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**(1989) 07 BOM CK 0015**

**In the Bombay High Court**

**Case No : Second Appeal No"s. 135 of 1989**

Satyabhamabai (deceased by LR) and etc.

APPELLANT

Vs

Pandurang Marotrao Pawar

RESPONDENT

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**Date of Decision : 31-07-1989**

**Acts Referred:**

Benami Transactions (Prohibition) Act, 1988 — Section 4  
Civil Procedure Code, 1908 (CPC) — Section 100, 11, 66  
Limitation Act, 1963 — Article 59

**Citation : AIR 1990 Bom 134 : (1990) 1 BomCR 99 : (1990) 183 ITR 290**

**Hon'ble Judges : A.A. Desai, J**

**Bench : Single Bench**

**Advocate : V.R. Manohar, A.M. Kurhekar, P.V. Hardas, Bhau Wahane and Mr. Chawhan, for the Appellant; M.G. Kashikar and Shri Bhattad, for the Respondent**

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## **Judgement**

1. These appeals raise a question as to what is the extent and nature of a right, interest and title of an ostensible owner vis-a-vis a real owner of benami property?

Facts involved in these appeals, to some extent, are inter-linked. They are heard together and being disposed of by this common judgment.

2. One Satyabhamabai widow of Balaji Kitey, the original plaintiff, claimed to be an owner of the suit house. She stated to have purchased the suit house vide sale-deed Exh. C-1 dated 7-1-1936 by making the payment of a consideration of Rs. 1600/-. She had three brothers; (i) Yeshwantrao, (ii) Laxmanrao and (iii) Marotrao. The defendant Pandurang is a son of Marotrao. According to her, she intended to execute a Will bequeathing the suit house to the sons of her brothers. She instructed defendant Pandurang to prepare a Will, She alleged that defendant presented Exh. 35 dated 21-6-1966 representing her as a Will drafted according to her instructions and wishes. She being an illiterate and old lady without understanding the contents, put her thumb impression.

3. The defendant thereafter sometime in 1977 tried to oust Kamlakar son of her

brother Laxmanrao from the suit premises. On enquiry she learnt that the defendant obtained her thumb impression on 21-6-1966 on a deed of relinquishment surrendering her right in the suit house in favour of the defendant. She subsequently, on 23-5-1977, executed a Will bequeathing the suit house in favour of Kamalakar, three other sons of Laxmanrao and defendant. On 29-4-1978 Satyabhamabai filed a suit against the defendant Pandurang alleging that the thumb impression on Exh. 35 dated 21-6-1966 was obtained by fraud and mis-representation. She, therefore, sought cancellation of the deed dated 21-6-1966 and consequential declaration that it is not binding and claimed possession of the property.

4. Defendant Pandurang asserted that he is an adopted son of Yeshwantrao who died sometime in 1962. He denied the ownership of the suit house and also the payment of sale consideration by Satyabhamabai. He also denied the mis-representation or fraud as alleged.

5. The trial Court after taking into consideration the material on record held that the plaintiff failed to prove her title to the suit house and also alleged misrepresentation or fraud played by the defendant in execution of the deed dated 21-6-1966. It is also held that even otherwise plaintiff got knowledge of the relinquishment deed in 1967 during the mutation proceedings of the suit house in favour of the defendant. Hence the suit filed on 29-4-78 for cancellation of the deed dated 21-6-66 is barred by limitation in view of Article 59 of the Limitation Act. The trial Court, therefore, by the judgment and decree dated 10-8-1982 dismissed the suit.

Plaintiff Satyabhamabai, therefore preferred an appeal registered as Reg. Civil Appeal No. 106 of 1983. However, she died on 7-5-1984 during the pendency. Kamalakar Pawar came to be substituted in her place as an executor of a Will dated 23-5-1977.

6. Original defendant Pandurang, in the meanwhile, on 28-2-1983 filed a suit for recovery of possession of the suit house against Kamalakar. According to him, he is an owner of the suit house. He sometime in 1973 permitted Kamalakar to occupy the premises being a relation. Kamalakar was thus a licensee. He revoked the licence by notice dated 25-10-1982.

