APPELLATE CIVIL.

Before Mr. Justice Varadachariar and Mr. Justice King.

1937, March 19.

CHITTALURI SITAMMA *alias* SITABAYAMMA AND ANOTHER (DEFENDANTS 1 AND 4), APPELLANTS,

v.

SAPHAR SITAPATIRAO AND FOUR OTHERS (PLAINTIFF AND DEFENDANTS 5, 7, 10 AND 11), RESPONDENTS.*

Benami transaction—Husband—Purchase in wife's name by—Benami or not—Onus of proof—Tests to find out nature of transaction—Indian Limitation Act (IX of 1908), arts. 142 and 144—Applicability—Tenants—Property in possession of—Scramble for several years prior to suit by attempts made by each of rival claimants to get tenants to attorn to him.

Where it was alleged that a purchase in the name of a Hindu wife was benami for her husband,

held (i) that the onus lay in the first instance on the party pleading that the transaction was benami; (ii) that the circumstance that the money required for the purchase was contributed by the husband and not by the wife was not conclusive in favour of the benami character of the transaction, though it was an important criterion; and (iii) that where the motive alleged for the benami transaction itself suggested that the purpose in view could be served only by a genuine transfer and not by a mere benami transaction, the more reasonable inference was that the transfer was intended to be operative as a transfer of the beneficial interest and not as a mere benami transaction.

Bilas Kunwar v. *Desraj Ranjit Singh*(1), *Rahiman Beebi* v. *Khathoon Bee*(2), *Thulasi Ammal* v. *The Official Receiver, Coimbatore*(3) and *Ismail Mussajee Mookerdam* v. *Hafiz Boo*(4) relied upon.

Where the suit was for recovery of possession of properties in the possession of tenants and it appeared that for several

*Appeal No. 112 of 1931 and Second Appeal No. 1214 of 1932.

(1) (1915) I.L.R. 37 All. 557, 564, 565 (P.C.).

(2) (1916) 4 L.W. 193.

(3) (1934) 67 M.L.J. 541.

(4) (1906) I.L.R. 33 Cal. 773, 784 (P.C.).

years prior to the suit there had been a scramble by the attempts made by each of the rival claimants—the plaintiff and the defendant—to get the tenants to attorn to his side,

held that the principle of article 144 and not article 142 of the Indian Limitation Act was applicable to the case.

APPEAL against the decree of the Court of the Subordinate Judge of Rajahmundry in Original Suit No. 34 of 1927 and SECOND APPEAL against the decree of the District Court of East Gōdāvari, Rajahmundry, in Appeal Suit No. 9 of 1931 preferred against the decree of the Court of the Subordinate Judge of Rajahmundry in Original Suit No. 17 of 1929.

V. Govindarajachari for appellants.

K. Umamaheswaram and *A. Rama Rao Saheb* for the first respondent.

Other respondents were not represented.

The JUDGMENT of the Court was delivered by VARADACHARIAR J.—This appeal arises out of a suit for recovery of possession of fifteen items of properties on the ground that the plaintiff has become entitled thereto under a gift deed (Exhibit A) executed in his favour by one Seetha Bai Ammal on 4th September 1914. Seetha Bai Ammal was the widow of one Jagannadha Rao and the mother-in-law of the first defendant. As the first defendant is also called Seetha Bai Ammal, we will refer to the first defendant when necessary as the daughter-in-law.

Jagannadha Rao died some time in 1903 leaving him surviving his widow Seetha Bai Ammal and an adopted son Subba Rao, who died in May 1914. The evidence shows that during the last days of Subba Rao or soon after his death the relations

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between the mother-in-law and the daughter-in-law became strained and the plaintiff, who is the grandson of a brother of the mother-in-law and who had been living in Subba Rao's family for some years, managed to persuade the old lady to execute a gift deed in his favour of properties in respect of which the title stood in her name. The old lady died a few months after the date of the gift: and, for several years thereafter, the plaintiff on the one hand and the first defendant on the other have been endeavouring to secure the tenants in possession of these properties to their respective sides till ultimately the plaintiff instituted this suit just when the period of twelve years from the date of the gift deed was about to expire.

The plaintiff claimed that the properties in respect of which the title deeds stood in the donor's name were her stridhanam properties and that she was accordingly competent to make a gift thereof. The first defendant who was the contesting defendant pleaded that though the title to these properties stood in Seetha Bai Ammal's name, they had all been purchased with the funds belonging to Jagannadha Rao, *benami* in her name. A plea of limitation was also raised. The question of benami formed the subject of the first issue and the question of limitation of the second issue.

