IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MRS. JUSTICE ANU SIVARAMAN

&

THE HONOURABLE MR. JUSTICE C.PRATHEEP KUMAR

WEDNESDAY, THE 6TH DAY OF MARCH 2024 / 16TH PHALGUNA, 1945

MAT.APPEAL NO. 423 OF 2016

AGAINST THE JUDGMENT DATED 18.01.2016 IN OP NO.1114 OF 2012 OF FAMILY COURT, THIRUVALLA

APPELLANT/RESPONDENT:

SUNILA
AGED 41 YEARS, D/O.T.K.DIVAKARAN,
RESIDING AT VAISHNAVAM HOUSE,
EZHUMATTOOR P.O. & VILLAGE,
MALLAPALLY TALUK,PATHANAMTHITTA-689586.

BY ADVS.
SRI.MANU RAMACHANDRAN
SRI.JOHNY K.GEORGE

RESPONDENT/PETITIONER:

ASHOK KUMAR
AGED 48 YEARS,S/O.K.P.KUTTAPPAN,
RESIDING AT SINDHU VILASAM,
EZHUMATTOOR P.O. & VILLAGE,
MALLAPALLY TALUK,PATHANAMTHITTA-689586.

BY ADVS.
SMT.DIVYA K.NAIR
SRI.P.HARIDAS
SMT.S.SIKKY
SRI.P.C.SHIJIN

THIS MATRIMONIAL APPEAL HAVING BEEN FINALLY HEARD ON 21.2.2024, THE COURT ON 6.3.2024 DELIVERED THE FOLLOWING:

J U D G M E N T

Dated this the 6th day of March, 2024

C. Pratheep Kumar, J.

This appeal has been preferred by the respondent in O.P. No.1114 of 2012 on the file of Family Court, Thiruvalla, against the judgment dated 18.1.2016, allowing the above petition.

2. The appellant is the wife of the respondent. The respondent filed the above O.P. for declaration that he is the title holder in interest of the schedule property and the building therein and that appellant herein is only a name lender in sale deed No.756/2004 of Vennikulam Sub-Registry and also for recover possession of the schedule property. As per the impugned judgment, the Family court decreed the OP declaring that the respondent is the title holder of the schedule property, that the appellant is only a name lender in the sale deed and also allowed the respondent to recover possession of the aforesaid property from the appellant.

3. The case of the respondent is that he had purchased the schedule property as per Exhibit B2 Sale Deed No.756/2004 in the name of the appellant, who is his wife. The entire sale consideration was paid by him. The property was purchased in the name of the appellant only

for the reason that she is his wife. After purchasing the property, he availed a loan in the name of the appellant and constructed a residential building therein and was running a soft drink's factory therein. While so, the appellant developed illicit relationship with another person and when it was objected by by him, she filed a M.C case before the Magistrate under the Protection of Women from Domestic Violence Act, obtained an order against him and expelled him from the above residence. Therefore, he filed the present suit.

4. According to the a appellant, the schedule property was purchased using her own money and that there is absolutely no merits or *bona fides* in the contention of the respondent that the property was purchased and a residential building was constructed using his own money. The residential building in the schedule property was constructed by the appellant after availing a loan and according to the appellant the Family Court was not justified in decreeing the OP.

5. Now, the point that arise for consideration is the following:

Whether the impugned judgment of the Family Court, Thiruvalla, allowing OP.1114/2012 is liable to be interfered with in the light of the grounds raised in the appeal?

