

**(2008) 01 DEL CK 0146**

**In the Delhi High Court**

**Case No : I.A.9987 of 2006 in C.S. (OS) No. 1593 of 2006**

Sh. Sarabjit Singh Anand and Others

APPELLANT

Vs

Sh. Manjit Singh Anand and Others

RESPONDENT

**Date of Decision : 11-01-2008**

**Acts Referred:**

**Citation : (2008) 106 DRJ 377**

**Hon'ble Judges : Vipin Sanghi, J**

**Bench : Single Bench**

**Advocate :** Sanjeev K. Tiwari, for the Appellant; Ravi Gupta, Manu Bansal and Reema Kalra for defendant No. 1 in is 9987/2006 and M.K. Singh, for defendants Nos. 2 to 7, for the Respondent

**Final Decision : Dismissed**

## Judgement

Vipin Sanghi, J.—By this order I propose to dispose of the above application filed on behalf of defendant No. 1 under Order 7 Rule 11 read with Section 151 CPC seeking rejection of the plaint. The plaintiff has filed the suit seeking the relief of partition of the suit property and for a decree of injunction against defendant No. 1 restraining the said defendant from alienating or creating third party interest in the suit property.

2. The broad facts which have been pleaded in the plaint or can be otherwise culled out from the documents filed are that the plaintiffs (excluding plaintiff No. 3) and the defendants are all sons and daughters of Late S. Sucha Singh Anand, albeit, from different wives. plaintiff No. 3 is the third wife of Late S. Sucha Singh Anand. plaintiff No. 1 and 2 and defendants No. 2 and 5 are born from plaintiff No. 3. Defendant No. 1, 3, 4, 6 and 7 are the children of the second wife of Late S. Sucha Singh Anand. There were no issues from the first wife.

3. Late S. Sucha Singh Anand and plaintiff No. 3 had from their own income and funds purchased the lease hold rights in the property and premises bearing No. 6, Cavalry Lines, Mall Road, Delhi-110007 for the residence of all their family

members. The entire sale consideration amounting to Rs. 2,05,000/- flowed from Late S. Sucha Singh Anand and the plaintiff No. 3. The said property was purchased by the aforesaid persons as a joint family property and Conveyance Deed dated 1.11.1961 was executed in the name of defendant No. 1.

4. At the relevant time when the conveyance was got executed in the name of defendant No. 1, the eldest son (defendant No. 3) was in the USA and since defendant No. 1 was the second major son of Late S. Sucha Singh, the property was purchased in his name as a trustee of the entire family. This was the understanding between all members of the family up to the filing of the suit. The plaintiff and defendants resided together in the said property and in course of time, only Late S. Sucha Singh, plaintiffs, defendant No. 1 and defendant No. 2 were left in the physical possession of the property, though the property still remained a joint family property of all. Even upon the demise of Late Sucha Singh Anand on 6.3.2000 his legal heirs continued in occupation of the said property in the manner in which they were in possession prior to his demise. Thus, the entitlement of other legal heirs of late S. Sucha Singh to the suit property was never disputed at any time and the defendant No. 1 had been holding the said property as a nominee and trustee of the plaintiff No. 3, Late S. Sucha Singh and the entire family.

5. Since the defendant No. 1 had with a malafide intention got a notice published in the Statesman on 22nd July 2006 and was negotiating/attempting to dispose of the suit property, the plaintiffs were constrained to file the instant suit on 18.8.2006.

6. The defendant has filed the above application on primarily two grounds. It is pleaded that the plaint has been filed, pleading that the defendant No. 1 is the Benami owner of the suit property and since the suit has been filed to enforce rights in respect of the property held Benami, the suit is barred by the Benami Transaction (Prohibition) Act, 1988 (hereinafter referred to as the Benami Act). The plaintiffs have nowhere pleaded that they are the co-owner of the said property and their own case is that all the documents of title pertaining to the suit property are exclusively in the name of the defendant/applicant. It is stated that there are only two recognized exceptions to the Rule that a suit shall not lie against a registered owner of a property. The first exception is that the property is owned by a co-parcener of a Hindu Undivided Family (HUF). However, plaintiffs have not brought their case within this exception and there is no mention of a HUF and the title of the property being vested in the said HUF. The details of the Karta and co-parcener of the HUF and other facts establishing the existence of a HUF for the applicability of the first exception are missing. The second exception is that the person suing must state and establish that the person, who has acquired the title of the property has been acting in judiciary capacity and had acquired the title as Trustee of the real owner. Though the word "trustee" has been used in the plaint, the admitted position is that there is no trust (as understood under the Indian Trust Act), public or private, which owns property