The learned Subordinate Judge found the first issue in the plaintiff's favour ; on the second issue, he found that as regards five items, namely 1 to 3, 13 and 15, the plaintiff had not shown that he or his donor had been in possession within twelve years of the institution of the suit but that in respect of the other items the plaintiff's possession

within the statutory period had been proved. He accordingly dismissed the suit so far as it related to items 1 to 3, 13 and 15 and gave a decree in the plaintiff's favour in respect of the other items. The first defendant has filed this appeal against so much of the decree as is against her and the plaintiff has filed a memorandum of objections in respect of the items disallowed to him.

In dealing with the question of benami, we may mention at the outset that it has not been suggested that Jagannadha Rao had any creditors from whom he desired to screen these properties. It is obvious from the written statement that the first defendant was hard put to it to suggest a motive for a benami transaction. It is true that Jagannadha Rao took the first defendant's husband in adoption in 1884 and some of the letters exhibited in the case show that as a young boy he was not easily persuaded to come and live with his adoptive parents and preferred to go back to the place where he had theretofore been living. These letters relate to a period when the first defendant's husband was eight or nine years old and it would be too much to suggest that at that time such conduct brought about any *differences* between Jagannadha Rao and the adopted son with reference to which the necessity for resorting to benami transactions could be explained. In the third paragraph of the written statement it is stated that Jagannadha Rao took such precautions as he liked in order to avoid among other things the possibility of the adopted son quarrelling with him and squandering the properties and in order to ensure the obedient conduct of the adopted son to his dictates and to avoid the possibility of the

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members of his natural family instigating the adopted son to act adversely to the interests of the adoptive father. In the course of the evidence one or two further reasons have been suggested, such as, a desire on Jagannadha Rao's part to keep apart some properties for the benefit of any *aurasa* son that he still expected might be born to him or a desire to ensure that the adopted son would behave respectfully towards Sita Bai Ammal by making it appear that she was the owner of some properties. We find it hard to believe that any of these motives would have led to a benami transaction rather than to a real transaction in favour of the wife.

The principal argument of Mr. Govindarajachari before us on behalf of the appellant was that as the attempt on the plaintiff's side to establish that these properties were acquired with the lady's funds had failed, it must be held that they were purchased by Jagannadha Rao with funds belonging to the joint family of himself and his adopted son, and that as sufficient provision for her maintenance had been made by Exhibit B and also by the provision in the adoption deed itself in the possible contingency of differences between her and the adopted son, there was nothing to rebut the presumption arising under the law that the purchases made in the wife's name with family funds were only made for the benefit of the family. It seems to us that this argument puts the effect of the evidence much too high and that the legal implications therein contained are not altogether tenable. It appears from the documentary evidence as well as from the admissions made by the first defendant herself

and by D.W. 13 that Seetha Bai Ammal did have some monies of her own and some money-lending transactions of her own. It is, however, not possible to fix the amount that she was thus in possession of. The evidence also establishes that at least after 1886 she must have been entitled to an annual income of between Rs. 100 and Rs. 200 from the properties set apart for her under Exhibit B, while the collection of that income was being made by Jagannadha Rao himself. In such circumstances, the mere fact that the plaintiff or his witnesses do not now find it possible to connect any of the sale deeds relating to the suit properties with a particular item of asset belonging to the lady does not necessarily lead to the inference that the purchases should have been made with family funds by Jagannadha Rao. Some of the transactions under which the suit properties were acquired were for comparatively small prices. The only substantial acquisition was under Exhibit D in 1896, the consideration therefor being made up of the amount which accrued due on a usufructuary mortgage of 1887 for a sum of Rs. 2,250 and a cash payment of Rs. 700. In the light of the circumstances stated above, there is nothing that necessarily suggests that the Rs. 700 paid in cash at the time of Exhibit D must have been Jagannadha Rao's money and could not have been the lady's. As regards the Rs. 2,250 advanced on the usufructuary mortgage in 1887, we have no evidence suggesting whether it could have been the lady's money or Jagannadha Rao's money. The position therefore at best only comes to this : here is a lady, the wife of a comparatively well-to-do man with an

