
(1982) 12 OHC CK 0010
In the Orissa High Court
Case No : First Appeal No. 19 of 1971

Smt. Manohari Devi and Others	Vs	APPELLANT
Choudhury Sibanava Das and Others		RESPONDENT

Date of Decision : 16-12-1982

Acts Referred:

Citation : AIR 1983 Ori 135 : (1983) 55 CLT 153

Hon'ble Judges : P.K. Mohanti, J;B.N. Misra, J

Bench : Division Bench

Advocate : N. Mukherjee, for the Appellant; B. Patnaik, R. Mohanty and A.K. Padhi, for the Respondent

Final Decision : Dismissed

Judgement

B.N. Misra, J.—Plaintiffs 1, 2 and 3 wives of brothers Puranmal, Matrumal and Prabhudayal respectively, have preferred this appeal against the judgment and decree of the learned 4th. Additional Subordinate Judge, Cuttack dismissing their suit for specific performance of contract, Choudhury Sibanava Das is defendant No. 1. The late Durgabati Devi was his first wife and defendants 2 to 4 are his sons and defendants 5 to 7 are his daughters through the late Durgabati. Defendant No. 8, Satyabhama Devi is the second wife of defendant No. 1 and defendants 9 to 11 are the adult sons and defendants 12 to 15 are the minor sons of defendant No. 1 through Satyabhama. The properties described in Schedules "A" and "B" appended to the plaint form the subject matter of dispute between the parties. Schedule "A" comprises Ac. 0.063 decimals of land together with a portion of the house appertaining to plot No. 422 of C. S. Khata No. 163 and Schedule "B" comprises Ac. 0.041-5 links of land together with a portion of the same house appertaining to plot No. 422/1 of C. S. Khata No. 163. The house and the lands are situated at Manikghose bazar in the city of Cuttack.

2. The plaintiffs' case may be briefly stated The defendants constitute a joint family of which defendant No. 1 is the Karta. The properties mentioned in Schedules "A" and "B" of the plaint were originally ancestral joint family

properties of defendant No. 1 and his co-sharers. In partition suits No. 69 of 1924 and No. 144 of 1927 of the Court of the Subordinate Judge, Cuttack between the co-sharers, the "A" schedule properties along with other properties fell to the share of the late Choudhury Padmanava Das, father of defendant No. 1. Padmanava got his name mutated in the landlord's Shirasta and Municipal office and remained in separate possession thereof. After his death defendant No. 1 became the owner in possession of the said property as Karta of the family. In the aforesaid partition suits the "B" schedule property along with other properties fell to the share of Choudhury Mohadev Das, Choudhury Brajabandhu Das and Choudhury Dukhishyam Das who amicably partitioned the same amongst themselves, Brajabandhu taking Ac. 0.19 decimals and the remaining two Ac. 0.16 decimals each. On 9-4-1938 Brajabandhu sold his share of Ac. 0.19 decimals to one Lambodar Misra who had two sons, Upendranath and Debendranath, both of whom after the death of their father divided the said Ac. 0.19 decimals of land equally between them. According to the plaintiffs, Choudhury Dukhishyam Das and Choudhury Mohadev Das proposed to sell their shares of Ac. 0.16 decimals each in the "B" schedule property to defendant No. 1 who purchased the same with his own funds benami in the name of his first wife, the late Durgabati Devi, by two sale-deeds dated 15-12-1940 and 12-12-1941. The aforesaid Debendranath Misra, one of the sons of Lambodar Misra, proposed to sell his share of Ac. 0.9 decimals and 5 links in "B" schedule property to defendant No. 1 who purchased the same on 22-11-1967 with his own funds benami in the name of his second wife, Satyabhama, defendant No. 8. Since after the purchases noted above, defendant No. 1 became the owner in possession of the entire Ac. 0.41 decimals and 5 links of land comprising "B" schedule property together with the dilapidated house thereon. The further case of the plaintiffs is that defendant No. 1 could not make any repairs to the old double-storeyed building standing on a portion of "A" schedule property and as a result the building became so dilapidated, that a huge sum of money was required for repairs. Defendant No. 1 who was then residing in village with his family did not think it profitable or beneficial to spend such a huge sum for repairs of the building. Accordingly he proposed to dispose of the same and utilise the money in extending his residential house at village Bhingarpur and also to run the family business as a profitable concern. Puranmal, husband of plaintiff No. 1, came to know that defendant No. 1 desired to sell the "A" schedule property and accordingly he met defendant No. 1 in the middle of June, 1968. It was stipulated between Puranmal and defendant No. 1 that the latter would sell the "A" schedule property with the house to the plaintiffs for a consideration of Rupees 43,000/-. Defendant No. 1 wanted an advance of Rs. 10,000/- for his urgent necessity and the plaintiffs agreed to give the same on the day of execution of the contract. According to the plaintiffs, a portion of the double-storeyed building on "B" schedule property was also in a dilapidated condition requiring investment of a huge sum for repairs and therefore defendant No. 1 thought it prudent to sell the "B" schedule property and utilise the purchase money for extension of the residential building at village Bhingarpur