and Therefore this exception does not govern the instant case. The word "trustee" used in the plaint is without any significance as the ingredients of the said exception have not been pleaded in the plaint. Reliance has been placed on Anil Bhasin v. Vijay Kumar Bhasin and Ors. 102 (2003) DLT 932 to emphasize the effect of the repealment of Sections 81 and 82 of the Indian Trusts Act by Section 7 of the Benami Act. It has been contended that after Section 81 and 82 of the Indian Trusts Act were repealed, the concept of trusteeship or fiduciary capacity or the transferee being deemed to be holding for the benefit of the person providing the consideration has undergone a change. Property purchased by a parent in the name of a son does not fall under the category of a fiduciary relationship and is clearly hit by the prohibition contained in the Benami Act. Therefore, the suit is not competent and is in the teeth of the prohibition contained in the Benami Act. The plea of existence of a Trust and the existence of a Joint Hindu Family are mutually destructive. It is not pleaded that there was any co-parcenary between the defendant No. 1 and Late S. Sucha Singh to make the doctrine of blending applicable.

7. The defendant states that Late Such Singh never laid any claim to the said property during his life time nor was suit filed before his death. After his death, the present plaintiffs any case have no right, authority or locus to institute the present suit. The plaint on these facts ought to have been brought within three years of the date of registration of the Deed of Conveyance in favor of the defendant/applicant. Thus, there is no cause of action available to the plaintiff to file a suit after 45 years of registration of the Conveyance Deed. The suit is barred by limitation. The plaintiff has also not sought the cancellation of sale deed executed in favor of defendant No. 1. The suit is not maintainable in the absence of the said relief.

8. Lastly it is contended that the plaintiff has claimed the relief of injunction against the true owner of the property but the law does not permit grant of such a relief in favor of a person having no right to the property. Moreover, since the defendant has filed a suit for possession before a competent court of law, there is no question of forcible dispossession of the plaintiff herein, hence the suit is misconceived and not maintainable.

9. The plaintiffs have in reply contended that the application of the defendant for rejection of plaint is sans any merit and is liable to be dismissed, inasmuch as, the suit is not hit by Section 4 of the Benami Act. The transaction cannot be treated as a ``benami``. Section 4 of the said Act bars suits, claims or actions whereby a plaintiff seeks to enforce any right in respect of a property held benami. The case of the plaintiffs is that the plaintiffs along with the defendants are in physical possession and occupation of the suit property and the defendant No. 1 is not holding the property solely. The plaintiffs contend that the suit property was purchased as a joint family property for the benefit and enjoyment of the entire family though in the name of the defendant No. 1. This is clearly averred in the plaint. Thus, the defendant No. 1 was clearly to act as a trustee in

respect of the property the beneficiaries whereof are all the family members of late Sucha Singh Anand. All throughout after the property was purchased the same has been treated as joint family property. The plea that the doctrine of blending has no applicability to the contribution made by plaintiff No. 3 being a female is also without any merit as a female can always make a gift of her self acquired property for the benefit of joint family. All other defendants have pleaded that the suit property is a joint family property. Whether the said property is actually a joint family property or not is a matter which can be determined only after a full-fledged trial after recording of evidence by the parties. Being a question of fact it cannot form the basis for rejection of plaint under Order VII Rule 11, CPC. The averments in the plaint set up a case which is squarely covered by the exception provided under clauses (a) and (b) of Sub-section (3) of Section 4 of the Benami Act.

