

**Smt. Urmila Dasi Vs. Probodh Ch. Ghosh and anr.**

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**Court :** Kolkata

**Decided On :** Jan-10-1985

**Reported in :** AIR1986Cal383,89CWN465

**Judge :** G.N. Ray and ;Sankari Prasad Das Ghosh, JJ.

**Acts :** [Trusts Act, 1882](#) - Section 82

**Appeal No. :** A.F.A.D. No. 497 of 1978

**Appellant :** Smt. Urmila Dasi

**Respondent :** Probodh Ch. Ghosh and anr.

**Advocate for Def. :** B.K. Roy Chowdhury and ;Akbaruzzaman, Adv.

**Advocate for Pet/Ap. :** R.P. Bagchi, ;S.S. Ray and ;Nandita Ghosh, Advs.

**Disposition :** Appeal dismissed

**Judgement :**

G.N. Ray, J.

1. This appeal arises out of the judgment and decree passed by the learned Additional District Judge, 9th Court, Alipore, in Title Appeal No. 702 of 1976 reversing the judgment and decree passed by the learned Sub-Judge, First Court, Alipore, in Title Suit No. 4 of 1972.

2. The plaintiff is the appellant in the instant appeal and the title suit was instituted by the plaintiff for declaration of his title to the property in dispute as described in schedule to the plaint and also for a declaration that the defendants Nos. 1 and 2 have no right, title and interest in the suit property and the alleged sale of the disputed property by a deed dt. May 10, 1067 between the defendant Nos. 1 and 2 was not binding upon the plaintiff. The plaintiff also made prayer for recovery of the khas possession of the disputed property after evicting the defendants from the same.

3. The plaintiffs case is that Tulsibala the mother of the plaintiff purchased on May 12, 1941 the plot in C. S. 563 and 559 since renumbered as R. S. Dag No. 606 and 614 out of her stridhan and built a hut on the said land and thereafter lived with her husband in the said property. The plaintiffs mother also purchased in the name of the plaintiff and also for her benefit the adjacent plot being dag No. 615 measuring 3 cent on June 19, 1953 by another registered deed. The mother of the plaintiff Tulsu Bala had died in 1949 leaving behind the plaintiff as her sole heir in respect of the said R. S. 606 and 614 and the father of the plaintiff Dasarathi Ghosh never claimed any title to or possession of the said property in view of the fact that the said property had been purchased by Tulsu Bala out of her Stridhan. It is also the case of the plaintiff that after the death of Tulsu Bala, the plaintiffs father Dasarathi married for the second time, the defendant No. 2 in 1950 and thereafter Dasarathi had died in 1951. During the revisional settlement operation, the plaintiff was a minor

and without her knowledge her name was jointly recorded with defendant No. 2 in respect of the said plot comprising a tiled hut standing in R. S. Dag No. 614. The plaintiff has contended that such record having been prepared erroneously, the same should be held to be not binding on the parties. The plaintiff has also contended that her stepmother the defendant No. 2, Anila Bala after fraudulently suppressing the aforesaid facts of ownership and possession of Tulsi Bala in respect of the disputed property till her death and also inheritance by the plaintiff after the death of Tulsi Bala, sold the said property to the defendant No. 1 by registered document dt. May 10, 1967. The defendant No. 1 taking advantage of the absence of the plaintiff took over the possession of the disputed property and fixed up boundaries by constructing pillars. The plaintiff, after coming to know of such act of dispossession by the defendant No. 1 from her maternal uncle Bama Charan Ghose, had to institute the instant suit against the defendant Nos. 1 and 2. It appears that defendant No. 1 only contested the suit by filing a written statement, inter alia, denying the allegations made in the plaint. The defendant No. 2 namely, the vendor of the defendant No. 1 did not file any written statement but she deposed in the said suit as a witness of the defendant No. 1. The defendant No. 1 has contended in the written statement that Dasarathi, the father of the plaintiff was a big merchant and he had purchased the disputed property in the benami of his wife Tulsi Bala by his own fund with the intention to keep himself free from the business liabilities and also constructed a house on the said plot. The land in Dag No. 505 was also purchased later on by the said Dasarathi in the name of his daughter namely the present plaintiff, Urmila Bala. The defendant No. 1 has contended that the record of rights was correctly prepared. After the death of Dasarathi, the suit property was inherited by the plaintiff and the defendant No. 2 jointly each having 8 annas interest and the revisional record of rights has been prepared accordingly. Thereafter, there was a mutual partition between the plaintiff and the defendant No. 2 by virtue of which the disputed properties had been allotted to the defendant No. 2 exclusively and the property at Jadavpur had been allotted to the plaintiff. The defendant No. 1 has contended that by virtue of his purchase of the exclusive interest of defendant No. 2, he had acquired the valid title and as such, the suit is liable to be dismissed.