and for joint family business. Purnamal also agreed to the suggestion of defendant No. 1 for purchase of "B" schedule property and if was agreed, between Purnamal and defendant No. 1 in the last part of June, 1968 that the plaintiffs would also purchase the "B" schedule property for Rs. 29,000/- and pay Rs. 5000/- as advance on the date of execution of the contract. Purnamal had made bona fide enquiries on behalf of the plaintiffs regarding the legal necessities of and benefits to the joint family and was satisfied about the existence of the same and, the plaintiffs were also accordingly satisfied. On 13-7-68 a deed of contract (Ext. 1) for sale of schedules "A" and "B" properties was executed in favour of the plaintiffs by defendant No. 1 for self and as Karta of the joint family and defendant No. 1 received an advance of Rs. 15,000/-. Although it was agreed that the sale-deeds would be executed within three months from that date, instead of doing that, defendant No. 1 sent a registered pleader's notice dated 11-10-1968 alleging that he had agreed to sell some lands at Kuanpur for Rs. 30,000/- and not the suit house. Defendant No. 1 suggested, refund of Rs. 15,000/- or acceptance of a sale-deed in respect of Kuanpur lands. Plaintiff No. 1 and her husband, Purnamal replied to the said notice by registered post denying all the allegations. The plaintiffs issued a registered notice on 14-10-1968 to defendant No. 1 demanding performance of the contract in respect of schedules "A" and "B" properties and to accept the balance consideration of Rs. 57,000/-. They also sent along with the notice a draft deed of sale. However, defendant No. 1 did not execute the sale-deeds. Accordingly the plaintiffs have filed the suit for specific performance of contract requiring defendant No. 1 to sell schedule "A" and "B" properties to the plaintiffs,

3. Defendants 1, 2, 8 and 12 to 15 have filed separate written statements. Defendants 3 and 4 have adopted the written statement filed by defendant No. 2. Defendants 5 to 7 and 9 to 11 have been set ex parte. The defence case may be briefly stated. In the year 1966, prior to the execution of the contract for sale, there was already a severance of the joint family status and as such defendant No. 1 was not competent to execute the contract as the Karta of the joint family. Assuming the defendants comprised of a joint family, defendant No. 1 was not the Karta. The "B" schedule properties were purchased by the late Durgavati, the first wife of defendant No. 1 and Satyabhama, defendant No. 8, the second wife of defendant No. 1, from out of their Stridhan funds and they are the absolute owners in possession of the same. Defendant No. 1 has no interest in the said properties and was incompetent to enter into any contract in respect of the same and as such the contract, if any, executed by him is not binding on the other defendants. The suit house is not a dilapidated house and the income from the family property is sufficient to meet the annual repairs and the said house was never a burden to the family. The defendants have no other business except cultivation and there was never any question of extending their residential house at village Bhingarpur which already comprised of 27 living rooms. Many rooms in the village house are lying vacant as defendants 2, 3 and 4 are staying separately with their families at different villages since after the severance of the

joint family status. It is also alleged that defendant No. 1 executed the contract for sale without knowing the contents thereof under undue influence and pressure and believing that the contract for sale was in respect of some lands at village Kuanpur and not the suit house. The defendants have accordingly prayed that the suit should be dismissed.

4. The main findings of the learned Additional Subordinate Judge are that the defendants constitute a joint family of which defendant No. 1 is the Karta, that the "B" schedule properties are the Stridhan properties of the two wives of defendant No. 1 and as such defendant No. 1 was not competent to enter into any contract for sale of the said properties, that defendant No. 1 is not competent to enter into any contract for sale of the joint family schedule "A" property and the contract for sale is not for benefit of the estate or for legal necessity and therefore not binding on the other defendants and that the contract for sale was duly executed by defendant No. 1 who had full knowledge of its contents and as such it is a genuine document, but the undivided interest of defendant No. 1 cannot be transferred. The suit filed by the plaintiffs has accordingly been dismissed and defendant No. 1 has been directed to refund Rs. 15,000/- which he had received as advance to the plaintiffs within one month from the date of delivery of the judgment.

5. The two findings of the learned Additional Subordinate Judge that the defendants constitute a joint family of which defendant No. 1 is the Karta and that the contract for sale (Ext. 1) dated 13-7-1968 was duly executed by defendant No. 1 with full knowledge of its contents and as such it is a genuine document have not been challenged by either the appellants or the respondents in this appeal. These two findings appear to be based on a proper assessment of the oral and documentary evidence adduced in this case and hence they are confirmed.

6. Mr. Mukherjee, learned counsel for the appellants, has assailed the findings of the learned Subordinate Judge on issues 4 and 7 and 5 and, 8. Issues 4 and 7 may be considered first and they are :--

"4. Is the defendant No. 1 competent to enter into any contract for sale of the joint family property mentioned in Schedule A of the plaint ?

XXX 7. Whether the agreement to sell by defendant No. 1 is for legal necessity and benefit to the estate and is the same binding and enforceable as against the other defendants and if not is the plaintiff entitled to enforce the contract as it is ?"

