHAI ENDLAW, J.

1. The appeal impugns the judgment and decree dated 30 th September, 1997 [of the Court of Additional District Judge (ADJ), Delhi in RCS No.63/1992 (Old No.69/1984)]. in favour of respondent/plaintiff and against the appellants/defendants for recovery of possession of a portion of the ground floor of house No.L-59, Kalkaji, New Delhi.

2. The appeal was admitted for hearing and the counsel for the respondent/plaintiff made a statement that the respondent/plaintiff will not execute the decree. Vide further interim order dated 13th July, 2006, the appellants/defendants were restrained from carrying out any construction or repair work in the property without the leave of the Court. Vide subsequent order dated 26th April, 2007, the appellant was directed to maintain status quo in regard to construction. Attempts for settlement were made but remained unsuccessful. The respondent/plaintiff died during the pendency of the appeal and his legal heirs were substituted. The appellants/defendants filed applications under Order 41 Rule 27 of the Civil Procedure Code (CPC), 1908 but which were dismissed vide order dated 18 th August, 2011. The counsels have been heard on 12 th August, 2013, 21st August, 2013, 2nd September, 2013 and 3rd September, 2013.

3. The deceased respondent/plaintiff filed the suit from which this appeal arises, for recovery of possession of part of the ground floor of property No.L-59, Kalkaji, New Delhi, pleading: (i) that he was the absolute owner of the entire property bearing No.L-59, Kalkaji, New Delhi; (ii) that the appellant/defendant No.1 Smt. Chanan Kaur was the wife of the brother of the father of the respondent/plaintiff and also the sister of the mother of the respondent/plaintiff and was residing in the said portion of the property along with her sons/appellants/defendants No.2 to 6 and the wife and the children namely appellants/defendants No.7 to 9 of the appellant/defendant No.2; (iii) that the respondent/plaintiff purchased the plot admeasuring 300 sq. yds. underneath the property with his own funds in the year 1965 vide registered Sale Deed dated 29th December, 1965; (iv) that the respondent/plaintiff on 5th June, 1970 got the plans for construction of the property sanctioned from the Municipal Corporation of Delhi (MCD) for construction of a building comprising of ground, first and barsati floors on the said plot of land and commenced construction in or around February, 1971; (v) that the respondent/plaintiff was then residing at L-49, Lajpat Nagar-II, New Delhi; (vi) that the appellants/defendants were then residing at L-110, Lajpat Nagar-II, New Delhi; (vii) that relations between the parties were cordial; (viii) that the respondent/plaintiff along with his parents, brothers and other members shifted to the suit property in or around November, 1971, while the construction thereof was still in progress; (ix) that the respondent/plaintiff was carrying on business as a

building contractor; the financial means of the appellants/defendants were very limited and the respondent/plaintiff was helping the appellant/defendant No.2 from the year 1970 onwards by getting him contract jobs; at that time, the appellant/defendant No.2 was the only grown up member of the family of the appellant/defendant No.1; the husband of the appellant/defendant No.1 was then practically not doing much work; (x) that the husband of the appellant/defendant No.1 expired on 5 th May, 1972; (xi) that out of near relationship and brotherhood, the respondent/plaintiff sometime in the first week of June, 1972 brought the appellants/defendants from L-110, Lajpat Nagar-II, New Delhi where they were then residing in a rented house to the suit property and housed them in a portion of the ground floor; (xii) that the respondent/plaintiff had brought the appellants/defendants to his house just to help them in their difficult times with the understanding that as soon as the appellants/defendants came out of their economic strain and were in a position to have their own house somewhere else, the appellants/defendants will shift from the house of the respondent/plaintiff; (xiii) that the respondent/plaintiff completed the construction of the upper floors of the suit property and obtained Completion Certificate on 16th August, 1976; (xiv) that the respondent/plaintiff has been paying the charges of all the eight electricity and power meters and two water meters in the property as well as the property tax of the suit property; (xv) that the appellants/defendants have never paid any consideration whatsoever for residing in the property of the respondent/plaintiff; (xvi) that since the appellants/defendants No.2 to 6 had grown up and became economically well settled, the respondent/plaintiff requested them to shift out but the appellants/defendants avoided doing so and which led to bickerings between the parties; (xvii) that the respondent/plaintiff had been letting out the two portions of the first floor of the property to different tenants from time to time; (xviii) that the barsati floor of the property has always been kept by the respondent/plaintiff for his own use; (xix) that there are two sets of staircases leading to the two portions of the first floor and which were used by the tenants in the respective portions of the first floor; (xx) that at the time of institution of the suit, even the entire first floor was being used by the respondent/plaintiff and the appellants/defendants had no access thereto.