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income of more than Rs. 1,500 per annum, the lady herself having some means of her own, though the amount thereof is not known. The husband had no intelligible motive for entering into any benami transaction. He gets documents executed in her name with a distinct statement that the monies paid for the purchase constituted the stridhanam property of the lady. In relation to the properties thus acquired, he takes registered lease deeds in the lady's name and also gets a power of attorney executed by that lady appointing her own agent to attend to her affairs. It does not appear that during all the time that Jagannadha Rao was alive, he ever took a single lease deed in his name in respect of these properties, except as regards one house which was leased to the Postal Department. There is no doubt evidence that the realisation of the income from these properties was attended to by Jagannadha Rao or his men, but that would have been equally the case even if these properties belonged to the lady and not to Jagannadha Rao. It is admitted that in respect of a mortgage under which money was due to this lady long prior to the adoption and in respect of the properties settled on this lady by Exhibit B, the interest or income used to be realised by Jagannadha Rao or his men.

It is clear from the adoption deed and from Exhibit B that Jagannadha Rao was alive to the possibility of the relations between his wife and the adopted son turning out to be unfriendly and it is nothing strange if in those circumstances a man in that position desired to put the lady in a position of some independence without depending upon the adopted son or being obliged to sue

him for maintenance or for a share in terms of Exhibit I. It is also significant that even during the period when he was taking sale deeds in his wife's name in respect of the suit properties, he was entering into other transactions of sale and mortgage in his own name, thus showing that he had no reason at that time to make it appear that he had no properties of his own other than the ancestral properties. Having regard to these circumstances we think the learned Subordinate Judge was justified in coming to the conclusion that the sale deeds relating to the suit properties were not taken in Seetha Bai Ammal's name benami for her husband or for the family. The onus lies in the first instance on the defendant who pleads that these transactions are benami. The mere suspicion that the purchases might not have wholly been made with the lady's money will certainly not suffice to establish that the purchases were benami, nor even the suspicion that monies belonging to Jagannadha Rao, whether in a smaller measure or a larger measure, must have also contributed to these purchases. Even in cases where there is positive evidence that money had been contributed by the husband and not by the wife, that circumstance is not conclusive in favour of the benami character of the transaction, though it is an important criterion. It is true that in the Indian law the English rule as to presumption of advancement has not been adopted, but section 82 of the Indian Trusts Act as well as the observations of the Judicial Committee in *Bilas Kunwar* v. *Desraj Ranjit Singh*(1) recognise that money may have

(1) (1915) I.L.R. 37 All. 557, 564, 565 (P.C.).

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been contributed by another towards a purchase with the intention of giving a beneficial interest to the person in whose name the purchase is made. The relationship of husband and wife between the person who contributes the money and the person in whose name the sale is taken will be a very important factor in determining whether the transaction was really meant for the benefit of the wife or not. The observations in *Sanjivaroya Pillai* v. *Balambiki Ammal*(1) are not opposed to this view because there was evidence in that case to suggest that the transfers were taken in the wife's name with a view to screen the property from creditors. In *Rahiman Beebi* v. *Khathoon Bee*(2) and *Thulasi Ammal* v. *The Official Receiver, Coimbatore*(3) reference has been made to the terms of section 82 of the Trusts Act and an attempt has been made to read the observations of the Judicial Committee in earlier cases consistently with the provisions of that section. The observations of their Lordships in *Ismail Mussajee Mookerdam* v. *Hafiz Boo*(4) and of VENKATASUBBA RAO J. in *Thulasi Ammal* v. *The Official Receiver, Coimbatore*(3) also show that where the motive alleged for a benami transaction itself suggests that the purpose in view could be served only by a genuine transfer and not by a mere benami transaction, the more reasonable inference is that the transfer was intended to be operative as a transfer of the beneficial interest and not as a mere benami transaction.

Mr. Govindarajachari next suggested that, if and in so far as any monies of Jagannadha Rao

(1) (1907) 17 M.L.J. 339.
(2) (1916) 4 L.W. 193.
(3) (1934) 67 M.L.J. 541.
(4) (1906) I.L.R. 33 Cal. 773, 784 (P.C.).

had gone to make the purchases of the suit property in his wife's name, a gift thereof would be invalid as a gift of joint family property. This question was not raised in the Court below in that form and the appellant's learned Counsel explains it by pointing out that the plaintiff's attempt in the lower Court was to establish that the purchases were made with the lady's funds and not with the family funds. Assuming that that contention can be raised at this stage, it will be material to consider it only if there is *positive* evidence that funds belonging to the joint family had been used for the purpose of these purchases. The mere fact that the plaintiff is not able to establish that the purchases were made with the lady's funds will not entitle the first defendant to ask the Court to take it for granted that joint family monies must have been utilised for these purchases. We accordingly confirm the finding of the lower Court on the first issue.