4. In the said suit, the plaintiff got herself examined and P. W. 2, Bama Charan Ghose and P. W. 3, Haran Ghose were also examined in support of the plaintiffs case. It may be noted here that Bama Charan happens to be the maternal uncle of the plaintiff and P. W. 3 is the paternal uncle of the plaintiff. The defendant No. 1 gave evidence in the said suit in support of his case and 5 other witnesses including the defendant No. 2 Anila Bala were also examined on behalf of the contesting defendant No. 1. It may be noted here that the maternal uncle and the paternal uncle of the plaintiff in their deposition had stated that at the Bibahabasar, Rs. 500/- was paid to Tulsi Bala by Bama Charan in lieu of ornaments and by the said money, Tulsi Bala purchased the said plot and had constructed a house on the land purchased in her own name and she had resided there with her husband and her daughter till her death. The plaintiff being a small child at the time of purchase of the said property is not competent to say about the nature of the transaction from her personal knowledge but she has stated that her mother received the said jautuk of Rs. 500/- at the time of marriage paid by her grandmother through her maternal uncle and she has stated that both her maternal and paternal uncles are alive at the time of her deposition. It also appears that D. W. 4 Dhankrishna Chatterjee supports the case of the defendant No. 1 and he has stated that he acted as a priest at the time of the marriage of Dasarathi and Urmila and he has stated that no jautuk was given to Tulsi Bala as the financial condition of Tulsi Bala's brother was not sound. He has also deposed that he acted as the sole priest in the marriage ceremony and left the place after the ceremony was over, and during his presence, no jautuk was paid to Tulsi Bala as alleged in the plaint. This witness has also stated that Dasarathi was also working as a carpenter/at the time of marriage.

5. Defendant No. 2 Anila Bala in her evidence has stated that she had resided in the disputed premises with her husband and after the death of her husband, she also resided in one of the rooms and had let out the other room to a tenant for some time.

6. The learned Subordinate Judge, after considering the evidence adduced by the parties, inter alia, came to the finding that the property in question had been purchased by Tulsi Bala out of her stridhan which came from the said jautuk of Rs. 500/- given by her brother at the Bibahabasar. As the plaintiff gave up her claim of

mesne profit at the time of argument, the learned Judge decreed the suit in part. The plaintiffs title to the suit property was declared and it was also declared that the deed of sale dt. May 10, 1967 in favour of the defendant No. 1 executed by the defendant No. 2 was not binding on the plaintiff. A decree for khas possession of the disputed property by evicting the defendant No. 1 was passed by the learned Sub-Judge and 3 months' time was allowed from the date of judgment to vacate the disputed property and for delivery of khas possession of the same to the plaintiff. In default, the plaintiff was given liberty to recover khas possession by executing the decree.