4. The appellants/defendants contested the suit by filing written statement, on the grounds: (a) that the suit was not properly valued for the purposes of court fees and jurisdiction; (b) that the respondent/plaintiff was not the owner of the property; (c) that the plot of land underneath the property was purchased by Sh. Bachhan Singh being the father of the respondent/plaintiff and Sh. Arjan Singh being the predecessor of the appellants/defendants (and both of whom were brothers) in equal share in the year 1965; (d) that the said Sh. Bachhan Singh and Sh. Arjan Singh were married to two sisters; (e) that for sometime Sh. Bachhan Singh and Sh. Arjan Singh were working together and being brothers married two sisters and had very good relations; (f) that the respondent/plaintiff was the eldest son of Sh. Bachhan Singh; (g) that Sh. Bachhan Singh and Sh. Arjan Singh being old, deputed the respondent/plaintiff to purchase the plot on their behalf and paid equally to respondent/plaintiff for the plot; (h) that the respondent/plaintiff got the Sale Deed of the plot executed in his favour, though Sh. Bachhan Singh and Sh. Arjan Singh were real owners and had equal share; (i) that the plan for construction of two houses was got sanctioned from the MCD and two identical houses were built on the land purchased; (j) that at the time of commencement of construction in February, 1971, a joint account was opened in the name of the respondent/plaintiff and appellant/defendant No.1 in the State Bank of India, Central Market, Lajpat Nagar, New Delhi and the money deposited in the said account was spent on construction and further amounts were paid by Sh. Arjan Singh and appellant/defendant No.1 to Sh. Bachhan Singh and respondent/plaintiff for construction of the house; (k) that equal amounts were spent by Sh. Arjan Singh and the appellant/defendant No.1 on the one hand and family of Sh. Bachhan Singh on the other hand; (l) that Sh. Arjan Singh and the appellant/defendant No.1 became the owners of the portion (in dispute) and the other portion came under the ownership of Sh. Bachhan Singh and family; (m) that both the houses were more or less completed in November, 1971 when both families shifted to their respective portions; however some of the members of the family of the appellants/defendants remained in house No.L-110, Lajpat Nagar-II, New Delhi, as work of construction on the suit property was still in progress; (n) that after the construction of the ground floor, the work of construction on the first floor was started; however Sh. Arjan Singh died on 5th May, 1972; consequently,

the progress of construction on first floor in his portion was stopped but Sh. Bachhan Singh and respondent/plaintiff carried out construction on the first floor of their portion; (o) that sometime later Sh. Bachhan Singh offered to the appellants/defendants financial aid in building on the first floor and it was agreed that Sh. Bachhan Singh and the respondent/plaintiff shall spend the amount on construction of the first floor of the appellants/defendants share and shall recover the same by letting out the said portion till such time they recovered the entire amount invested by them in construction; (p) that the construction of the first floor and the barsati floor of the appellants/defendants portion was completed in or about 1976/1977 and was let out and remained with the tenants till December, 1981 and till then the respondent/plaintiff and his father Sh. Bachhan Singh must have recovered more than Rs.50,000/- as rent from the tenants, though had only incurred expenditure of about Rs.25,000/- to Rs.30,000/- in completing the construction of first and barsati floors of the property of the appellants/defendants portion; (q) that after vacation by the tenant in December, 1981, the first floor of the portion of the appellants/defendants remained vacant under the lock and key of the appellants/defendants; (r) that in or about August, 1983, the respondent/plaintiff and his father Sh. Bachhan Singh occupied the first floor and the second floor of the appellants/defendants portion also and refused to vacate the same; (s) that the appellants/defendants reserved their right to file a suit for recovery of possession of the first floor and barsati floor of their portion; (t) that the appellants/defendants were thus in occupation of the ground floor, for recovery of possession whereof the suit was filed, as owners and had been paying the electricity and water charges of their portion as per meter reading; (u) that in any case the appellants/defendants were in possession of the said portion of the ground floor since November, 1971 in their own rights claiming themselves to be the owners and had become owners by adverse possession.

5. The respondent/plaintiff filed a replication in which with respect to the joint account, it was inter alia stated that Sh. Arjan Singh did not want the appellant/defendant No.2 with whom the respondent/plaintiff had taken up some construction/building work in joint venture to handle the finances and the said account was opened to enable the appellant/defendant No.1 to withdraw monies RFA No.329/1997 therefrom; however upon objection by appellant/defendant

No.2, the said idea was dropped.

6. On the pleadings of the parties, the following issues were framed on 8th August, 1985:

1. Whether the plaintiff is the owner of the property in dispute?. OPP2 Whether the suit is not valued properly for the purposes of Court fee and jurisdiction?. OPD3 Whether the property in dispute was purchased by Bachan Singh and Arjan Singh as alleged in para 1 of the written statement?. If so, its effect?. OPD4 Whether the defendants are illegal occupants of the suit property?. OPP5 Whether the suit is bad for non joinder of parties?. OPD6 Whether the defendants have become the owner of the suit property by way of adverse possession?. OPD7 Relief.

7. The respondent/plaintiff examined as many as 24 witnesses. The appellants/defendants examined 6 witnesses. The respondent/plaintiff examined himself in rebuttal.

8. The learned ADJ in the impugned judgment has found/observed/held: (i) that not only was the Sale Deed of the land underneath the property in the name of the respondent/plaintiff but the property was also recorded with the Municipal Authorities in the name of the respondent/plaintiff only and the electricity and water meters in the property were also in the name of the respondent/plaintiff and all other documents with respect to the property viz. Sanction for construction, completion certificate etc. were also in the name of the respondent/plaintiff; (ii) that all the bills of purchase of materials for construction of the property were in the name of the respondent/plaintiff only and the contractors/workers who had constructed and completed the property were also engaged by the respondent/plaintiff only; (iii) that it is the respondent/plaintiff only who had declared himself as the absolute owner of the property before the Income Tax Authorities; (iv) that Sh. Arjan Singh being the predecessor of the appellants/defendants, at the time of his death on 5th May, 1972 was resident of L-110, Lajpat Nagar-II, New Delhi only and all the ceremonies in connection with his death had also taken place there only and which showed that the appellants/defendants had not shifted to the suit property in November, 1971 or till then as was claimed by them in the written statement; (v) that the testimonies of