These two issues, require consideration of the powers of the Karta of a joint Hindu family. Courts have always recognised the power of the manager or Karta of a joint Hindu family to alienate for value joint family property, so as to bind the interests of both adult and minor coparceners in the property, provided that the alienation is made for legal necessity or for the benefit of the estate. In (1856) 6Ind App 393 (423), Hunoomanpersaud Panday v. Mussumat Babooee M.

Koonweree, the Privy Council held, "the power of the Manager for an infant heir to charge an estate not his own, is, under the Hindu law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make, in order to benefit the estate, the bona fide lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded.....

Their Lordships think that the lender is bound to inquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the Manager is acting in the particular instance for the benefit of the estate. But they think that if he does so inquire, and acts honestly, the real existence of an alleged sufficient and reasonably-credited, necessity is not a condition precedent to the validity of the charge, and they do not think that, under such circumstances, he is bound to see to the application of the money."..... In 20 CWN 645 : AIR 1916 Cal 840. Krishna Chandra Choudhury v. Ratna Ram Pal it was held that, "the rule laid down by the Judicial Committee in Hanooman Pershad Pandey's case is not restricted to cases of mortgage or other forms of partial alienation, nor is it restricted in its application to cases of necessity alone, for a "benefit" of the estate is there differentiated from the ""need" of the estate as a circumstance justifying alienation." In Jagmohan Agrahri and Another Vs. Prag Ahir and Others, , it was held, "under the Hindu Law a transfer can be made by the manager of a family either for legal necessity or for the family benefit. A transaction which is entered into by the father manager of a joint family for the purpose of disposing of property, which yielded a small profit and was difficult to manage, and to apply the sale consideration to the extension of the existing family business, cannot be questioned by the sons. Where the business was not of a speculative nature, the subsequent failure of that business affords no criterion for determining whether the transaction was originally a prudent transaction which the manager of a Hindu family, and especially a father was entitled to make for the family benefit." In Basdeo Narain Vs. Muhammad Yusuf and Others , it was held that, "a transaction entered into by the manager for an infant heir need not be of a defensive nature. If the transaction is shown to be for the benefit of the estate and such as a prudent owner would have carried out with the knowledge that was available to him at the time it cannot be set aside by anybody. The degree of prudence which might be required from a person who was not the sole owner would be somewhat greater than that which might be expected in the case of a sole owner, and might well be held to be what would be demanded in ordinary cases from a trustee." In Chhotey Lal Chaudhury and Another Vs. Dalip Narain Sing and Another, , it was held that, "a mortgage of joint family property to finance a venture embarked on by the manager of a joint family for the benefit of the family (and not for his own benefit only) is binding on the members of the family, whether they in fact profited by the venture or not, provided it was of

such a nature as a prudent manager would undertake and funds were in fact required to finance it." In *Ananto Mohini Vs. Khalli Sahu and Others*, , it was held that, "when a creditor had personal knowledge of the condition of the family and also all about the unexpected expenses of the family, he is not ordinarily required to make any inquiry as to them. His personal knowledge itself is sufficient to justify the loan advanced by him. Apart from this, Ext. I at best shows that, though the recital in it cannot be taken to be as evidence as to the existence of any legal necessity, she made a representation to the original creditor as to the existence of any legal necessity for borrowing the money, and that believing that representation to be true supplemented by his personal knowledge of the family, the creditor advanced money to her. Such a belief, we think, is a bona fide one." In AIR 1963 Mys 5 -- *Veerabhadrapa v. Lingappa*, it was observed that, "if the existence of a family necessity is established, the manner in which it should be met and the nature of the alienation of the family property, if any, made for the purpose of meeting that necessity, is a matter entirely for the manager to decide. So long as he does it honestly and bona fide in the interest of the family, the fact that another person in the position of a manager could have or would have done a better arrangement for meeting the necessity, is not an argument available to invalidate the actual arrangement made by the manager." In *Balmukand Vs. Kamla Wati and Others*, , the Supreme Court held, (at pp. 1387-88).

"The next case is *Sital Prasad Singh and Others Vs. Ajablal Mander and Others*, That was a case in which one of the questions which arose for consideration was the power of a manager to alienate part of the joint family property for the acquisition of new property. In that case also the test applied to the transaction entered into by a manager of a joint Hindu family was held to be the same, that is, whether the transaction was one into which a prudent owner would enter in the ordinary course of management in order to benefit the estate. Following the view taken in the Allahabad case the learned Judges also held that the expression "benefit of the estate" has a wider meaning than mere compelling necessity and is not limited to transactions of a purely defensive nature. In the course of his judgment Harries, C. J. observed at p. 311 (of ILR Pat) : (at p. 372 of AIR) :

"..... the karta of a joint Hindu family being merely a manager and not an absolute owner, the Hindu Law has, like other systems of law, placed certain limitations upon his power to alienate property which is owned by the joint family. The Hindu law givers, however, could not have intended to impose any such restriction on his power as would virtually disqualify him from doing anything to improve the conditions of the family. The only reasonable limitation which can be imposed on the karta is that he must act with prudence, and prudence implies caution as well as foresight and excludes hasty, reckless and arbitrary conduct."