6. Heard both sides.

7. The Point:

The petition schedule property now stands in the name of the appellant. Exhibit B1 is Sale Deed No.756/2004, by which the said property was purchased in the name of the appellant. While according to the respondent, the said property was purchased using his own money, the appellant claims that it was purchased using her own money. Both parties would further claim that the residential building in the said property was also constructed by them. At the time of evidence, it is revealed that the respondent was employed at Escorts Yamaha, Noida, Uttar Pradesh. It is also revealed that as early as in the year 1992, he had purchased a studio apartment in Ghaziabad, Uttar Pradesh spending Rs.25000/-. Thereafter, it was sold in the year 1993 for a sum of Rs.40,000/-. After another year, he had purchased a flat at Noida for Rs.60,000/- and it was sold in the year 2001. Thereafter he purchased a plot at Greater Noida by spending Rs.3,00,000/-. In the said property, he had constructed a residential building and sold the same in the year 2006. The above sale proceeds was deposited in the bank account. In addition to the same, he had availed VRS and the amount received from the company in connection with the VRS was also deposited in his Bank. From the Bank deposit, some amount was utilised for starting a soft drink's factory and out of the

remaining, a sum of Rupees One Lakh was utilised for purchasing the schedule property. In order to prove the withdrawal of the money from the Bank, he has produced Exhibit B4 Bank Statement. He has also examined the Bank Manager, Federal Bank, Valakuzhi Branch as RW4 and he proved the Bank Statement. He also deposed that on 26.5.2004, on the date of Exhibit B1 Sale Deed, the respondent had withdrawn a sum of Rs.2,60,000/- from his account with the Federal Bank, Valakuzhi Branch.

8. Before the Family Court, O.P. No.1114 of 2012, along with O.P. No.1029 of 2012 filed by the appellant herein as petitioner were tried jointly and the appellant herein was examined as PW1. In the original petition and the proof affidavit filed by the appellant before the Family Court her case is that she had purchased a residential building at Noida and sold the same and the above sale proceeds was utilised for purchasing the petition schedule property. Her case is that she purchased the above house at Noida by selling her gold ornaments and also by using the financial support from her parents. She also claimed that at Noida, she had worked as Stenographer in two companies. However, she could not produce even a scrap of paper to prove that she had any such job or source of income as claimed. She also could not prove that she had any

such house at Noida, in her name. On the other hand, during cross examination, she changed her stand and deposed that the house at Noida was in the name of the respondent. During the cross examination by the respondent, the attempt of the appellant was to show that the respondent purchased the residence at Noida using the sale proceeds of the gold of the appellant as well as using her salary from her employment. It was contended that while they were at Noida, the appellant had no separate bank account and that her salary was deposited in the account of the respondent. Therefore, at the time of evidence, her case was to the effect that the sale proceeds of her gold and salary entrusted by her with the respondent was utilised by him for purchasing flat in his name and as such she also has got right in the sale proceeds of the above flat, which was ultimately utilised for purchasing the petition schedule property. However, the above claim of the appellant was stoutly denied by the respondent and his case is to the effect that the appellant had no job and also that she had no qualification so as to work as a stenographer. According to the respondent, the appellant studied only up to Pre-degree and that she was only a homemaker.

9. As we have already noted above, the appellant could not produce any documents to prove that she had worked as Stenographer as

claimed. During the cross examination of the father of the appellant as PW2, he deposed that he was not aware whether his daughter studied stenography. The case pleaded in the petition and raised in the proof affidavit that the appellant had a residential building at Noida in her own name and that it was purchased using her gold ornaments and financial support given by her parents was given a go by and during the course of trial the appellant changed her case to the effect that residence at Noida was in the name of the respondent and she had contributed to the respondent for purchasing the above residence.

10. On the other hand, from the evidence of the respondent as RW1 and the Bank Manager as RW4, it is revealed that on the date of purchase of the schedule property, respondent had withdrawn a sum of Rs.2,60,000/- from his own bank account and out of which a sum of Rupees One Lakh was given to the vendor of the schedule property. The vendor of the schedule property was also examined by the respondent as RW5 and he deposed that he had sold the schedule property to the respondent for a consideration of Rupees One Lakh. He also denied having any transaction with the appellant. RW3, who constructed the residential building in the schedule property also deposed that he had constructed the said residential building at the instance of the respondent

and that he had no contract or connection with the appellant.