the witnesses examined by the appellants/defendants to show that they were also involved in the construction of the suit property or were in occupation thereof as owners, did not inspire confidence; (vi) that the total cost of construction was about Rs.1,25,000/-; (viii) that the appellants/defendants had failed to prove joint ownership of the property or any understanding or settlement that the suit property was benami in the name of the respondent/plaintiff; (ix) that the respondent/plaintiff was thus held to be the sole owner of the suit property; (x) that Sections 91 & 92 of the Indian Evidence Act, 1872, bar evidence of any oral agreement or settlement; in view of the registered Sale Deed of the property in favour of the respondent/plaintiff, no other evidence of ownership of the appellants/defendants or their predecessor could be considered; (xi) that the appellants/defendants had also not become owners of the said portion of the ground floor of the property by adverse possession as the suit was instituted within 12 years of the appellants/defendants coming into possession of the property; (xii) that the appellants/defendants were thus in illegal possession of the property; (xiii) that the suit was correctly valued for the purposes of court fees and jurisdiction; (xiv) that the suit was not bad for non-joinder of parties. Axiomatically, the suit was decreed and a decree for recovery of possession was passed in favour of the respondent/plaintiff and against the appellants/defendants.

9. The senior counsel for the appellants/defendants has argued: (A) that the prohibition as contained in the Benami Transactions (Prohibition) Act, 1988 from taking a defence, of the appellants/defendants being the actual/real owner of the property for recovery of possession of which the suit was filed and the respondent/plaintiff being benami owner thereof, would not apply as the appellants/defendants had filed the written statement (in the suit from which this appeal arises) taking the said defence on or about 12th November, 1984 i.e. prior to the coming into force of the Benami Act and which as per the G. Mahalingappa Vs. G.M. Savitha (2005) 6 SCC441 is not retrospective; (B) that the only reason given in the impugned judgment for negating the plea of the appellants/defendants of being the actual/real owner, is Sections 91 & 92 of the Evidence Act but which have no application to a plea of benami; reliance is placed on Bai Hira Devi Vs. Official Assignee of Bombay AIR 1958 SC448 laying down that the application of the rule contained in Sections 91 & 92 is limited to cases as between the parties to

the instrument or their representatives in interest and it is contended that the appellants/defendants being not parties to the Sale Deed of the land underneath the property in favour of the respondent/plaintiff are not prohibited from setting up title in their own favour. Reliance in this regard is also placed on Jai Narain Parasrampuriah Vs. Pushpa Devi Saraf (2006) 7 SCC 756 laying down that Section 54 of the Transfer of Property Act, 1882 does not lay down a law as to whether in all situations an apparent state of affairs as contained in a Deed of Sale would be treated to be the real state of affairs and does not bar benami transactions and there is no embargo in getting a property registered in the name of one person although the real beneficiary thereof would be another; (C) that the plea in the written statement of the appellants/defendants is of benami only; (D) that the said plea of benami is proved from construction of two separate identical units in the property; had the two brothers namely Sh. Bachhan Singh (being the father of the respondent/plaintiff) and Sh. Arjan Singh (being the predecessor of the appellants/defendants) been not the owners in equal share of the property, the occasion for constructing two separate units would not have arisen and the respondent/plaintiff if had allowed the appellants/defendants to reside in his house out of love and affection, would have constructed the house as one only; (E) that there could have been no closer relationship amongst the two families with the brothers Sh. Bachhan Singh and Sh. Arjan Singh being married to two sisters; (F) that it was owing to such close relationship that trust was reposed in the respondent/plaintiff who was not only the eldest and the only major child of the two families but was also the most educated one with the others being uneducated; (G) that the respondent/plaintiff having admitted the joint bank account with the appellant/defendant No.1, the onus to prove that the same was not to meet the construction expenses of the house, was on the respondent/plaintiff and which he has failed to discharge; (H) that there would have been no occasion for the appellants/defendants to shift from their tenanted accommodation at Lajpat Nagar-II but for being the owners in equal share of the suit property; (I) reliance is placed on Madan Lal Vs. Ram Prasad AIR 2002 Rajasthan 99 holding that when it is found that the property was purchased from the income of the joint family business, then the title of the property cannot vest in the plaintiff merely because the plaintiff had shown himself as proprietor of the firm before the Income Tax

Authorities and it is contended that since the Sale Deed of the land underneath the property was in the name of the respondent/plaintiff though benami, all other documents viz. sanction plan for construction, completion certificate, electricity, water meters, house tax, but naturally would be in the name of the respondent/plaintiff and would have no relevance to determine the aspect of benami; (J) that though at the time of institution of the suit from which this appeal arises, the respondent/plaintiff was in possession of the first floor of the property but subsequently under pressure of the society/family RFA No.329/1997 delivered possession thereof to appellants/defendants and has subsequently filed a suit for recovery of possession of the first and the second floors also and which is pending adjudication; (K) that though the applications filed by the appellants/defendants in this appeal under Order 41 Rule 27 of CPC have been dismissed but the appellants/defendants in the suit with respect to the first and second floors would be leading evidence which this Court has refused to take; (L) that the findings to be returned in the judgment in this appeal should thus be confined with respect to the ground floor only and should not prejudice the defence of the appellants/defendants in the suit for possession of the first and second floors; (M) that the respondent/plaintiff has not proved the source of consideration of Rs.9,000/- paid for purchase of the land underneath the property; (N) that though the respondent/plaintiff in his deposition claimed to have paid advance of Rs.1100/- for purchase of the land underneath the property but the Sale Deed records the entire sale consideration of Rs.9,000/- to have been paid at the time of execution thereof only and does not mention of any advance of Rs.1100/- having been paid; (O) that the appellants/defendants have proved as Ex.PW-24/D-1 accounts of expenses incurred in construction; there would have been no occasion for the said accounts to be in custody of the appellants/defendants; had the appellants/defendants not been the equal owners of the property; (P) that between the year 1965 when the land was acquired and the year 1976 when construction thereon was completed, the land cost at Rs.9,000/- was inconsequential viz-a-viz. the construction cost of Rs.1,25,000/-; it is for this reason only that though no details/accounts of the land cost were maintained but accounts of the expenses incurred in construction were scrupulously maintained; (Q) that had the construction cost been not shared, there would have been no need to maintain