According to Kamalakar, Satyabhamabai was the owner of the suit house and she inducted him in the premises. The trial Court upheld the contention of Pandurang and passed a decree in his favour on 27-3-1985. Kamalakar, therefore, presented an appeal registered as Reg. Civil Appeal No. 263 of 1985 against the judgment and decree dated 27-3-1985.

7. The learned Additional District Judge heard both these appeals (R.C.A. No. 106/83 and R.C.A. No. 263, 85) and by two separate judgments dated 28-2-1989 dismissed them, Kamalakar, therefore, presented second appeal No. 135 of 1989 against the judgment and decree in the suit seeking cancellation of a relinquishment deed and Second Appeal No. 136 of 1989 against a judgment

and decree ordering him to deliver vacant possession of the suit premises. Both these appeals are heard together. Mr. V. R. Manohar, the learned counsel appeared for the appellant Kamlakar; whereas Messrs Kashikar and Bhattad the learned counsel represented respondent Pandurang in both the appeals.

8. Mr. Manohar in Second Appeal No. 135 of 1989 tried to urge that the Courts below in suit filed by Satyabhamabai ought to have held that the documents styled as a relinquishment deed was obtained by fraud and misrepresentation. Admittedly, Satyabhamabai was an old and illiterate lady. Her intention to bequeath the property under Will in favour of all the sons of her brother, according to the learned counsel, was adverse to the interest of the defendant Pandurang. It was, therefore, quite natural for him to play a fraud and misrepresent. Perused with the assistance of the learned counsel the judgments of both the Courts below. It could not be pointed out that the Courts below committed any patent or material illegality in recording the finding. The Courts below after close scrutiny o!" the evidence on record rightly reached the conclusion that Satyabhamabai failed to prove any fraud or misrepresentation in the execution of Exh. 35. The finding as recorded is just and proper. This concurrent finding docs not warrant any interference in this second appeal.

9. The Courts below even otherwise held that Satyabhamabai failed to prove that she got the knowledge of the relinquishment deed in the year 1977. They have unanimously held that in the year 1967 during the mutation proceedings of the suit house in favour of Pandurang she got the knowledge of a relinquishment deed. The learned counsel could not seriously dispute the findings as recorded by the Courts below. Her suit for cancellation of an instrument filed on 29-4-1978 is admittedly beyond three years from the date of knowledge as prescribed under Article 59, In view of this, Second Appeal No. 135 of 1989 is liable to be dismissed.

10. Mr. Manohar in Second Appeal No. 136 of 1989 relying on the observation made by the Courts below in an earlier suit for cancellation of relinquishment deed, submitted that the purchase of suit house in the name of Satyabhamabai was Benami, The learned trial Judge, taking into consideration the evidence of Satyabhamabai, has observed that "this admission clearly shows that Yeshwant was the real vendee but he purchased it in the name of plaintiff to avoid creditors." He, therefore, has drawn an inference that the plaintiff Satyabhamabai was a benami purchaser and it was Yeshwant who was a real owner of the house.

11. Mr. Manohar, therefore, made a submission that this finding operates as a res judicata in a suit proceedings subsequently initiated by Pandurang against Kamlakar for possession. These findings are binding on the parties. According to Mr. Manohar, Section 4 of the Benami Transactions (Prohibition) Act, 1988 declares a prohibition against the right to recover the property held benami. These provisions came into force on 19-5-1988. However, they are retroactive in operation in view of the decision of the Supreme Court in case Mithilesh Kumar

and Another Vs. Prem Behari Khare, . Hence suit for recovery of possession instituted against Kamlakar the appellant by Pandurang who claimed a title to the suit house through Yeshwant the real owner in respect of the property held benami by Satyabhamabai is not maintainable. The suit is, therefore, liable to be dismissed.