7. Being aggrieved by the aforesaid judgment and decree by the trial Court, the defendant No. 1 Probodh Chandra Ghose preferred an appeal being Title Appeal No. 702 of 1976. The said appeal was heard by the learned Additional District Judge, 9th Court, Alipore who after analysing the evidence did not accept the finding of the trial Court that Tulsi Bala had purchased the disputed property in her name and in the name of her daughter namely the plaintiff out of her stridhan which she received by way of jautuk at the Bibahabasar. The learned Additional District Judge accepted the evidence of the priest that no jautuk was given at the time of marriage of Tulsi Bala and as such, Tulsi Bala had no capacity to purchase the said property out of her own fund. It may be noted that it is an admitted case of the plaintiff that besides the said jautuk, Tulsi Bala had no independent source of income. The learned Additional District Judge had also come to the finding that Dasarathi had his independent income and he had purchased the said property in the benami of his first wife and the daughter. It also appears that the learned Additional District Judge did not accept the evidence of the maternal and paternal uncles of the plaintiff about the payment of jautuk to the plaintiffs mother at the time of marriage on the ground that the said two persons were highly interested witnesses. The learned Judge, therefore, allowed the appeal and set aside the judgment and decree of the learned Sub-Judge and dismissed the suit on contest. Being aggrieved by the said judgment and decree of the Court of appeal below, the plaintiff has preferred the instant appeal.

8. Before the respective findings of the Courts below are taken into consideration, the law regarding the benami purchase as relied on by the learned Counsel for the parties may be summarised. Mr. Bagchi appearing for the appellant has submitted that the law is well settled that the person in whose name the property stands should be presumed to be the owner and any person who asserts that such person is only an ostensible owner and not the real owner is to establish the fact of benami purchase in the name of ostensible owner. Mr. Bagchi has also submitted that for the purpose of discharging the onus that the ostensible owner is not the real owner, the person who asserts the benami character, must lead legal proof in support of his case. On mere surmise and conjecture, the fact of benami cannot be decided by a Court of law. In support of this contention. Mr. Bagchi has referred to a Bench decision of this Court made in the case of Prolimarani Debi v. Pititpaban Mukkerjee, reported in (1956) 60 Cal WN 886. It has been held in the said division that there is no presumption that when a property stands in the name of a female, the Court will immediately come to the conclusion without any proof that it really belongs to the husband of the Female. Before such a presumption is raised or attracted, it is necessary for the person, who wants to make out that the property is not the property of the female, in whose name the document stands, to establish the fact that the consideration money for the purchase had come from the husband. Mr. Bagchi has also referred to a Supreme Court decision made in the case of Jaydayal Poddar v. Must. Bibi Hazra, reported in AIR 1971 SC 171 where it has been held that the burden of proving that a 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 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 though. 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.

9. Referring to the said decisions, Mr. Bagchi has submitted that the close relations namely, the paternal and

maternal uncles of the plaintiff have specifically deposed that a sum of Rs. 500/- was paid to the mother of the plaintiff by way of jautuk at the time of marriage and they have also said that the financial condition of Dasarathi had considerably deteriorated because of his long illness and he was in need of money and had to be maintained by the said paternal and maternal uncles of the plaintiff. There is also the evidence that after the said purchase by the plaintiffs mother, the plaintiffs father had to sell his share in the ancestral property which only indicates that the father of the plaintiff was in dire need of money at the time when the said property had been purchased. Mr. Bagchi has submitted that the said evidences have not been accepted by the Court of appeal below because the priest had stated that no jautuk was given to the plaintiffs mother at the time of marriage. He has submitted that the Court of appeal below has failed to note the evidence of the priest that he could not say if any jautuk had been given during his absence. Mr. Bagchi has submitted that the priest was only concerned in performing the rituals of the marriage and he admittedly had left after some time. Mr. Bagchi has submitted that when the said jautuk was given at the bibahabasar it is reasonably expected that the priest was not supposed to be present at that point of time. Mr. Bagchi has submitted that the Court of appeal below had proceeded on mere surmise and conjecture that in a Hindu family such jautuk was likely to be accepted by some members of the family and not by the bride herself and it was also not likely that the amount given by way of jautuk should be tied in the corner of the sari of the bride. He has submitted that about the advancement of the consideration money for the purchase of the said property of Dasarathi, no convincing evidence has been led on behalf of the contesting defendant No. 1. He has submitted that even assuming that Dasarathi had some earnings, the said fact by itself cannot establish that the property had been purchased by Dasarathi. Mr. Bagchi has contended that although it is obligatory on the part of the defendants Nos. 1 and 2 to give convincing legal evidence to prove that the property in question had been purchased by Dasarathi in the benami of his wife and daughter, the Court of appeal below has accepted the case of defendant No. 1 on mere surmise and conjecture and he has substituted such surmise and conjecture in place of the proof required to be given by the defendant No. 1. He has submitted that the decision made by the Supreme Court in the case of Jayadayal Poddar (AIR 1971 SC 171) (supra) squarely applies in the facts and circumstances of the case.