pennywise accounts as is found from the document Ex.PW24/D-1 to have been done; (R) that the said accounts and of which there is no explanation by the respondent/plaintiff, coupled with construction of two separate units which is out of the ordinary, clearly establishes joint ownership and/or the appellants/defendants being actual/real owners of half of the property including the portion in their possession; (S) reference is made to Madan Lal Kapur Vs. Subhash Lal Kapur 2003 VIII AD (Delhi) 108 and to Marcel Martins Vs. M. Printer AIR 2012 SC1987 to contend that there can be benami coownership and that contribution to the purchase consideration of the property leads to the inference of benami; (T) that in 1965-1976 tenants were protected from eviction and rents were low and the appellants/defendants would not have left the premises at Lajpat Nagar in their tenancy to reside as licensees in the house of the respondent/plaintiff; (U) that the entries in the account of construction Ex.PW-24/D-1 tally with the entries in the passbook of the joint account aforesaid of the respondent/plaintiff and the appellant/defendant No.1; (V) that the appellants/defendants have filed a large number of other documents on Trial Court record showing incurring of expenditure by them in construction of the property and in their own name and maintenance of account of expenses on construction of the property and though they were proved in accordance with law but the exhibit marks were not put thereon and the same ought to be read in evidence; (W) In response to query, as to what test is to be applied to determine whether the transaction is a benami one, reliance is placed on Binapani Paul Vs. Pratima Ghosh AIR 2008 SC543 (X) reference is made to Jai Pal Shishodia Vs. Poonam Rathore 191 (2012) DLT487(DB) to contend that in disputes amongst family relations, by the very nature of relationship, it is to be expected that people would be un-officious in conducting the affairs within the family and would feel comforted that their trust and confidence would not be belied for the party that they are dealing with is their own kith and kin and further that the truth is known to all the relations.

10. Per contra, the counsel for the respondent/plaintiff has contended: (I) that inference of benami cannot be drawn on surmises and conjunctures; he also places reliance on Binapani Paul (supra); (II) that the appellants/defendants do not say who paid the monies to whom and make vague averments; (III) that the appellants/defendants do not claim to have participated in the purchase of land as

would have been the case, had they been the joint owners; (IV) that the appellants/defendants nowhere claimed themselves to be the owners of the property; (V) that no motive for indulging in benami transaction is disclosed; (VI) that according to the appellants/defendants their predecessor Sh. Arjan Singh was having a flourishing construction business and there is no explanation as to why he could not purchase the property in his own name; (VII) that the appellants/defendants never claimed partition or mutation in their own names and have taken the plea of benami only when sued for possession; (VIII) that from the factum of the respondent/plaintiff admittedly inducting tenants and realising rent of the portion of the first floor of which also the appellants/defendants claim to be owners, the plea of benami is belied; (IX) that if there had been any merit in the plea of the appellants/defendants of having allowed the respondent/plaintiff to induct tenants to compensate the respondent/plaintiff for the cost of construction of the first and second floors incurred by him on the appellants/defendants behalf, account of such costs and of the rent realised would have been kept; on the contrary, the appellants/defendants in their pleadings and testimonies have vaguely stated that about Rs.25,000/- to Rs.30,000/- would have been incurred by the respondent/plaintiff in construction and he must have realised Rs.50,000/- as rent; the appellants/defendants could not even give particulars of the tenants and which shows that they were then not concerned at all with the said letting of the property; (X) that no evidence whatsoever of benami has been led; (XI) that the burden of proof in this regard was on the respondent/plaintiff; (XII) that though the possibility of benami between the two brothers i.e. Sh. Bachhan Singh and Sh. Arjan Singh may have existed but the question of the respondent/plaintiff being benami for his father and his fathers brother did not arise; (XIII) that there are no separate units of construction in the property as has been incorrectly argued; the plan for construction of the property was sanctioned as one only and not as two units, with only one kitchen on the ground floor and the sanction plan has been proved as Ex.PW-6/1; (XIV) that the appellant/defendant No.1 who has died during the pendency of this appeal was not examined as a witness; the joint account was in her name and she was the best witness; (XV) that adverse inference has to be drawn against the appellants/defendants for suppression of best evidence; reliance in this regard is placed on Vidhyadhar Vs. Manikrao (1999) 3