10. Before proceeding further with the matter it may be expedient to deal with the nature and scope of an application under Order VII Rule 11 for the rejection of a plaint. For deciding an application under Order VII Rule 11 CPC on the ground that the suit is barred by any law, the court has to only see the averments in the plaint and the accompanying documents relied upon by the plaintiff. The court is not supposed to look at the defense set up by the defendant in his written statement. At this stage the Court is only required to satisfy that if the allegations made in the plaint are accepted as true, the plaintiff would be entitled to the relief as claimed. The Court is not required to evaluate the merit in the claims or adjudicate upon the truth or the falsity of the averments made. If a question of fact or a mixed question of law and fact is raised, the plaint cannot be rejected under Order 7 Rule 11 CPC.

11. Section 2(a) of the Benami Act defines "Benami transaction" to mean "any transaction in which property is transferred to one person for a consideration paid or provided by another person;"

12. Section 4 of the Benami Act reads as follows:

4. Prohibition of the right to recover property held benami.- (1) No suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property.

(2) No defense based on any right in respect of any property held benami, whether against the person in whose name the property is held or against any other person, shall be allowed in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property.

(3) Nothing in this section shall apply,-

(a) where the person in whose name the property is held is a coparcener in a Hindu undivided family and the property is held for the benefit of the coparceners in the family; or

(b) where the person in whose name the property is held is a trustee or other person standing in a fiduciary capacity, and the property is held for the benefit of another person for whom he is a trustee or towards whom he stands in such capacity.

13. Thus it cannot be doubted that the instant transaction is a benami transaction. However, purport of the law is not to bar all benami transactions. Exceptions are created to protect the interest of the wife and unmarried daughters by virtue of Section 3(2)(a) of the Benami Act, which otherwise bars all benami transactions except those specified in Section 3(2). Moreover, it is not that the law creates an absolute bar against a party either staking a claim or defending an action in respect of a property, by claiming that the property in question was held benami by the opposite party. Section 4(3) carves out exceptions when the bar created by Section 4(1) and 4(2) would not apply. The bar contained in Section 4 does not operate where a transaction is of the nature as provided by Subsection (3) of Section 4 which begins with a non-obstante clause. Therefore what needs to be determined is whether the averments contained in the plaint (assuming them to be true for the purpose of the present application), would bring the case within the clause (a) and/or (b) of Subsection (3) of Section 4 of the Benami Act. As Section 4 takes away the right of a party to either approach the civil court, or to defend an action on the basis of a benami transaction, the bar must be strictly construed. As a corollary, the exclusionary clause must be given its full play. (See S.M. Wahi and Ors. v. Ms. Reeta Wahi 2006 V AD (Del) 109.

14. The averments in the plaint along with the documents filed on record are that the property was purchased by the father and step-mother of the defendant No. 1 in his name as he was the only major son/child then available in Delhi in whose name the property could have been purchased at the relevant time. The property was purchased in his name as a nominee of the purchasers. The property was purchased for the benefit of all the members of the family which consisted of late Sardar Sucha Singh Anand, his children from the second wife (including defendant No. 1), his third wife (plaintiff No. 3) and his children from plaintiff No. 3. The property has been in the possession and enjoyment of the entire family. All throughout the defendant No. 1 has been the registered owner and has held the property for the benefit of all.

15. In para 8 it is averred "It is submitted that Late Sardar Sucha Singh Anand and plaintiff No. 3 purchased the suit property as a joint family property and the conveyance deed dated 1.11.1961 was executed in the name of defendant No. 1 as trustee of entire family members in respect of the suit property." In para 16 it is averred as follows:

It is submitted that in the year 1961 defendant No. 1 was in his final year of graduation and was about 21 years old. It is submitted that at the time of registration of the said conveyance deed dated 1.11.1961 defendant No. 1 had just passed out his graduation. It is submitted that prior to the registration of

conveyance deed in respect of the suit property, defendant No. 1 was simply a student having no income of his own and was completely depended upon his father for his day to day expenses. Thus, registration of the Conveyance deed dated 1.11.1961, in the name of defendant No. 1, was mere faith and choice of Late Sardar Sucha Singh Anand, plaintiff No. 3 and their family members as trustee of entire family members in respect of the suit property. Thus conveyance deed in favor of defendant No. in respect of the suit property was a sham and was done with the intention to treat the suit property as joint family property while defendant No. 1 holding the suit property as trustee for all the family members in order to maintain harmony. It is submitted that had any other major son of Late Sardar Sucha Singh Anand was available at that particular point of time, conveyance deed would have been executed also in the name of such other son(s) jointly with defendant No. 1.