10. Mr. Bagchi has also submitted that the documents relating to the purchase of the said properties in the name of the plaintiffs mother and the plaintiff herself came from the custody of the plaintiff and the said fact also indicates that the property had been purchased by the plaintiff herself and not by the husband of the plaintiff in the benami of his wife and daughter. Mr. Bagchi has also submitted that it has come out from the evidence that the father of the plaintiff did not go to the Registration office when the property was registered. He has submitted that if in reality the property had been purchased by the father of the plaintiff in the benami of his wife, it was reasonably expected that he would have taken all steps for the purpose of purchasing the said property and had also attended the Registration office. Mr. Bagchi has submitted that the Court of appeal below has failed to consider the evidence in its proper perspective and on surmise and conjecture has come to the finding that the mother of the plaintiff had not purchased the said property out of her stridhan money and in all probability, the father of the plaintiff had purchased the same out of his fund. He has, therefore, submitted that the decision of the Court of appeal below should be set aside and the judgment and decree of the trial Court should be accepted by this Court.

11. Mr. Roy Chowdhury appearing for the respondent No. 1 has, however, submitted that benami purchase is very frequent in India and every slight evidence in support of a benami transaction is sufficient to establish the benami character of such transaction. He has submitted that the law is well settled that in case of benami transaction particularly when such benami transaction is made in favour of a very close relation, the proof of such benami transaction should not be insisted very rigorously. He has submitted that overall assessment of the facts and circumstances should be made and if overall assessment of the evidence appears to be quite probable that the transaction was a benami transaction, the Court should accept such contention. In support of such contention, Mr. Roy Chowdhury has referred to the decision of the Privy Council made in the case of Hakim Maulvi Md. Mahbuh Ali Khan v. Bharat Indu, reported in (1919) 23 Cal WN321: (AIR 1918 PC 137). In that decision, Privy Council has noted that benami transaction is frequent in India and in regard to benami

transactions, Court of law should not approach them with that scrupulous rigour which in other systems of jurisprudence may demand the existence of the clearest positive evidence that the ex facie owner of a property is a trustee for or holds the same for the interest of another. It has been further held that even a slight quantity of evidence to show that it was a sham transaction will suffice for the purpose. The Privy Council has further noted in the said decision that the decision of the Court should rest not upon suspicion but upon legal grounds established by legal testimony.

12. Mr. Roy Choudhury has also referred to a Bench decision of this Court made in the case of Bhubanmohini Dasi v. Kumudbala Dasi reported in (1924) 28 Cal WN 131: (AIR 1924 Cal 467) and in this case, the decision of the Privy Council in the case of Hakim Maulvi Md. Mahbub Ali Khan (supra) has been relied on. It has been held that the elementary principle that the burden of proof lies upon the person who asserts that the apparent is not the real state of things should not be lost sight of and a slight quantity of evidence on the basis of which the probability of a case may be reasonably inferred or proved or admitted facts together with the surrounding circumstances should be taken into consideration.