SCC573(para 17); (XVI) that though the appellants/defendants claimed that they were in possession of the first floor from December, 1981 till they were dispossessed therefrom in 1982-1983 but did not make any police complaint of such dispossession; on the contrary, when the appellants/defendants during the pendency of the suit from which this appeal arises, forcibly took possession of the first floor in or about the year 1993, a police complaint thereof was made by the respondent/plaintiff; (XVII) that there is not a whisper of benami in the entire written statement; (XVIII) that the joint bank account on which so much emphasis has been laid by the senior counsel for the appellants/defendants shows total transactions of Rs.15,975.81p only and which is meaningless in the face of the admitted construction cost of Rs.1,25,000/-; (XIX) that the reason given for benami transaction is false as the respondent/plaintiff was only 8th Class pass, while the appellant/defendant No.2 is admittedly a matriculate; (XX) that the appellants/defendants in their written statement have admitted the respondent/plaintiff to be better financially and the appellants/defendants at the relevant time going through a financial crunch and which establishes that the reason for the respondent / plaintiff allowing appellants / defendants to reside in his house was compassion; (XXI) that no witness has been called by the appellants/defendants to prove any purchase of building material for construction purpose by the appellants/defendants as has been done by the respondent/plaintiff; (XXII) that the appellants/defendants in the written statement have interchangeably referred to the respondent/plaintiff and Sh. Bachhan Singh being the owner of the other half of the property and which itself belies the plea set up of the respondent/plaintiff being benami owner and Sh. Bachan Singh and Sh. Arjan Singh being the real owners of the property; (XXIII) that according to the testimony of appellant/defendant No.2, appellants/defendants were maintaining regular accounts of business and employing Munshis but no accounts of the suit property have been pleaded or proved to have been maintained in their books and the only reason can be that they were not the owners.

11. The senior counsel for the appellants/defendants in rejoinder has argued: (a) that the appellant/defendant No.2 became matriculate after 1965, when he was a minor; (b) that the pleas in the written statement of having equally shared the cost of the property are indeed pleas of benami; (c) that the existence of two gates, two

rear doors, two kitchens with no inter se access and two staircases in the property is admitted and thus there was no need for the appellants/defendants to file any plan and the sanction plan does not represent the construction existing at the site; (d) that the appellant/defendant No.1 Smt. Chanan Kaur was/is but one of the defendants and there was nothing which was in her exclusive knowledge and thus the rule of adverse inference from nonproduction of best evidence does not apply.

12. The appellants/defendants having also taken the plea of ownership by adverse possession in alternative to the plea of being the real co-owner of the property and having also claimed an issue on the said plea and which has also been decided against the appellants/defendants, attention of the senior counsel for the appellants/defendants was invited to the judgments of the Supreme Court in Mohan Lal Vs. Mirza Abdul Gaffar (1996) 1 SCC639 Karnataka Board of Wakf Vs. Govt. of India (2004) 10 SCC779 Annasaheb Babusaheb Patil Vs. Balwant @ Balasaheb Babusahed Patil (1995) 2 SCC543 and L.N. Aswathama Vs. P. Prakash (2009) 13 SCC229 laying down that a person claiming lawful title to the property cannot simultaneously take the plea of adverse possession and it was enquired whether the appellants/defendants want to press the claim for adverse possession or as real owners.

13. The senior counsel for the appellants/defendants replied that though he has no instructions to give up the plea of adverse possession but his argument is on the basis of the appellants/defendants being real owners of the property. No arguments on the aspect of adverse possession have been addressed.

14. The learned ADJ has disbelieved the version of the appellants/defendants of having come into possession of the property in November, 1971 and has held that the appellants/defendants were residing at Lajpat Nagar till the demise of their predecessor Sh. Arjan Singh on 5 th May, 1972 as all ceremonies of death were held from Lajpat Nagar residence only and the suit for recovery of possession (from which this appeal arises) was filed within twelve years thereafter and the plea of adverse possession was thus not available to the appellants/defendants. There is, as aforesaid, no challenge to the said finding. I, even otherwise, concur with the same. Had the appellants/defendants shifted to the suit property in

November, 1971 with only some family members continuing in Lajpat Nagar House, in the normal course of human behaviour the ceremonies pursuant to death on 5th May, 1972 of Sh. Arjan Singh would have been held near about the suit property only, specially considering the closeness of relationship emphasised by the senior counsel for the appellants/defendants. Not only so, no averment of adversity has been pleaded or proved. Mere long possession does not create any rights in immovable property, as held in *Roop Singh Vs. Ram Singh* (2000) 3 SCC708 The claim of the appellants/defendants of having becoming owners by adverse possession is thus rejected and the impugned judgment affirmed to the said extent.

15. I will now take up the claim of the appellants / defendants of the purchase of the property in the name of the respondent / plaintiff being benami and Sh. Bachhan Singh, father of the respondent / plaintiff and Sh. Arjan Singh predecessor of the appellants / defendants being the actual / real owners of the property.

16. Though the senior counsel for the appellants / defendants had faintly suggested that since the reliance placed by the learned Additional District Judge on Sections 91 and 92 of the Evidence Act to negate the said claim of the appellants / plaintiffs is contrary to the dicta of the Supreme Court in *Bai Hira Devi & in Jai Narain Parasrampur* supra, the judgment is in any case liable to be set aside but the same is not the correct position in law. Not only do I find the learned Additional District Judge to, besides relying on Sections 91 and 92 of the Evidence Act for negating the claim of the appellants / defendants of ownership, have also held that the appellants / defendants had failed to prove joint ownership of the property or any understanding or settlement that the property was benami in the name of the respondent / plaintiff but even otherwise the hierarchy of the Courts cannot play ping pong in the manner suggested. Merely because the appellate Court disagrees with the reasoning given in the impugned judgment is no reason to set aside the impugned judgment if the appellate Court on the basis of the material otherwise on record finds the relief ultimately granted in the judgment to be in order. It has not been argued by the senior counsel for the appellants / defendants that the appellants / defendants had invited the attention of the learned

Additional District Judge to Bai Hira Devi supra. The appellants / defendants are thus equally to blame for having not argued the said aspect in correct perspective before the learned Additional District Judge. A lis would never be decided if the matters are permitted to so shuttle between the Courts.