After observing that the transaction entered into by a manager should not be of a speculative nature the learned Chief Justice observed :--

"In exceptional circumstances, however, the court will uphold the alienation of a part of the joint family property by a karta for the acquisition of new property as for example, where all the adult members of the joint family with the knowledge available to them and possessing all the necessary information about the means and requirements of the family are convinced that the proposed purchase of the new property is for the benefit of the estate." These observations make it clear that where adult members are in existence the judgment is to be not that of the manager of the family alone but that of all the adult members of the family, including the manager. In the case before us all the brothers of Pindidas were adults when the contract was entered into. There is no suggestion that they agreed to the transaction or were consulted about it or even knew of the transaction. Even, therefore, if we hold that the view expressed by the learned Chief Justice is right it does not help the plaintiff because the facts here are different from those contemplated by the learned Chief Justice. The other Judge who was a party to that decision, Manohar Lal J., took more or less the same view."

In Smt. Rani and Another Vs. Smt. Santa Bala Debnath and Others, , the Supreme Court held (at p. 1031),

"Legal necessity does not mean actual compulsion : it means pressure upon the estate which in law may be regarded as serious and sufficient. The onus of proving legal necessity may be discharged by the alienee by proof of actual necessity or by proof that he made proper and bona fide enquiries about the existence of the necessity and that he did all that was reasonable to satisfy himself as to the existence of the necessity.

Recitals in a deed of legal necessity do not by themselves prove legal necessity. The recitals are, however, admissible in evidence, their value varying according to the circumstances in which the transaction was entered into. The recitals may be used to corroborate other evidence of the existence of legal necessity. The weight to be attached to the recitals varies according to the circumstances."

7. Bearing in mind the principles of law enunciated in the aforesaid decisions we would now proceed to examine the evidence to see whether the contract of sale (Ext. 1) executed by defendant No. 1 on 13-7-1968 was made for legal necessity or for the benefit of the estate. The plaintiffs have asserted in the plaint that the suit house was in a highly dilapidated condition in 1968 on account of lack of repairs and a huge sum of money was required to meet the cost of repairs and that as defendant No. 1 did not have sufficient funds, he desired to dispose of the suit house and utilise the money for extension of the residential building at village Bhingarpur and for joint family business purposes. The defendants have denied these allegations and have asserted that the suit house was not in a dilapidated condition and that the income from the family property was always sufficient to meet the annual repairs of the suit house which was never a burden to the family and that there was never any question of extending the residential accommodation at village Bhingarpur and that the family had no business

excepting cultivation. P. Ws. 4 to 6 and 10 and 11 support the plaintiffs' case in this regard. P. W. 11 is the husband of plaintiff No. 1 and all throughout he acted on behalf of the plaintiffs. In examination-in-chief P. W. 11 has said that the suit house was old, broken and cracked at many places. According to him, the Municipal Engineer P. W. 10 had accompanied him during his visit to the suit house in the month of May, 1968. However, in cross-examination he has stated that he had visited the suit house in June, 1968 and not in the month of May. P. W. 11 failed to describe the exact places of the suit house where there were cracks. He was even unable to say whether the cracks were on the front, back or inner side of the building. Thus P. W. 11 does not seem to have any idea as to the condition of the suit house around June, 1968. P. W. 4 is a resident of Manikghosh bazar where the suit house is situated. At first he stated that about three months prior to his deposition in court in September 1970, at the instance of defendant No. 9, son of defendant No. 1 through his second wife, he had gone to see the suit house. After making the above statement and, after a long pause he stated that he had visited the suit house two years and three months before the date of his deposition. The demeanour of this witness as regards his hesitation and long pause has been noted by the trial court. According to him, the walls of the suit house were broken at places and there were cracks in many places. The plastering materials were found to have been corroded due to ravages of weather. Some bricks were found to have given away at many places. In cross-examination P. W. 4 has stated that he did not ascertain from defendant No. 1 as to how many rooms were there in the portion of the suit house which he had wanted to sell. He had not even gone round the rooms in the house. He failed to give the dimensions of the cracks which according to him existed on the roadside wall of the suit house. He had gone into one room and, he had not noticed any damage there. He could not give the dimensions of the corroded portions of the house. P. W. 5 is a grocer and he knows defendant No. 9. In his examination-in-chief he has stated that at the instance of defendant No. 9 he had gone to see the suit house with a view to purchase it. But he has not indicated at what point of time he had paid his visit to the suit house. He has very vaguely stated that the suit house was an old house and broken at some places. In cross-examination he failed to describe the actual damage to the suit house. P. W. 10 is a retired Overseer. He has stated that in June, 1968 at the instance of P. W. 11 he had gone to the disputed house to demarcate the share of defendant No. 1 which P. W. 11 wanted to purchase. This obviously refers to the land and the portion of the suit house situated in schedule "A". On measurement P. W. 10 found, the area of Schedule "A" to be 63 decimals. He has stated that the suit house was an old building and it had broken at many places and he had estimated the cost of repairs at Rs. 22,000/-. He has further stated that under authority of the Municipality he had informed defendant No. 1 either to dismantle the house or to get it thoroughly repaired. However he failed to mention the date on which he had given notice to defendant No. 1 on behalf of the Municipality. He had not seen the notice nor the concerned municipal file. He has further stated that at the instance of defendant No. 1 in February, 1967 he