13. Mr. Roy Choudhury has also referred 'to a decision of the Supreme Court made in the case of Bhim Singh v. Kan Singh reported in : [1980]2SCR628 . In the said decision, the Supreme Court has referred to all kinds of benami transactions recognised in India. It has been held in the said decision that in one kind of benami transaction, a person buys a property with his own money but in the name of another person without any intention to benefit such other person. In that case, the transferee holds the property for the benefit of the person who has contributed the purchase money, and he is the real owner. The second case of benami transaction is a case where a person who is the owner of the property executes a conveyance in favour of another without the intention of transferring the title to the property thereunder. In such case, the transferor continues to be the real owner. In such case, the question whether a transaction is a benami transaction or not mainly depends upon the intention of the person who has contributed the purchase money. Several tests have been indicated by the Supreme Court for the purposes of deciding the real character of a transaction. The principle governing the determination of the question whether a transfer is a benami transaction or not has been summed up by the Supreme Court to the following effect : --(1). The burden of showing that a transfer is a benami transaction lies on the person who asserts that it is such a transaction; (2) if it is proved that the purchase money came from a person other than the person in whose favour the property is transferred, the purchase is prima facie assumed to be for the benefit of the person who supplied the purchase money, unless there is evidence to the contrary, (3) the true character of the transaction is governed by the intention of the person who has contributed the purchase money and (4) the question as to what his intention was has to be decided on the basis of the surrounding circumstances, the relationship of the parties, the motive governing their action in bringing about the transaction and their subsequent conduct, etc.

14. Referring to the said decision of the Supreme Court, Mr. Roy Chowdhury has submitted that the surrounding circumstances have to be taken into consideration in deciding the real nature of a transaction namely whether it is a benami transaction or not. He has submitted that in the instant case the admitted case of the plaintiff is that the mother had no other income excepting the money received by her by way of Jautuk and precisely with the said money, she had not only purchased the disputed property and other properties but had also constructed the structure. Mr. Roy Chowdhury has submitted that the fact of advancement of such jautuk was sought to be proved by examining the maternal and paternal uncles of the plaintiff but the evidences of the said persons were contradicted by the priest who had also deposed in the case. The Court of appeal below has taken into consideration the reasonings given by the trial Court in placing reliance on the said evidences of the maternal and paternal uncles of the plaintiff and discarding the evidence given by the priest. The Court of appeal below has held that the said two witnesses are highly interested witnesses and when a disinterested witness like the priest has categorically stated that no jautuk was given to the mother of the plaintiff at the time of marriage such evidence should be accepted. Analysing the probabilities of giving such jautuk in the manner suggested by the plaintiff, the Court of appeal below had not accepted the

evidences of the said witness and when such view is not perverse, no interference is called for in a second appeal.