11. On the side of the appellant, an attempt was made to show that at the time of marriage she had 20 sovereigns of gold ornaments and that it was also utilised by the respondent for purchase of the property. However, in order to substantiate this contention, appellant could not produce any reliable evidence. At one time, she would contend that her gold ornaments were utilised for purchasing a residential building in her own name at Noida and now, during the course of evidence she changed her stand and contended that her gold and salary were utilised by the respondent for purchasing the building at Noida in his name. Thereafter, it was contended that, the sale proceeds of the above residential house was utilised for purchasing the petition schedule property. On the other hand, from the very beginning the respondent has a consistent case that the schedule property was purchased using his own money and through the evidence of RW1 and RW4 it was established that on the date of Exhibit B1 sale deed on 26.5.2004, a sum of Rs.2,60,000/- was withdrawn from the account of the respondent. According to the respondent as well as the seller of the schedule property, Rupees One Lakh was the sale consideration for the schedule property and in the light of the evidence of RWs1, 4 and 5 and Exhibit B4 bank statement, it is

proved by the respondent that the schedule property was purchased by him using the money withdrawn by him from his own bank account maintained with Federal Bank, Valakuzhi Branch.

12. When the father of the appellant was examined as PW2, he had put up yet another case against the appellant. According to PW2, he had advanced a sum of Rupees One Lakh to the respondent for purchasing the schedule property. He clarified that the above Rupees One Lakh was mobilised by him from his own business and handed over the same to the respondent through the appellant. He further claimed that another Rupees One Lakh was there in the hands of the appellant. In addition to the same, he claimed that the gold of the appellant and children were also utilised for purchasing the schedule property. During the re-examination, an attempt was made to show that the gold was utilised for purchasing the first property in the name of the respondent at Noida. However, his version that he had advanced a sum of Rupees One Lakh for purchase of the property is not supported by any documentary or other evidence. The appellant has no case that for purchasing the schedule property her father had advanced a sum of Rupees One Lakh. She also had no case that there was a sum of Rupees One Lakh in her own hands and it was utilised for purchasing the schedule property. Therefore, from the evidence of PWs 1

and 2, it can be seen that their evidence are contradictory to each other. It is also against the case of PW1 in her petition and proof affidavit. Therefore, the evidence of the appellant and her witnesses are not at all reliable and trustworthy.

13. At the time of evidence, it is revealed that a loan was taken for the construction of the residential building in the name of the appellant and the property was mutated in the name of the appellant. It was admitted by the respondent also that the property was mutated in the name of the appellant and a loan was availed in her own name as the title deed stands in her name. The above explanation given by the respondent for the fact that mutation was effected in the name of the appellant and the loan was availed in the name of the appellant is a believable one. It was also revealed that though the housing loan was taken in the name of the appellant, the respondent's soft drinks factory and the property situated therein was given as security for the loan. Therefore, the contention of the appellant that the building in the schedule property was also constructed using his money as well as using the housing loan taken by him in the name of the appellant can only be believed. In the above circumstance, for the mere reason that mutation was effected in the name of the appellant and the loan was taken in her name, she will not get any

special right in the schedule property as it is revealed that the entire consideration for the property was met by the respondent from the amount withdrawn by him from his own bank account. In the above circumstances, the finding of the Family Court that the respondent is the title holder of the schedule property and that the appellant is only a name lender is perfectly valid.

14. It was argued on behalf of the appellant that Exhibit B3 produced on the side of the respondent is a fabricated document. The stamp paper used for preparing Exhibit B3 is seen purchased on 12th August 2006. The date of Exhibit B3 mentioned in the document is 11th May 2006. Therefore, *prima facie* the said document is not a genuine one. The respondent produced Exhibit B3 to prove that he had a property at Noida and that it was sold for a sum of Rs.10,90,000/- and that the said amount was there in his bank account. The fact that the respondent had a residential building at Noida and that it was sold by him is not disputed by the appellant. In fact, according to the appellant, the respondent sold his residential building at Noida for a sum of Rs.40,00,000/-. However, according to the respondent, it was sold not for Rs.40,00,000/- but for Rs.10,90,000/-. Since the appellant admitted that respondent had a residential building at Noida and that it was sold, Ext.B3 produced by the

respondent to prove the same has no relevance. Therefore, Exhibit B3, which is *prima facie* a fabricated document cannot be accepted in evidence and it has in fact no relevance for determining the dispute between the parties. Even if Exhibit B3 is discarded, it will not make any change as the appellant has succeeded in proving that he had withdrawn a sum of Rs.2,60,000/- from his account on 26.5.2004, on the date of executing Exhibit B1 sale deed.