had prepared an estimate for repairs of the house. He had not given a written estimate to defendant No. 1. He had also not given any written estimate to P. W. 11 at whose Instance he had measured, the suit house in the first part of June, 1968. In the absence of any written material, no importance can be given to the statement of P. W. 10 that the estimate for cost of repairs to the suit house was Rs. 22,000/-. According to P. W. 10 at the instance of P. W. 11 he had visited the suit house once only in the first part of June, 1.968 and during that visit he had confined his work only to Schedule "A" property. P. W. 10 has not specifically stated anything as to the estimate of repairs with regard to the portion of the suit house situated in Schedule "B". P. W. 11 also does not specifically say that P. W. 10 had inspected Schedule "B" property. In view of the sketchy and vague evidence of the plaintiff's witnesses as discussed above, the plaintiffs must be held to have failed to establish that the suit house was in a highly dilapidated condition and a huge sum of money was required to meet the cost of repairs of the suit house. In the absence of evidence worthy of acceptance, the recital in Ext. 1 that the suit house was in a dilapidated, condition and required a huge sum of money for its repair cannot by itself be held as proof of the actual state of the house. There is no basis to hold that the suit house was a burden to the family of defendant No. 1.

8. According to the plaint, the further case of the plaintiffs is that the consideration money from sale of the suit house was to be utilised by defendant No. 1 in extending his residential house at Bhingarpur which was an urgent necessity in view of the growing number of the family members of defendant No. 1 and also to run the family business as a profitable concern. However, in his evidence in court P. W. 11 has taken a different stand. According to him, defendants 2 and 9 had told him during his visit to village Bhingarpur that out of the 27 rooms in the village house of defendant No. 1, 22 were tin-roofed rooms and they wanted to change them to terrace-roofs as otherwise they were too hot. This as a new case which is sought to be introduced for the first time in court. Further, the visit of P. W. 11 to village Bhingarpur is not corroborated by any other witness. P.W. 11 claims to have met some villagers at Bhingarpur during his visit, but he cannot give the names of those villagers nor have the plaintiffs examined any of the villagers. In Ext. 1 it is stated that the consideration money out of the sale of the suit house was to be utilised for constructing a new pucca house in the village and for business purposes. So far as the residential house at Bhingarpur is concerned, Ext. 1 is entirely silent as to the extension of the residential building as pleaded in the plaint and also as to the changing of tin-roofs to terrace-roofs as stated by P. W. 11 in his evidence in court. The case sought to be made out by the plaintiffs with regard to the residential house at Bhingarpur is highly discrepant and inconsistent. As regards the joint family business, the learned Additional Subordinate Judge has found that the family was carrying on business in rice and cereals. The evidence of P. Ws. 5 and, 11 and D. W. 3 for defendant No. 1 justifies this finding. However, this finding does not necessarily lead to the conclusion that the consideration money

out of the sale of the suit house was meant for expansion of the joint family business. Though it is true that the nature of the alienation of joint family property for the purpose of meeting the legal necessity is a matter entirely for the manager to decide, in the facts of this case no prudent person would want to dispose of the only residential joint family house in the city of Cuttack when admittedly the family has vast landed, properties in the village. Further, admittedly the plaintiffs themselves never made any enquiries as to the existence of any legal necessity or family benefit justifying sale of the suit house. P. W. 11, husband of plaintiff No. 1, is the person who made enquiries on their behalf. There is no evidence that prior to the transaction he had personal knowledge of defendant No. 1 or his family or the condition of their family. A scrutiny of his evidence shows that the enquiries made by him were most perfunctory and casual. In cross-examination P. W. 11 has stated that he could not say to whose share plot No. 422/1 had fallen at the family partition. Even at the time of the transaction he had not ascertained to whose share that plot had fallen and whether any property of that plot still remained unsold. He did not know if the defendants' family had a pucca house at village Bhingarpur and whether the defendants had, got three pucca rooms from that house as their share. According to him, the enquiry in the village by him was made before the agreement was executed, but after the second transaction had been finalised. It is thus clear that P. W. 11 had decided to go ahead with the transaction even before he made enquiries. In his cross-examination P. W. 11 has clearly stated that he had decided to purchase the property irrespective of the consideration whether there was legal necessity or not for defendant No. 1 to sell. In these circumstances and in view of the evidence discussed above it cannot be said that the plaintiffs or P. W. 11 on their behalf had made bona fide enquiries as to the existence of legal necessity or family benefit or had acted honestly. On consideration we agree with the learned Additional Subordinate Judge that the contract for sale (Ext. 1) was not for legal necessity or for benefit of the estate. These two issues have been correctly decided by the trial court.

9. The findings of the learned Additional Subordinate Judge on issues 5 and 8 have also been challenged by the appellants. These two issues are :--

"5. Is the defendant No. 1 competent to enter into any contract for sale of the B schedule properties of the plaintiff?