15. Mr. Roy Chowdhury has contended that in the instant case, the Court of appeal below has not really decided the case on mere surmise and conjecture as sought to be contended by the learned Counsel for the appellant. He has submitted that the Court of appeal below has referred to the evidence adduced in the case and on the basis of such evidence has come to the finding that the father of the plaintiff had independent earnings and it was, therefore, quite possible for him to acquire the disputed properties. The Court of appeal below has also accepted the positive evidence given by the priest that no jautuk was offered at the time of marriage and besides this jautuk there is no case of any other independent income of the mother of the plaintiff. The Court of appeal below is therefore justified in holding that the plaintiff's mother had no occasion to purchase the property in question out of her stridhan money. Mr. Roy Chowdhury has submitted that the factum of possession of the disputed property cannot be lost sight of for the purpose of deciding the real character of the transaction. He has submitted that the positive evidence is that after the death of the father of the plaintiff the disputed house was kept under lock and key and the said maternal uncle had exercised possession on behalf of the plaintiff all throughout. The said fact could not be established by any cogent evidence. Mr. Roy Chowdhury has submitted that although the house stands very close to the house of the maternal uncle of the plaintiff, no rent was paid for years together either by the plaintiff or by any of the relations of the plaintiff and admittedly the possession of the said property is not with the plaintiff. The defendant No. 2 has categorically stated that she had resided in the said premises for some time even after the death of her husband and she had let out one of the rooms to a tenant. Barring the said two interested witnesses, no independent witness has been examined on behalf of the plaintiff to prove the factum of possession of the said property after the death of Dasarathi. Mr. Roy Chowdhury has submitted that the absence of Dasarathi at the time of registration of the document has been amply explained and it transpires from the evidences that Dasarathi was ill when the said registration was made and as such, it was not possible for him to attend the registration office. Mr. Roy Chowdhury has, therefore, contended that in the instant case, from the overall evidence adduced by the parties, it cannot be held very reasonably that the mother of the plaintiff had no occasion to purchase the suit property out of her own fund and if the acquisition of the said property by the mother of the plaintiff cannot be established by any other source of income, it can be safely held that Dasarathi had acquired the said property in the benami of his wife and daughter intending the said property to be kept for himself and as a matter of fact, he had exercised possession of the same even after the death of his first wife. Mr. Roy Chowdhury has, therefore, submitted that no interference is called for and the appeal should be dismissed.

16. After giving our anxious considerations to the respective contentions made by the learned Counsel for the parties, it appears that in the case of benami transaction, the entire surrounding circumstances should be taken into consideration and it should not be lost sight of, as pointed out by the Privy Council, that in India benami transaction is familiar, more so, when such acquisition is made in the name of very close relations like the wife and the children. Although law is well settled that the onus of proving the benami character squarely lies on the person who asserts that the person on whose name the title of the property stands is not the real owner, but the ostensible owner and such onus is required to be discharged by a clear legal evidence that the ex facie owner of the property is not the real owner and not on the basis of any surmise or conjecture. It should however be borne in mind that in a benami transaction particularly when it is alleged that such transaction was made in favour of a very close relation, a very strict proof which is required in other cases should not be adhered to. The Supreme Court in Bhim Singh's case : [1980]2SCR628 (supra) has given the guidelines which should be kept in mind for the purpose of deciding the true character of a transaction although the said guidelines are not exhaustive as pointed out by the Supreme Court itself in the said decision. There is no manner of doubt that the said guidelines will surely go a long way to determine the real character of the transaction. In the instant case, Mr. Roy Chowdhury is justified in his contention that acquisition of the property by the mother of the plaintiff out of her stridhan has not been accepted by the Court of appeal below not on mere surmise and conjecture. The Court of appeal below has accepted the

positive evidence of the priest who was present all throughout of the marriage ceremony. The Court of appeal below has also discarded the evidence of the paternal and maternal uncles of the plaintiff as they were highly interested witnesses. It may be noted in this connection that although the maternal uncle of the plaintiff had stated in his deposition that excepting the paternal uncle of the plaintiff no other person witnessing the said payment of jautuk to the mother of the plaintiff at the time of the marriage, was then alive there is evidence that another maternal uncle Abhoy who was then alive was also present. Unfortunately, the said maternal uncle Abhoy Charan has not been examined in support of the plaintiffs case. On the face of the evidence of the plaintiff that Abhoy Charan is still alive, the evidence of Bama Charan that excepting the paternal uncle, no other person witnessing payment of jautuk is alive cannot be accepted.

17. So far as the exercise of possession by the plaintiff either by herself or through his uncles is concerned, it should be noted that excepting bald statement made by Bama Charan that he had put the said house under lock and key for a number of years, no convincing evidence is forthcoming. It also appears that the plaintiff and/or her uncles did not pay rent for the said property and in the record of rights, her exclusive title and possession had not been recorded in the disputed property.

18. In the aforesaid circumstances, we are not inclined to take any contrary view in this appeal. This appeal is, therefore, dismissed.

There will be no order as to costs.

Sankari Prasad Das Ghosh, J.

19. I agree.

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