16. In para 21 it is stated that "It is submitted that right from the date of purchase of the suit property till the date of filing of the present suit there was/is no controversy, at all, with regard to the status of suit property that the same is joint family property and that defendant No. 1 has been holding the suit property as the nominee and trustee of Late Sardar Sucha Singh Anand, plaintiff No. 3 and entire family members. It is submitted that entitlement of the legal heirs of Late Sardar Sucha Singh Anand as co-owners of the suit property was neither denied nor disputed at any time, by any person including defendant No. 1, either during the life time of Late Sardar Sucha Singh Anand or after his death, as also evident and clear from some subsequent events as averred hereinafter."

17. From a reading of the aforesaid averments it appears that the stand of the defendant that exception (b) to Section 4(3) of the Benami Act is not applicable on a reading of the plaint is not correct. Even though the existence of a registered trust is not pleaded by the plaintiffs, that is not the end of the enquiry. The word "trustee" here can also imply existence of a relationship of active confidence or a fiduciary one. A particular word used in the pleadings cannot be picked up and interpreted like a statute. The entire pleading has to be read as a whole and a meaning ascribed to the words used therein. Therefore, it would not be correct to pick up the word "Trustee" and construe it as a "Trustee" stricto sensu as a registered Trust. Moreover, exception (b) contained in Subsection (3) of Section 4 provides that the person holding property may be ``a trustee or other person standing in a fiduciary capacity, and the property is held for the benefit of another person for whom he is trustee or towards whom he stands in such capacity'' and, Therefore, the said exception is not limited to a "trustee" of a registered trust and covers even persons other than trustees but sharing a fiduciary relationship. From the averments reproduced hereinabove it appears that the plaintiffs have pleaded that it was on account of faith and active confidence that the property was purchased in the name of the Defendant No. 1 and he was only a nominee of the family, a name lender for acquiring the property for the benefit of entire family including himself. In S.M. Wahi (Supra), this Court while dealing with a similar objection observed as follows:

The heart and soul of a fiduciary relationship was described by the Supreme Court as one person being bound to protect the interests of the other. (See *Canbank Financial Services Ltd. Vs. The Custodian and Others*, . The aspect of confidence and trust was also adverted to in *The State of Gujarat Vs. Jaswantlal Nathalal*, (cited with approval in *Pratibha Rani Vs. Suraj Kumar and Another*, ) in the following words:

The expression entrustment carries with it the implication that the person handing over any property or on whose behalf that property is handed over to another, continues to be its owner. Further the person handing over the property must have confidence in the person taking the property so as to create a fiduciary relationship between them.

18. The decision of this Court in *Anil Bhasin* (supra) relied upon by the defendant No. 1 is to my mind of no avail for various reasons. Firstly that was a case dealing with an application seeking amendment of the plaint under Order 6 Rule 17 CPC and not one under Order 7 Rule 11 CPC seeking rejection of the plaint. Nevertheless, the Court in that case did interpret the expression "fiduciary capacity" employed in Section 4(3)(b) of the Benami Act.

19. Secondly, the facts in that case were materially different from those in the present case. In *Anil Bhasin* (supra) the factual position was that the benami transaction was undertaken in the year 1997 i.e. after the enforcement of the Benami Act in 1988 and consequently the prohibition u/s 3(1) which states "no person shall enter into any benami transaction", was in force. However, in the present case, the transaction is of the year 1961 when there was no such prohibition. Now, Section 3 of the Benami Act is not retrospective [see *R. Rajagopal Reddy and Others (deceased by legal representatives) Vs. Padmini Chandrasekharan (deceased by legal representatives)*, ]. Para 15 of *R. Rajagopal Reddy* (supra), which reads as follows:

15. In the case of *Garikapati Veeraya v. N. Subbiah Choudhry* AIR 553 25 Chief Justice S.R. Das speaking for this Court has made the following pertinent observations in this connection:

The golden rule of construction is that, in the absence of anything in the enactment to show that it is to have retrospective operation, it cannot be so construed as to have the effect of altering the law applicable to a claim in litigation at the time when the Act was passed.