12. Satyabhamabai, as discussed, in her suit has merely sought cancellation of a relinquishment deed dated 21-6-1966. She has, however, not sought any declaration about her title in respect of the suit house. Even the defendant has not raised a plea of benami purchase of house in the name of Satyabhamabai. There was no issue either involved or raised or framed by the Court in this regard. The Court was not called upon to decide the question regarding the nature of title or ownership of Satyabhamabai as reflected through Exh. C-1 i.e. original sale deed dated 7-1-1936. The trial Court, has, therefore, not decided any question directly or substantially involved so far as it relates to the nature of transaction. As such, the observation made by the learned trial Judge that Yeshwant was the real owner and Satyabhamabai was the benamidar cannot operate as res judicata in a subsequent suit filed by Pandurang for recovery of possession.

Moreover, the subsequent suit filed by Pandurang against Kamlakar cannot be said to be between the same parties. In the earlier suit between Satyabhamabai and Pandurang, Kamlakar was substituted in her place as an executor of the Will. However, in the subsequent suit he was impleaded being the licensee of the respondent-Pandurang. As such, both the suits cannot be said to be between the same parties so as to attract the rule laid down under S. II of the Code of Civil Procedure.

13. Mr. Manohar then submitted that Exh. 35 a relinquishment deed is nothing but an act of Satyabhamabai to reassert that the transaction as evidenced through sale deed Exh. C-1 dated 7-1-1936 as a benami transaction. In the submission of the learned counsel, Satyabhamabai being a benamidar, did not possess any right, title or interest in respect of suit property. He, therefore, contended that Exh. 35 as executed in favour of Pandurang does not transfer or enlarge his right, title or interest in the property. In this behalf he sought support from a ruling of the Patna High Court reported in case of Munshi Gobind Prasad Vs. Lala Jagdeep Sahai, . Patna High Court has observed ;

"Now it has been held repeatedly that the deed of relinquishment does not confer a title and that title to land cannot pass by admission when the Statute requires a deed. Here the parties have been trying to effect by release what could only be effected by conveyance. This document is of no effect whatsoever in transferring the title from the defendant to the plaintiff."

In the case before the Patna High Court, it was held that the defendant was a beneficial owner and, therefore, a legal owner. It is further held that for transferring the interest or title statute requires a conveyance and such transfer

could not be on the admission. The case before the Patna High Court was not one of the relinquishment or release of a surrender by benamidar in favour of a real owner. The observation on which the reliance is placed by the learned counsel is of no assistance for a question raised in this appeal.

However, Mr. Bhattad, the learned counsel contended that Satyabhamabai through Exh. 35 has relinquished whatever right she possessed as a holder of the property in favour of Pandurang. He is recorded as an owner and holder of the property since 1966 in the Municipal Record. The property has as such ceased to be a benami. In the submission of the learned counsel relinquishment by benamidar is a normal and recognised mode of surrendering and acknowledging the right of a real owner. As a result of Exh. 35 the property ceased to be benami, since then.

14. Exh. 35 is a deed executed by Satyabhamabai in favour of Pandurang a sole legal heir of dead Yashwantrao. The document is in veranacular. The deed is registered and is valued at Rs. 10000/-. The title of the document reads as "the deed relinquishing right of a benami purchase". It opens with a statement, "in this year of 1966 -- she is writing this deed to relinquish right..... This house purchased in my name. In sale consideration not a single pie is of mine. Because of difficulties your father purchased in my name. This right of benami purchase without taking anything in return is relinquishing from today."

On going through the text of the document it is explicit that the deed unambiguously declares the intention of the executor to surrender and relinquish her right in respect of the house purchased in her name. In *Mariyam Bivi and Others Vs. Natharsa Rowther Trust*, , it is held that an instrument whereby a benamidar sustains and declares the interest of a real owner is a release deed and not a conveyance. Similar view was earlier taken in a case reported in *The Chief Controlling Revenue Authority, Board of Revenue, Madras Vs. M. Hamid Sultan*, .