17. Though both counsels on being asked to show the test to be applied for determining whether the transaction is a benami one, relied on Binapani Paul supra and which while dealing with the contention that a transaction in benami may be entered into for no apparent reason, holds that a person may for various reasons intend to purchase a property in the name of his wife, it may be for one reason or the other, there may or may not be a practice in respect thereto but I am unable to decipher from the said judgment, as was suggested by the senior counsel for the appellants / defendants that a benami transaction may be entered into for no apparent reason. The Supreme Court earlier in Valliammal Vs. Subramaniam (2004) 7 SCC233 and which was cited with approval in Binapani Paul held that there is a presumption in law that the person who purchases the property is the owner of the same; this presumption can be displaced by successfully pleading and proving that the document was taken benami in the name of another person for some reason; that the essence of a benami transaction is the intention of the party or parties concerned and though such intention may be shrouded in a thick veil which cannot be easily pierced through but such difficulties neither relieve the person nor justify the acceptance of mere conjectures or surmises as a substitute for proof. Though the Supreme Court laid down the following six circumstances i.e.:

(i) The source of the purchase money. (ii) The nature and possession of the property after the purchase. (iii) Motive if any for giving the transaction a benami colour. (iv) The position of the parties and the relationship. (v) The custody of the title deeds after the sale and (vi) The conduct of the parties in dealing with the property after the sale. as a guide to determine the nature of the transaction but further proceeded to hold that the source from where the purchase money came and the motive why the property was purchased benami are by far the most important tests for determining whether the sale standing in the name of one person, is in reality for the benefit of the other. It was further held that a plaintiff, in

order to prove that he was the real owner of the property is required to show that there were valid reasons for purchase of the property in the name of his wife; finding the reason given in that case to be not plausible, the claim for benami was rejected. It was held to be well settled that intention of parties is the essence of benami transaction and finding the plaintiff in that case to not have any justification for purchasing the property in the name of his wife, the claim for benami was rejected.

18. I am therefore of the opinion that when the Supreme Court in Binapani Paul observed that a person may for various reasons intend to purchase the property in the name of his wife and that it may be for one reason or the other and that there may or may not be a practice, the same cannot be held to be laying down that without proving a motive or reason for entering into the benami transaction such a claim can be sustained.

19. The reason given in the written statement of the appellants / defendants for the purchase of the plot of land underneath the property benami in the name of the respondent / plaintiff is that Sh. Bachhan Singh and Sh. Arjan Singh were old and had deputed the respondent / plaintiff who was the eldest son of Sh. Bachhan Singh to purchase the plot on their behalf. Though the senior counsel for the appellants / defendants had in his arguments also vehemently contended that Sh. Bachhan Singh and Sh. Arjan Singh were illiterate, respondent / plaintiff was the most educated and that the other children of Sh. Bachhan Singh and Sh. Arjan Singh were then minors but the said argument is not shown to have any foundation in pleadings or in evidence. Such arguments, factual in nature, but without any foundation cannot win suits and appeals arising therefrom.

20. There is, in my view, really no justification in the written statement of the appellants / defendants for purchase of plot of land by Sh. Bachhan Singh and Sh. Arjan Singh benami in the name of the respondent / plaintiff. Sh. Bachhan Singh is stated to have been alive during the pendency of the suit. He thus in 1965 could not have been so old so as to be not able to get the Sale Deed executed in his favour. No particulars of age neither of Sh. Bachhan Singh nor of Sh. Arjan Singh in the year 1965 are pleaded. Sh. Arjan Singh also is stated to have died only on

05.05.1972 i.e. seven years after the purchase of the plot of land. Thus he also could not in 1965 have been so old so as to be unable to have the Sale Deed executed in his favour.

21. Moreover, the reason given of old age of Sh. Bachhan Singh and Sh. Arjan Singh is belied from the admitted opening of the joint bank account in the name of respondent / plaintiff and the deceased appellant / defendant No.1 Smt. Chanan Kaur wife of Sh. Arjan Singh. It is unbelievable that Sh. Arjan Singh or his wife Smt. Chanan Kaur would trust the property to be benami in the name of the respondent / plaintiff but for the purpose of incurring the costs of construction, not trust the respondent / plaintiff but join the name of Smt. Chanan Kaur in the account. Just like Smt. Chanan Kaur was made the joint holder of the said bank account, even if Sh. Arjan Singh was too old to have the Sale Deed executed in his favour, the Sale Deed also could have been in favour of respondent / plaintiff jointly with Smt. Chanan Kaur.