With reference to the plea of limitation, we are not satisfied that the lower Court was justified in dealing with the case as one governed by article 142 of the Limitation Act. The allegations in the plaint as well as the evidence tendered during the course of the trial establish that all the suit properties were in the possession of tenants. It is true that during Subba Rao's lifetime he was taking muchilikas in his name and collecting the income from the suit properties. But as he and his adoptive mother were living together amicably, it cannot be seriously suggested that his possession or management was adverse to the mother's interest. As we have already said, the relations between the mother-in-law and

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the daughter-in-law became strained as soon as Subba Rao died and the plaintiff's interference with a view to securing some benefit to himself seems to have made matters worse. A scramble accordingly began after Subba Rao's death by the attempts made on each side to get the tenants to attorn to the one side or to the other. In circumstances of that kind, the principle of article 144 and not article 142 should be applied. Considering the evidence on this basis, the conclusion seems to us to be that in respect of most of the suit items, the first defendant has failed to show that she got the tenants in possession to attorn to her more than twelve years before the institution of the suit. In many instances registered muchilikas have been taken from the tenants in the mother-in-law's name and there is evidence that some of these tenants were sued for rent on the basis of such muchilikas and decrees were obtained. As against such evidence on the plaintiff's side, the story related on the first defendant's side of oral arrangements and payments of rent to her can scarcely be seriously pressed.

As regards one of the items of property, namely, item No. 14, a house in Rajahmundry, a further point was pressed before us on behalf of the appellant, namely, that only a part of the house was in the occupation of the tenant who had attorned to the mother-in-law and that the other part was in the possession of a lady named Pankajam who refused to attorn to the old lady. In the suit for rent instituted by the plaintiff against these two tenants, the suit was decreed only against the former and not against the

latter. It was accordingly contended that at least to the extent of the interest in one half of the house in the possession of Pankajam the plaintiff's suit should be held to be barred by limitation. But if, as we have already pointed out, the principle to be applied is that of article 144, it is not sufficient for the defendants merely to suggest that Pankajam had not attorned to the old lady or to the plaintiff. It is only on proof that she had attorned to the first defendant that the plaintiff's suit could be held to be barred even as regards the portion in her possession. The first defendant's evidence is only that some time after 1915 Pankajam paid ten months' rent in respect of her portion to the first defendant. Even taking this to be true, that is within twelve years of the institution of the suit. We see no reason to differ from the conclusion of the lower Court in respect of items 4 to 10, 11, 12 and 14.

[The portion of the judgment confirming the lower Court's decision in respect of items 1, 13 and 15 and reversing it in respect of items 2 and 3 is omitted as not being necessary for the purpose of the report.]

As regards item 15 it will follow from our finding on the question of benami that the title thereto also is in the plaintiff. But the learned Subordinate Judge has not given the plaintiff a decree in respect of that item because in the connected suit, Original Suit No. 17 of 1929, he held that the present plaintiff had not shown that he had possession of this item within twelve years of the institution of the suit. Apart from the observation we have already made that in the circumstances of the present case the principle of

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article 144 and not article 142 should be applied, the learned Judge's observation that the plaintiff was not in possession of this item within twelve years of the institution of the suit seems to rest upon a misapprehension, because D.W. 9, the tenant who is alleged to have been in possession of this item under the first defendant, admits that for at least a year after Subba Rao's death the plaintiff was occupying a portion of this house. We accordingly hold that the learned Judge's finding on the question of limitation even in respect of this item is not correct. But as his decision has been set aside on appeal by the District Court in Appeal Suit No. 9 of 1931, it is not necessary that we should pass a formal decree for possession in the present plaintiff's favour in respect of this item. It will be sufficient if there is a declaration of title in the plaintiff's favour in respect of this item.

As regards items 2 and 3 which we have allowed in the plaintiff's favour, the plaintiff will also be entitled to mesne profits from the first defendant at a flat rate of thirty rupees per annum for the three years before suit (1923–1925) and future mesne profits at the same rate from 1926 till delivery of possession of the suit items or until the expiry of three years from this date, whichever happens earlier. We do not, however, think it necessary to interfere with the direction in the lower Court's decree as to costs. The appeal is dismissed with costs. In the memorandum of objections there will be no order as to costs as the parties succeed in part and fail in part.

For the reasons given above Second Appeal No. 1214 of 1932 is dismissed with costs.

A.S.V.