8. Is the Schedule B property acquired benami by defendant No. 1 in the name of his wives?"

It may be noted that Schedule "B" property comprises Ac. 0.041 and 5 links of land with a portion of the suit house on it. Out of this Ac. 0.041-5 links, Ac. 0.032 decimals with a portion of the suit house has been purchased in the name of the late Durgabati, the first wife of defendant No. 1 and the remaining Ac. 0.009-5 links also with a portion of the suit house has been purchased in the name of defendant No. 8, the second wife of defendant No. 1. Ext. C-2 dated 17-12-1940 and Ext. C-2/1 dated 12-12-1941 are the two sale deeds executed in

favour of the late Durgabati and Ext. A/3 dated 22-11-1967 is the sale deed executed in favour of defendant No. 8. Exts. C 2 and C-2/1 are for considerations of Rs. 700/ and Rs. 600/-respectively. Ext. A-3 is for a consideration of Rs. 2000/-. In paras 9 and 10 of the plaint the plaintiffs have stated that the "B" schedule property was purchased by defendant No. 1 with his own funds benami in the names of his two wives. That is all that is stated in the plaint regarding the benami nature of the transactions. The plaintiffs have not stated in the plaint that the purchase money for the "B" schedule property came out of the joint family funds. Their specific case as disclosed in the plaint is that defendant No. 1 had himself purchased the property with his own funds. However in court the plaintiffs have sought to make out a case that the purchase money for the "B" schedule property had come from the joint family fund. Learned counsel for the appellants has submitted that at the time of acquisition of schedule "B" property the joint family property of the defendants had sufficient nucleus from which the said property might have been acquired and therefore the burden is on the defendants to prove that the "B" schedule property was acquired by Durgabati and defendant No. 8 without the aid of the joint family property. In support of this proposition learned counsel relies on the following decisions. In AIR 1947 PC 189--Appalaswami v. Suryanarayanamurty, it was held, "proof of the existence of a joint family does not lead to the presumption that property held by any member of the family is joint, and the burden rests upon any one asserting that any item of property is joint to establish the fact. But where it is established that the family possessed some joint property which from its nature and relative value may have formed the nucleus from which the property in question may have been acquired, the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family property." The same principle has been reiterated, in Chanderdeb Lall and Others Vs. Nandji Lall and Others, and Chandrasekhar Praharaj and Others Vs. Pitambari Dibya, . In AIR 1960 SC 335--Rukhmabai v. Laxminarayan, it was held, "the burden lies upon the person who asserts that a particular property is joint family property to establish that fact But if he proves that there was sufficient joint family nucleus from and out of which the said property could have been acquired, the burden shifts to the member of the family setting up the claim that it is his personal property to establish that the said property has been acquired without any assistance from the joint family property." In K.V. Narayanaswami Iyer Vs. K.V. Ramakrishna Iyer and Others, , it was held, ""the legal position is well settled that if in fact at the date of acquisition of a particular property the joint family had sufficient nucleus for acquiring it, the property in the name of any member of the joint family should be presumed to be acquired from out of family funds and so to form part of the joint family property, unless the contrary is shown,"

10. Learned counsel for the respondents have urged that the presumptive doctrine enunciated in the aforesaid decisions applies to acquisitions in the names of male members of a joint family; it has no application in the case of

acquisitions in the names of female members of a joint family. In support of this stand learned counsel rely on the case of Nagayasami Naidu v. Kochadai Naidu AIR 1969 Mad 329 wherein it was held,

"18.A. We will now take up for consideration point No. 2, i.e. the character of the properties set out in Schedules B to E. This is discussed in paras 66 to 72 of the judgment of the learned Judge. The learned Judge has proceeded on the footing that as the family owned sufficient ancestral nucleus, which would yield an income between Rs. 12000 and, Rs. 16000 per annum, all the properties set out in Schedules B to E must be held to be joint family properties, as they could have been acquired with the assistance of ancestral nucleus inasmuch as defendants 2, 3, 4 and 5 who claimed these properties as their own separate properties have not made out their own independent separate resources with which these properties could have been or were acquired. Even at the outset, it has to be mentioned that the entire perspective approach is not correct. There is an essential distinction as to the scope of the presumption in the case of acquisitions in the names of male members of a joint family and the female members of a joint family. In the case of male members of a joint family, there is a presumption that if the joint family had sufficient ancestral nucleus, the properties standing or acquired in the name of junior members are joint family properties unless the presumption is rebutted by showing that the properties are the separate properties of the particular member or members in whose names the properties stand or were acquired. There is no such presumption in the case of properties standing in the name of female members. In the latter case, it is for the party who claims properties as joint family properties to specifically plead the particulars and details, in the pleadings and establish the same by adducing necessary evidence. If there is no pleading and if on the side of the plaintiffs there is no evidence, there is no need for detailed scrutiny of the case of the female members or persons claiming through them, as to the resources of the female members and as to how they acquired the properties in question. If the plaintiff on whom the burden lies adduces no evidence, no further question arises and the female member in whose name the property stands, must be held to be the beneficial owner of the property in question.