22. 1971. The joint bank account is stated to have been opened in February, Both Sh. Bachhan Singh and Sh. Arjan Singh were then alive. Though Sh. Arjan Singh died a little more than one year thereafter on 05.05.1972 but Sh. Bachhan Singh is stated to have been alive till the evidence is led in the suit i.e. till 1990s. Had Sh. Bachhan Singh and Sh. Arjan Singh been the real / actual owners of the property and spending monies on construction thereof, it is inexplicable why the account was in the name of the respondent / plaintiff and not in the name of Sh. Bachhan Singh. Reliance in this regard may also be placed on V. Shankaranarayana Rao Vs. Leelavathy (2007) 10 SCC732(of which also the same Honble Judge of the Supreme court who has authored Binapani Paul supra was the author) laying down that the role and / or the motive on the part of the person who had advanced the amount of construction played an important role in the determination of the nature of the transaction and further holding the High Court to have committed a manifest error in holding that the source of purchase money was conclusive to hold the transaction to be benami.

23. The factum of the respondent / plaintiff being the eldest of the children of the two brothers Sh. Bachhan Singh and Sh. Arjan Singh, in the other circumstances

of this case in my opinion is not a plausible justification for purchase of the property by Sh. Bachhan Singh and Sh. Arjan Singh benami in the name of the respondent / plaintiff. Though Sh. Bachhan Singh and Sh. Arjan Singh besides being related by blood were also related through their wives but were admittedly at the time of purchase of the plot of land in the year 1965 neither joint in residence nor in business. It was not as if the respondent / plaintiff as the eldest and the only child of age of a joint household of two brothers was representing in joint affairs of the said brothers. There is no plea to the said effect. If that was so, then the said reason for the transaction / benami in the name of the respondent / plaintiff cannot be accepted. Significantly, the plea in the written statement also is of the respondent / plaintiff only having purchased the land with no participation from any other and only the purchase consideration having been paid to him equally by Sh. Bachhan Singh and Sh. Arjan Singh and not of the respondent / plaintiff contrary to the instructions of Sh. Bachhan Singh & Sh. Arjan Singh purchasing the land in his own name. The plea is of everybody being aware since the date of purchase of the land being in the name of the respondent / plaintiff only.

24. Taking the reasoning given by the appellants / defendants logically further, even if at the time of purchase of the land in the year 1965, the respondent / plaintiff was the only major child of Sh. Bachhan Singh and Sh. Arjan Singh, admittedly the appellant / defendant No.2 being the eldest son of Sh. Arjan Singh, at the time of commencement of construction in the year 1971 was of age and himself carrying on construction business. He has rather deposed having done his matriculate in the year 1967. If the reason for purchase of the land in the name of respondent / plaintiff only was of him alone being major at that time, in the ordinary course of human behaviour upon the eldest son of Sh. Arjan Singh coming of age and being admittedly more educated than the respondent / plaintiff, documents showing joint ownership of the property would have been executed.

25. The reliance by the senior counsel for the appellants / defendants on the judgment supra of the Rajasthan High Court in this regard is thus misconceived. In that case, the parties were in joint business. The question whether a particular sale is benami or not is largely one of fact and even a little difference in facts can make a judgment cited as precedent inapplicable.

26. Though in my view the appellants / defendants having failed to satisfy the condition of existence of a plausible justification for entering into a benami transaction, no further enquiry is required to be made and they are bound to fail but for the sake of completeness, I proceed to deal with the other arguments also.

27. Save for a bare plea in the written statement of Sh. Arjan Singh having paid 50% of the purchase consideration for the plot of land to the respondent / plaintiff, there is absolutely no other evidence of the appellants / defendants or their predecessor Sh. Arjan Singh having contributed to the construction for the purchase of the plot of land. Though the senior counsel has attempted to fill the said lacuna by arguing that the purchase price of the land was inconsequential to the cost of construction but his argument on the aspect of the cost of construction is of account being maintained penny-wise and attention was drawn to entries in Ex.PW24/D1 of as low as an amount of 50 paise. When the appellants / defendants were keeping accounts of even 50 paise spent on construction, it is inconceivable that they would not have kept accounts of the payment of the purchase consideration. Moreover, the appellants / defendants have pleaded that they were carrying on business and employing munshis and maintaining accounts and in these circumstances the failure of the appellants / defendants to account for contribution to the purchase consideration of the plot of land has but to be inferred as failure to prove any contribution towards purchase consideration of the land. The contention of the senior counsel for the appellants / defendants that it was for the respondent / plaintiff to have proved that he had paid the entire purchase consideration cannot be accepted as the same loses sight of the fact that the registered document records the purchase consideration for the land to have been paid by him.

28. The argument of the senior counsel for the appellant / defendant of accounts of money spent on construction being in the custody of the appellants / defendants is also without any basis. The appellants / defendants were also at the contemporaneous time in the construction business. Mere production of accounts of construction without establishing the same to be with respect to the suit property is of no avail. The senior counsel for the appellants/defendants having laid much emphasis on the closeness and duality of the relationship between the families, I

had during the hearing put to the senior counsel for the appellants/defendants and am of the view that the same can also work to the prejudice of the appellants/defendants inasmuch as the same could have also allowed the accounts even if of construction of suit property, to have come into custody of appellants/defendants.

29. As far as the plea of the appellants / defendants having spent monies on construction is concerned, the said plea is with respect to the ground floor only. RFA No.329/1997 It being not in dispute that the joint bank account of Page 39 of 45 appellant/defendant No.1 and the respondent/plaintiff shows deposit and withdrawal of Rs.15,957.81p only, it was enquired from the senior counsel for the appellants/defendants whether there is any other documentary evidence of the appellants/defendants having borne the remaining of the total amount of Rs.1,25,000/- admittedly spent on construction.