15. The question that comes for consideration is as to what is the nature and extent of a right of a benamidar. It is well settled that a person advancing consideration sometime borrows the name of a third person for recording in the sale as a purchaser. When such purchase does not create any beneficial interest in the person who has lent his name, then he holds the property as an ostensible owner. The person advancing consideration is a beneficial owner.

16. Mr. Bhattad invited my attention to a decision of the Madras High Court reported in *Rangaswami v. Krishnan* (1969) 1 Mad LJ 173. It is held that -- "S.66 of C.P.C. does not prohibit recognition of a title of a real owner by a benamidar (auction-purchaser)." It is also held that "released-deed in favour of real owner or his heir might well be construed as a deed of transfer or conveyance sufficient to vest title in the true owner." Mr. Bhattad, therefore, made a submission that Satyabhamabai by a registered deed Exh. 35 asserted her brother Yeshwant as a real owner and surrendered right to hold property in her name as an ostensible

owner in favour of Pandurang an adopted son of Yeshwant. The learned counsel, therefore, made a further submission that as a result of the release deed Pandurang becomes legally entitled to hold property in his name and can further transact or deal with it without any hindrance or impediment.

Mr. Manohar made a submission that the view taken by Madras High Court in the case cited supra is erroneous in view of the law laid down by Supreme Court in a case reported in *Kuppuswamy Chettiar Vs. A.S.P.A. Arumugam Chettiar and Another*, . The Supreme Court on construction of the documents held that "it was a deed of release. Such release without consideration is a gift". It is observed that the release is in a form of conveyance by person having interest in favour of a person having limited interest. Such release it is observed, then operates as an enlargement of a limited estate. It is further observed that a deed which is not in favour of a person having any interest could not take the place of as an enlargement of existing title. In substance, release can amplify the rights which are in existence. However, it cannot create new right. The Supreme Court was not dealing with the case of relinquishment by a person holding property as an ostensible owner in favour of a legal owner. The Supreme Court, therefore, does not disapprove the view taken by Madras High Court in *Rangaswami v. Krishnan* 1969 1 Mad LJ 173 cited supra.

17. Benamidar possesses ostensible title. He holds and represents the property for all practical purposes to the entire world "except the real owner". S. 66 of the CPC as held by Madras High Court does not create any legal bar for a benamidar to recognise the title of a legal owner. He can do so by an instrument which, as held by Madras High Court in case of *Mariyam Bivi and Others Vs. Natharsa Rowther Trust*, , constitutes as a deed of release. It is well settled that the purchaser of a property from an ostensible owner (benamidar) is protected from the real owner save for their want of knowledge of a real owner and benamidar can transfer a valid title in favour of a purchaser.

Satyabhamabai by a deed of release Exh. 35 relinquished such right. She surrendered her ostensible title and her right to hold the property in her name, and also a right to represent. As a result of Exh. 35 her character as an ostensible owner in respect of the property has extinguished. Since then she has no longer been a benamidar. Consequently, the suit house also ceased to be a benami property in the name of Satyabhamabai. Ostensible title, right to hold and represent the property, by deed Exh. 35 has completely merged in the legal owner. Pandurang came to be recorded as an owner of the property in place of Satyabhamabai as a legal heir of a real owner Yeshwantrao. Since 1967, Pandurang is holding the property in his name as legal and real owner for all practical purposes.

18. In view of the discussion, the Act of 1988 which came into force on 19-5-1988 even though retroactive in operation cannot create bar against Pandurang to re-enforce his right against Kamalakar in respect of a property which ceased to be benami since 1966 as a consequence of execution of

relinquishment deed Exh. 35. Pandurang was, therefore, entitled to recover possession from Kamlakar. The Courts below were justified in awarding decree in favour of Pandurang. The judgment and decree in view of the discussion does not suffer from any legal infirmity. Second Appeal No. 136 of 1989, therefore, must fail.

19. In the result, Second Appeal No. 135 of 1989 and Second Appeal No. 136 of 1989 are hereby dismissed. There would be no orders as to costs.

20. Appeals dismissed.