19. xx xx But Mr. Nambiar learned counsel for the respondents relied upon the decision in K.V. Narayanaswami Iyer Vs. K.V. Ramakrishna Iyer and Others, , as indicating a contrary view, i.e., that the presumption is the same whether it is male or female member of the joint family. We do not think that there is any warrant for that inference from the decision of the Supreme Court. That decision arose out of a suit for partition and the question arose whether the properties standing in the name of the wife, son and the grandson of a male member of the family were joint family properties or the separate properties of those individuals. The Supreme Court observed at page 292 as under --

"The legal position is well settled that if in fact at the date of acquisition of a particular property the joint family had sufficient nucleus for acquiring it, the

property in the name of any member of the joint family should be presumed to be acquired from out of the family funds and so to form part of the joint family property unless the contrary is shown. Vide *Amritlal v. Surathlal* AIR 1942 Cal 553, *Appalasami v. Suryanarayanamurthi* ILR (1948) Mad 440 : AIR 1947 PC 189."

With regard to the property standing in the name of the first defendant's son, the position is different. With regard to the property standing in the name of the wife and daughter of the male member, while dealing with the burden of proof and presumption and as to whether the acquisition must be deemed to be with the funds of the first defendant, the Supreme Court at page 292 has observed thus --

"It was also argued that acquisitions in the name of the third defendant and the 6th defendant should also be made to have been made with funds advanced by the first defendant himself and so these also should be presumed to have been acquired with joint family funds if it is shown that the joint family had sufficient nucleus for acquiring those at the date of the acquisitions and the first defendant does not show positively that the funds with which they were acquired did not belong to the joint family."

From this sentence it was argued that the Supreme Court was of the view that even in the case of properties standing in the names of female members, there is a presumption in favour of joint family and it should be rebutted by the husband. This sentence should not be divorced from the context and particularly from the important fact that it was not disputed that acquisitions in the name of the wife of the first defendant were made with the funds advanced by him. It is also important to notice that in that case, it was clearly admitted that the acquisitions were made in the name of the wife with the funds of the first defendant, the male member and the only question was whether those funds supplied by the male member were his own separate property or the joint family property. On the facts, the Supreme Court held that the funds in the hands of the first defendant male member were his own separate possession. It will thus be seen that the Supreme Court had not to consider a situation as in the instant case. We are not prepared to hold that the Supreme Court intended to overrule the uniform view taken by all the High Courts in a series of cases and upset this well settled and well established rule of distinction in the matter of presumption."

On review and analysis of several authorities the learned Judges have held as noted above that the presumptive doctrine available in respect of property acquired in the name of any male member of the joint family is not applicable in the case of properties standing in the names of female members and that in the latter case, it is for the party who claims properties as joint family properties to specifically plead the particulars and details in the pleadings and establish the same by adducing necessary evidence. The legal position has been correctly enunciated in the aforesaid decision. In the present case the onus is on the plaintiffs to prove that the "B" schedule property was purchased benami in the

names of Durgabati and defendant No. 8 from out of the joint family funds. The plaintiffs have not pleaded the particulars and details in the plaint. Their evidence in this regard is also most unsatisfactory. They mainly rely on the admission of defendant No. 1 in the contract of sale (Ext. 1) that the "B" schedule property was purchased benami in the names of the two wives. However, there is no basis to hold that this admission by defendant No. 1 was made by him in a representative character. On the contrary the recital in Ext. 1 is to the effect that defendant No. 1 had purchased the "B" schedule property benami in the names of his two wives with his own funds. There is no mention at all of joint family or joint family funds. In AIR 1974 SC 171--Jayadaya Poddar (deceased) v. Bibi Hazra, it was held, "it is well settled 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 the 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 through. 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. The reason is that a deed is a solemn document prepared and executed after considerable deliberation, and the person expressly shown as the purchaser or transferee in the deed, starts with the initial presumption in his favour that the apparent state of affairs is the real state of affairs. Though the question whether a particular sale of benami or not, is largely one of fact, and for determining this question, no absolute formulae or acid test, informally applicable in all situations, can be laid down; yet in weighing the probabilities and for gathering the relevant indicia, the courts are usually guided by these circumstances: (1) the source from which the purchase money came; (2) the nature and possession of the property, after the purchase; (3) motive if any, for giving the transaction a benami colour; (4) the position of the parties and the relationship, if any, between the claimant and the alleged benamidar; (5) the custody of the title-deeds after the sale and (6) the conduct of the parties concerned in dealing with the property after the sale." As regards motive for the benami transaction, the plaintiffs have stated in paras 8 and 10 of the plaint that defendant No. 1 decided to purchase the property in the name of his wife, Durgabati due to delicacy in purchasing the same in his own name from his own agnates and also decided to purchase in the name of defendant No. 8 with a view not to allow the co-sharers to know that he was recovering the family property himself. These reasons put forward as justification for the benami transactions are not at all convincing and further no supporting evidence has been led in court. As regards relationship between the alleged benamidar and the alleged principal, the late Durgabati and defendant No. 8 being the wives of defendant No. 1, it is probable that they could have been selected as benamidars. As regards custody of the documents of title, plaintiffs have examined P.Ws. 6 and