30. The senior counsel for the appellants/defendants has fairly admitted that there is none except for the statement of accounts of construction materials purchased by the appellants/defendants.

31. The plea, of respondent / plaintiff and / or Sh. Bachhan Singh having spent monies on construction of the first floor of the share of the appellants / defendants also and having recovered the same by realizing rent of the portion of the first and second floor of the share of the appellants / defendants has also not been established. On the one hand, the senior counsel for the appellants / defendants contends that accounts in annas and paise of construction were being maintained and on the other hand no accounts of what amounts were spent by the respondent / plaintiff and / or Sh. Bachhan Singh on behalf of appellants / defendants and how much they realized from rent, were maintained. The only inference again can be that there was no such arrangement.

32. It was also enquired from the senior counsel for the appellants/defendants whether the appellants/defendants, between the year 1984 when the suit from which this appeal arises was filed and at least from the filing whereof the appellants/defendants had notice that the respondent/plaintiff was denying their claim of being actual owner of the property and till the year 1993 when the

appellants/defendants were admittedly not in possession of the upper floors of the property, take any action for recovery of possession thereof or for declaration of their title with respect thereto and whether not the right, if any, of the appellants/defendants to take such action became time barred in the said period.

33. The senior counsel for the appellants/defendants again fairly stated that no such action was taken by the appellants/defendants and though the right to take action may have become time barred but the same does not come in the way of the appellants/defendants taking the requisite pleas as a defence to the claim by the respondent/plaintiff for possession of the said floors.

34. The only other argument of the senior counsel for the appellants / defendants of construction in the form of two independent units having been only for the reason of the appellants / defendants having right as owner to one of the said units is also found to be not made out. The plea of the appellants / defendants in their written statement was of the plan for construction of two houses having been got sanctioned from the MCD and two identical houses having been built. However the appellants / defendants failed to even file any site plan. The justification now given of admissions in the cross-examination of the respondent / plaintiff are of no avail. The sanctioned site plan proved by the respondent / plaintiff does not show sanction having been obtained for construction of two independent units in the property. The appellants / defendants have thus not proved as to how the property has been divided between the respondent / plaintiff, Sh. Bachhan Singh and the appellants / defendants and / or that the two portions are equal. The second floor barsati as per the sanctioned plan comprise of one room only. As far as the admission of existence of two stair cases is concerned, it is the admitted position that the two portions of the first floor have always been let out separately. The plot in question is not a square or a rectangular one but is much narrower in front than on the rear and it is well nigh possible that considering the odd dimensions of the plot, one stair case would not have conveniently provided access to the two units constructed on the upper floor. As far as the construction of two units on the first floor is concerned, the same does not give rise to presumption of the same being in acknowledgment of equal rights of the two brothers; judicial notice can be taken of owners of properties constructing two instead of one unit when a floor is

intended to be let out, as smaller units fetch more rent.

35. Another test lay down by the Supreme Court in the judgment supra and in which also the appellants fail is of the appellants / defendants being not in custody of any of the title documents pertaining to the house. It cannot be lost sight of that the parties are businessman who often make use of title documents of their properties to secure loans and financial advances. There was no reason for the appellants / defendants to for so many years having not demanded a document affirming their title to 50% of the property for use for securing such loans / financial advances.

36. What I also find strange is that though the claim of the appellants/defendants was of Sh. Bachhan Singh and Sh. Arjan Singh being the real owners and the respondent/plaintiff being the Benami owner and, even though Sh. Arjan Singh was no more at the time of institution of the suit but neither Sh. Bachhan Singh nor the appellant/defendant No.1 i.e. Smt. Chanan Kaur wife of Sh. Arjan Singh, who were both alive throughout the period of pendency of the suit, were examined by the appellants / defendants. In my opinion, they were the best witnesses to the defence set up by the appellants/defendants.

37. No merit is found in the contention of the senior counsel for the appellants / defendants of Smt. Chanan Kaur being one of the several defendants, no adverse inference can be drawn from her non appearance for the reason of the appellant / defendant No.2 having appeared. It is the case of the appellants / defendants themselves that the property in the year 1965 was purchased benami in the name of the respondent / plaintiff for the reason of the appellant / defendant No.2 being a minor in the year 1965. The appellant / defendant No.2 thus could not be expected to be in the know of the circumstances at the time of purchase in the year 1965 of the land underneath the property and only the appellant / defendant No.1 could have deposed of the same.

38. The appellants / defendants thus fail on all counts. Resultantly, the appeal is dismissed. Though the suit in this appeal for recovery of possession has been pending for the last nearly 30 years but neither did the respondent / plaintiff make any claim for mesne profits / damages for use and occupation nor did the learned

Additional District Judge make any such order as could have been made as per the judgments in R.S. Madanappa Vs. Chandramma AIR 1965 SC1812 and Gopal Krishna Pillai Vs. Meenakshi Ayal AIR 1967 SC155 even without any specific prayer nor was any order for payment of mesne profits while granting stay of execution of the judgment was made. Though according to me this is a fit case for award of mesne profits but in the absence of the counsels having been heard on the said aspect, I refrain from doing so. However the case of the appellants / defendants having been found to be false, I burden them with costs of Rs.50,000/- of this appeal payable to the respondent / plaintiff within 90 days hereof. Decree sheet be drawn up. RAJIV SAHAI ENDLAW, J.

SEPTEMBER 18 2013 Bs/gsr

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