20. In *Anil Bhasin* (supra) the Court did not say, and cannot be taken to have held that with the repeal of Sections 81 and 82 of the Indian Trusts Act, 1882, the party relying upon a benami transaction (in cases where Section 4(3)(a) and (b) is invoked) cannot be permitted to prove the said benami transaction, and the existence of conditions (a) and/or (b) of Section 4(3) of the Benami Act. The said Sections 81 and 82 of the Indian Trusts Act before they were repealed read as follows:

81. Where it does not appear that transferor intended to dispose of beneficial interest - Where the owner of property transfers or bequeaths it and it cannot be inferred consistently with the attendant circumstances that he intended to dispose of the beneficial interest therein, the transferee or legatee must hold such property for the benefit of the owner or his legal representative.

82. Transfer to one for consideration paid by another - Where property is transferred to one person for a consideration paid or provided by another person, and it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration. Nothing in this section shall be deemed to affect the Code of Civil Procedure, Section 317, or Act No. XI of 1859 (to improve the law relating to sales of land for arrears of revenue in the Lower Provinces under the Bengal Presidency), Section 36.

21. The repeal of Sections 81 and 82 of the Indian Trusts Act only takes away the presumption that the law raised in favor of the person providing the consideration in a benami transaction. Such a presumption cannot now be raised. Therefore, the party setting up a plea of benami transaction would have to prove not only the benami transaction, but that (in case clause (b) is invoked) the ostensible owner was either a trustee or was acting in a fiduciary capacity qua the property in question.

22. A reading of para 17 of the decision in Anil Bhasin (supra) shows that the Court gave only illustrations while dealing with the aspect of what would constitute acting in a fiduciary capacity. The Court used the expression "such as" before giving the two instances where the Court felt that the position of the ostensible owner can be considered to be in a fiduciary capacity. In my view, the said observation of the Court constitutes merely an obiter since the Court in the fact of that case was not dealing with all possible situations in which a person could be said to be acting in, or be placed in a fiduciary capacity in relation to another. In para 18 of the Judgment the Court observes as follows:

18. The distinction is subtle, but significant. If Mr. X asks Mr. Y to purchase in his own name certain property, of which consideration has been paid by Mr. X, then that is a Benami Transaction. On the other hand if Mr. X were to ask Mr. Y to buy the property in the name of Mr. X, but for any reason Mr. Y purchases the property in his own name (viz. name of Mr.Y), then the relationship trustee and or fiduciary capacity is available in the former case, but not in the latter case.

23. The second instance given by the learned Judge in the aforesaid paragraph in fact, would be a transaction which would be fraudulent and may constitute criminal breach of trust. It would, Therefore, in any event be assailable irrespective of the prohibition contained in the Benami Act. It is well-settled that an authority constitutes a binding precedent only in respect of the principles of law arising and dealt with by the Court in the facts of that particular case. In

Bhavnagar University Vs. Palitana Sugar Mill Pvt. Ltd. and Others, the Supreme Court observed:

59. A decision, as is well known, in an authority for which it is decided and not what can logically be deduced there from. It is also well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision....

24. Consequently, for Anil Bhasin (supra) to constitute a binding precedent, the material facts in that case and in the present case have to be the same, which is not the position as aforesaid. Consequently, I am of the view that the plaint cannot be rejected at this stage, since the plaintiffs case as pleaded falls within the exception (b) contained in Section 4(3) of the Benami Act.

