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**(1975) 07 MAD CK 0011**  
**In the Madras High Court**

Neikara Abdul Hye Sahib and Others

APPELLANT

Vs

Neikara Majid Sahib

RESPONDENT

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**Date of Decision :** 22-07-1975

**Acts Referred:**

**Citation :** (1976) 89 LW 232 : (1976) 1 MLJ 301

**Hon'ble Judges :** S. Mohan, J

**Bench :** Single Bench

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### **Judgement**

S. Mohan, J.—Defendants 2 to 5, 7 and 8 are the appellants in the above second appeal. O.S. No. 408 of 1966 was filed before the Court

of the District Munsif, Tiruppattur, North Arcot, for declaration of the plaintiff's title concerning two items of properties, item 1 covering an extent

of 1.59 acres and item 2 covering an extent of 1.28 acres. Under Exhibit A-5 dated 20th November, 1941 the mother of the plaintiff Ayisha Bi

came to purchase item 1 from one Abul Salam Sahib for Rs. 100 while item 2 was purchased by the sister of the plaintiff Fathima Bi under Exhibit

A-1 dated 22nd November, 1942 for Rs. 58-12. Fathima Bi died in the year 1943. Thereafter the mother, Ayisha Bi executed Exhibit A-1, a

usufructuary mortgage deed dated 19th February, 1957 in favour of one Batcha Bi over both these items. Exhibit A-2 was attested by the plaintiff.

Under Exhibit A-4 dated 10th September, 1959 Batcha Bi the usufructuary mortgagee assigned her rights in favour of the wife of the plaintiff,

Meharunnisa Bi. Ayisha Bi died later on. Thereafter the first defendant's father and the plaintiff had a muchilika executed on 16th February, 1961

under Exhibit B-1. The release under Exhibit A-3 was also executed by the first defendant in favour of the plaintiff. Contending that Exhibits A-5

and A-7 were benami and that the real owner being the plaintiff, he came forward with the suit.

2. In defence it was contended that the ostensible titleholders viz., Ayisha Bi and Fathima Bi were the real owners and the case of benami set up by the plaintiff was false.

3. The learned District Munsif applying the various tests adumbrated in the rulings relating to benami transactions came to the conclusion that the plaintiff's allegation relating to benami had not been proved and consequently dismissed the suit.

4. Thereupon he preferred A.S. No. 30 of 1969 to the learned Subordinate Judge of Tiruppattur, North Arcot, who reversed the findings of the trial Court and granted a decree in favour of the plaintiff holding that Exhibits A-5 and A-7 are benami. Hence the present second appeal.

5. No doubt, both the Courts have set out various tests on which a case of benami has to be made out. The question of motive is not very much

relevant. As pointed out by the Privy Council the case of benami purchase is so frequent and common in India and so motive is not necessary. One

significant factor which has been lost sight of by the lower Court is| the subsequent treatment of the property From the above narration of the facts

it is clear that as early as 1951 under Exhibit A-2, the mother/treating both the items as her own, would create an usufructuary mortgage in favour

of a third party. The rights of the usufructuary mortgagee came to be assigned in favour of the plaintiff's wife. This goes a long way to believe the

case of the plaintiff on the question of benami. To cap all the plaintiff had attested Exhibit A-2. NO doubt, at that time he might not have had any

concern in this property till the execution of muchilika Exhibit B-1 dated 16th February, 1961 and Exhibit A-3 the release deed dated 12th

December, 1961. But I am resting my conclusion with regard to the attestation, only to show as to how the property was dealt with. Besides,

having regard to the smallness of the consideration viz., Rs. 100 and Rs. 58-12 it is incorrect on the part of the lower appellate Court to hold that

merely because the vendees were gosha ladies, they would not have the fund to purchase the properties. Even assuming that the plaintiff, who was

a contractor and who was under affluent circumstances supplied the fund, he has got to prove that he did not intend to benefit either his mother

under Exhibit A-5 or his sister under Exhibit A-7. The proof concerning this aspect of the matter is wholly lacking. Therefore, the conclusion is

probable that he did intend to benefit the mother or the sister, as the case may be. Even in such a case no question of benami would arise.

6. For all these reasons, I am unable to agree with the findings of the lower appellate Court and consequently the second appeal will have to be

allowed and the decree granted by the lower appellate Court is set aside and the dismissal of the suit as held by the learned trial Munsif will stand.

There will be no order as to costs. No leave.