11. In his examination-in-chief P. W. 6 has stated that Jagabandhu Moharir had referred to the sale deeds and rent receipts in respect of the "B" schedule property in his presence and those papers were in the custody of defendant No. 1, but in cross-examination he has stated that he had not gone through the sale deeds nor were they read out in his presence and that none of them had read the sale deeds. P. W. 11 has stated that Jaga Moharir had, verified three sale deeds and municipal receipts and said that two sale deeds were in the name of the first wife and the third one in the name of defendant No. 8 and that to his query defendant No. 1 had said that he had purchased the property benami in the names of his wives. This statement of P. W. 11 is contradicted by P. W. 6 who has said that none of them had gone through the sale deeds and that Jaga Moharir might have read them, but did not give out anything to others. This is a serious contradiction. Further, it is surprising that in the contract for sale, Ext. 1, the particulars of sale deeds executed in favour of Durgabati and defendant No. 8 are significantly absent. The names of the vendors, the amounts of consideration, the stamp number and date and the details of the properties have not at all been mentioned in Ext. 1. If the title-deeds with regard to the "B" schedule property were with defendant No. 1, there is no explanation why the particulars with regard to the said deeds were not incorporated in Ext. 1. On the other hand, defendant No. 2, son of defendant No. 1 through his first wife, and defendant No. 8 have stated in court that the title deeds were all along in their possession. In these circumstances it cannot be said that the title deeds in respect of the "B" schedule property were in the possession of defendant No. 1. As regards possession of the "B" schedule property, the evidence shows that neither the late Durgabati nor defendant No. 8 was in exclusive possession of the same, but that the family used to stay in the suit house during their visits to Cuttack. As regards source of the consideration money for the "B" schedule property, the plaintiffs have not led any evidence to show that the consideration money was paid by defendant No. 1 from out of his own pocket, though it has been pleaded in the plaint and noted in Ext. 1. In Exts. C-2, C-2/1 and A-3 it has been noted that the consideration money was paid by the two wives from out of their Stridhan funds. Defendant No. 2 (d. w. 5 for defendants 2, 3 and 4) has stated that his mother had about two hundred acres of agricultural lands. A part of this was purchased by his mother in her own name, a part was purchased by her benami in the names of Mrutunjaya and Sadhu Charan and the remaining part was purchased by Durgabati's mother-in-law benami in the name of the said Mrutunjaya and Sadhu Charan. Defendant No. 2 has no personal knowledge about these acquisitions. D. W. 1 for defendant No. 2 was working as Durgabati's Gumasta since 1940 and prior to him his father was working as the Gumasta. According to him, the two hundred acres of lands were recorded benami in the names of the previous Gumastas Sadhu Charan and Mrutunjaya, but Durgabati was in possession of the same. After d. w. 1 joined service under Durgabati he got deeds of releases executed and registered from those Gumastas. In his presence Sadhu Charan had executed the release-deed, Ext. A-2 and Mrutunjaya had executed the release-deed Ext. B-2. D. W. 1 was also present at the time of

execution of Exts. C-2 and C-2/1. He has stated that the consideration money for those sales was paid by Durgabati out of her own funds through his father. D. W. 1 has further stated that he was managing the properties of Durgabati on her behalf and was rendering accounts to her. However, no accounts have been filed- Defendant No. 2 has explained that the accounts were being submitted in loose sheets and he used to destroy them after scrutiny. D. W. 1 has further stated, that Durgabati had also purchased lands from others vide Exts. D-2 and D-2/1 and the consideration amounts were paid by Durgabati. The evidence of defendant No. 2 and d. w. 5 shows that Durgabati had properties of her own and the capacity to purchase her portion of the "B" schedule property from out of her own funds. In her evidence defendant No. 8 has stated that defendant No. 1 had settled about 47 acres of land with her in the years 1945 and 1946. No deeds of settlement were executed, but receipts were issued in favour of defendant No. 8 in respect of the settled lands. However, no rent receipts have been filed except Exts. D-3 to D-3/8 which show defendant No. 8 as the owner in respect of some of these lands. Defendant No. 8 purchased twelve acres of land at Marichpur from Sadhu Charan Bay in 1948 under the sale deed, Ext. B-3. Exts. C-3, C-3/1 and C-3/2, sale deeds dated 25-5-1962, 27-4-1964 and 7-4-1967 respectively, show that defendant No. 8 had purchased lands at Bhubaneswar from her Stridhan funds. The evidence of defendant No. 8 is corroborated by the evidence of her Gumasta, D. W. 2 for defendant No. 8. Ext. B-3/1 is the release-deed dated 26-8-1955 executed by Gangadhar Misra in favour of defendant No. 8 and Exts. D-3/9 to D-3/16 are the rent receipts showing payment of rent by defendant No. 8 in respect of the released lands. The evidence discussed above shows that defendant No. 8 had property of her own and the capacity to purchase her portion of the "B" schedule property from out of her own funds. Considering the evidence adduced in the this case we hold that the plaintiffs have failed to prove that the "B" schedule property was purchased benami by defendant No. 1 in the names of his two wives with his own funds or with the joint family funds and that the "B" schedule property is the Stridhan property of the late Durgabati and defendant No. 8. The findings of the trial court with regard to issues 5 and 8 are confirmed.

11. For the reasons stated above this appeal is dismissed. Parties will bear their own costs. The judgment and decree of the learned Additional Subordinate Judge and the direction to defendant No. 1 to refund Rs. 15,000/- to the plaintiffs are confirmed.

P.K. Mohanti, J.

12. I agree.