25. I now turn to consider the submission that the plaintiff's case is not saved by exception (a) in Section 4(3) of the Benami Act. Reliance has been placed on the decision in Surjit Lal Chhabda Vs. The Commissioner of Income Tax, Bombay, to contend that the plaintiff No. 3 being the wife of Late Shri Sucha Singh Anand did not constitute a coparcenery with late Sucha Singh. Reliance has been placed upon Goli Eswariah Vs. Commissioner of Gift Tax, Andhra Pradesh, to contend that before the doctrine of blending can be made applicable in a case, the existence of a coparcenery is absolutely necessary so that a coparcener may throw in the common stock his self-acquired properties. On the basis of this decision, it is contended that it has not been pleaded that at the time when the property was purchased by late Sardar Sucha Singh and plaintiff No. 3 in the name of defendant No. 1, there already existed a coparcenery between father and sons, so as to make the doctrine of blending applicable. Reliance has been placed on Kewal Krishan Mayor Vs. Kailash Chand Mayor and Others, to contend that the basis of doctrine of blending is existence of coparcenery property as well as existence of separate property of a coparcener and in the absence of coparcenery property the said doctrine would not be applicable. Reliance has been placed on Mohan Lal and Anr. v. Ram Dayal and Ors. AIR 1941 Oud 331 to contend that though there is a presumption of jointness of family, there is not such presumption of existence of joint family property without a nucleus. No nucleus has been averred into which the suit property could have said to merged. In support of the above preposition reliance has also been placed upon AIR 1940 204 (Privy Council) , wherein it was held that there is no presumption that a joint Hindu family possesses joint property or any property, which in fact has to be shown by leading affirmative evidence. Reliance has been placed upon Mallesappa Bandeppa Desai and Others Vs. Desai Mallappa and Others, to contend that the doctrine of blending cannot be applied to the case of a Hindu female. Therefore, the act of plaintiff No. 3 contributing towards purchase of the suit property does not attracts the applicability of doctrine of blending so as to convert the said property into joint family property. For the same purpose reliance has been placed on AIR 1983 Bombay 495 and Pushpa Devi Vs. Commissioner of Income Tax, New Delhi, .

26. The stand of the defendant that the property is not a joint family property to my mind cannot also be decided at this stage without leading any evidence. In para 17 of the plaint it is stated that "That at the time of the purchase of the suit property, Late Sardar Sucha Singh Anand and his family members was residing at Kashmiri Gate, Delhi. Defendant No. 3 has already gone to USA, for studies, in the year 1957 and subsequently settled in USA. Late Sardar Sucha Singh Anand Along with all his family members shifted in the Suit property in the year 1964." In Para 32 it is stated that "That the plaintiffs submit that the parties herein have interest in the various other joint family properties. However, those properties are either not under the possession of the parties or subject matter of litigation before the Hon"ble Court. Therefore plaintiffs are not including those properties for the partition in the present suit and hereby reserve their right to initiate legal action in respect thereof at the appropriate time." In view of these averments it cannot at this stage be assumed without evidence being led that the family was not possessed of any other joint family property at the relevant time when the suit property was purchased.

27. In Kewal Krishan Mayor (supra) the Court was dealing with the issue whether there was a joint Hindu family in existence, as alleged by the plaintiff and whether the property in question was joint Hindu family property and liable to be partitioned. The court had come to the conclusion that before 1963, the properties in question belonged exclusively to one Lala Bal Mukand and at the time when these properties were put in common hotch-potch, there was no other property of the HUF existing. It was also not the stand of the plaintiff in that case, that an HUF was in existence prior to 1963 and it was stated by the plaintiff himself that the HUF headed by Lala Bal Mukand was itself formed in the year 1963. It was also pleaded that the eldest son Brahm Dutt of said Bal Mukand had also separated and was living separately. The plaintiff was himself having his separate practice after having studied medicine from the year 1945 onwards. Thus, there was no sharing of income. It was on the basis of these circumstances that this Court came to a conclusion that since a Hindu joint family cannot be created by a contract, there was no joint Hindu family in existence. It was also observed that the plaintiff had not led any evidence other than a declaration made by Lala Bal Mukand of his intention to throw the property in the family hotch-potch. It was further observed that whether a property was voluntarily thrown into the common stock with the intention of abandoning separate claims, had to be proved like a fact. In any event since the Court concluded that there was no joint Hindu family of the deceased with plaintiff and defendant prior to 1963, neither did it come into existence during the time when the declaration was executed, the claim of the plaintiff was negatived. The observation of the Court with regard to non-applicability of doctrine of blending in the said case Therefore, have to be understood in the light of the above facts established on record. I do not find any averment in the plaint as filed by the plaintiff before me that there was no joint family in existence prior to purchase of the said property or that it came into existence only upon the purchase of the said property. I also

do not find any averment in the plaint that the joint Hindu family of late Sardar Sucha Singh was not possessed of any other coparcenary property/joint family property at the time of purchase of the said property. The decision in Kewal Krishan Mayor (supra) was rendered after the parties had led their evidence and upon a full-fledged trial. Since the existence of joint family or joint family property or coparcenary is a question of fact, the same has to be proved by leading evidence. The defense raised by the defendant would also similarly require proof by way of evidence and even otherwise cannot be looked into at this stage. The decisions cited by the defendant on the aspect of blending are Therefore of no avail at this stage.

28. As far as the decision in Pushpa Devi (supra) is concerned, it may be noted that the Court was dealing with the following two questions in the appeal:

One relating to the right of a Hindu female, who is a member of an undivided family, to impress her absolute, self-acquired property with the character of joint family property; and the other as to whether, if there has been no such blending, the transaction in the instant case can amount to a gift in favor of the undivided family.

29. The Apex Court while taking note of the decision in Mallasappa (supra) held that a Hindu female not being a coparcener cannot blend her separate property with the joint family property. The theory of blending under the Hindu law involves the process of a wider sharing of ones own properties by permitting the other members of one's joint family the privilege of common ownership. While introducing new sharers in one's own property, one does not in the process of blending efface one's own interest in favor of other. Since a Hindu female is not a coparcener, by contributing her property in the family hotch-potch, she would be giving up her own interest in the process of blending. Therefore, the doctrine of blending cannot be made applicable to the separate property owned by a female. However, it may be noticed that in the said decision the second question was answered in favor of the assessed Hindu undivided family and the court did not lay down an absolute principle that a female cannot contribute in any manner to the funds or property of the joint family, under any circumstances. It was in fact held that the property given by the female member must be deemed to be a gift to the undivided family of which she was a member. The averment of the plaintiff in the case before me is that money was contributed by the plaintiff No. 3 towards purchase of the said property for the benefit of the entire family. It is open to the plaintiff to establish that plaintiff No. 3 had not blended her separate property in the family hotch-potch, but gifted her income and savings to the joint family and from that family fund the said property was purchased. Therefore, this aspect also requires evidence to be led.

30. Reliance has been placed on Ramti Devi (Smt) Vs. Union of India (UOI), to contend that a duly registered document (in this case the sale deed executed in the year 1961) remains valid and binds the parties till the document is avoided or cancelled by proper declaration. The defendants contention is that a suit for

cancellation has to be filed within three years from the date when the cause of action has occurred. Since in this case the challenge has been made that too without seeking the cancellation of the sale deed in the year 2006, the suit is hopelessly barred by limitation. Reliance is also placed upon judgments reported in Md. Noorul Hoda Vs. Bibi Raifunnisa and Others, and Udhav (dead) by L.Rs. and Another Vs. Pandharinath Kishanrao Tak and Another, .

31. I find that the plaintiffs are not seeking a cancellation of sale deed in this case. Their claim is that the said property though in the name of one party, was purchased for the benefit of all and constituted co-parcenary property. Now a joint family property may not stand in the name of all the co- parceners as ownership in the said property is governed by law and a co-parcener acquires interest in the same by birth and independent of any document of title.

So long as his title is not denied by the others i.e., a cloud is not cast on his title, there is no obligation on him to seek a declaration of his title from the court. However, the moment his title is so denied or threatened to be denied or an act detrimental to his interest is committed so as to curtail his right, the time begins to to run for seeking the appropriate relief. The plaintiffs had categorically averred that their rights and title was admitted by the defendant no. 1 till the publication of the notice in the Statesman on 22.07.2006, and it was only thereafter that the cause of action for seeking a declaration commenced. I find that none of the cases referred on behalf of the defendant deal with a fact situation where the property in question is alleged to be co- parcenary property and issue/relief is only for declaration of a share by a co- parcener. This matter also Therefore cannot be decided without leading of evidence. The plaintiff have already filed a separate suit being CS(OS) No. 1791/2006 to challenge the title of the transferees from defendant No. 1.

32. Consequently, in my view the suit cannot be said to be barred either under the Benami Act or the Limitation Act at this stage without a trial. This application is Therefore dismissed with costs of Rs. 20,000/-.