15. In O.P.1114/2004 the appellant had raised a counter claim for injunction against the respondent. The trial court while decreeing the O.P. dismissed the counter claim. However, the appellant has not challenged the decree dismissing the counter claim, which according to the respondent is fatal to the case of the appellant. To substantiate the contention that failure to challenge a decree in the counter claim amounts to *res judicata,* the learned counsel for the respondent relied upon the decisions in **Premier Tyres Ltd. v. KSRTC [1993 KHC 296], Mathew v. Rajan [2016 KHC 154, Cholapllakkal Abdul Nazer v. Kuttanparambath K Lakshmana Das and Another [2016 (4) KHC 140] and George Tharakan P.V. v. M.M. Mathew 2018 (2) KHC 136.**

16. Now the law is well settled that when two appeals arise from a single suit are consolidated and disposed of by a common judgment, it is

sufficient for the unsuccessful party to file a single appeal. However, he has to challenge the adverse decision rendered by the Trial Court in both appeals and also has to pay separate court fee. In the instant case, the appellant has not challenged the adverse findings in the counter claim and separate court fee is also not paid for the appeal against the counter claim.

17. The learned counsel for the respondent would argue that the conduct of the appellant in not challenging the counter claim amounts to *res judicata* against her. It is true that the appellant has not filed any appeal challenging the dismissal of the counter claim. The learned counsel for the respondent would argue that though separate appeal is not required to challenge a counter claim, even in the present appeal the appellant has not challenged the decision in the counter claim. On a perusal of the present appeal, it can be seen that nowhere in the appeal the appellant had challenged the decision in the counter claim. Therefore, the decision in the counter claim still hold good as against the appellant. However, it is to be noted that the counter claim raised by the appellant in the OP is only for injunction while the OP was for declaration of title of the respondent. Moreover, the Family Court has found that the respondent is the owner of the schedule property and he was allowed to recover possession of the property from the appellant. In the above

circumstances, the fact that the appellant has not challenged the counter claim in the OP is not material in the facts of this case.

18. In order to substantiate the contention that the bar under Section 3(1) of the Benami Transactions (Prohibition) Act, 1988 does not apply in this case and that the relationship between respondent and the appellant is a fiduciary one, the learned counsel for the respondent relied upon the decisions in **Binapani Paul v. Pratima Ghosh and Others [2007 (6) SCC 100, Marcel Martins v. M.Printer and Others [(2012) 5 SCC 342], Om Prakash Sharma @ O.P. Joshi v. Rajendra Prasad Shewda and Others [2015 KHC 4677], Debika Chakraborty v. Pradip Chakraborty [AIR 2017 Cal 11]** and **Joy C.C. And Others v. C.D. Mini and Others [2022 KHC 429].**

19. It was contended on the side of the appellant 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. Therefore, it was argued that it is the burden of the respondent to prove that it is a benami transaction. In support of the above argument, he has relied upon the decision of a Division Bench of this Court in **Suseelan v. Leela, 2004 (2) KLT, 606**. It is true that the burden of proving that a particular sale is benami, is on the person who alleges that it is a benami transaction. Sub-

section (1) of Section 3 of the Benami Transactions (Prohibition) Act, 1988 prohibits benami transactions. However clause (a) of Sub-section (2) of Section 3 provides that Sub-section (1) shall not apply to purchase of property by a person in the name of his wife or unmarried daughter and it shall be presumed unless the contrary is proved, that the said property has been purchased for the benefit of the wife or the unmarried daughter.

20. In the decision in **Joy C.C and Others v. C.D.Mini and Others, 2022 KHC 429,** a Division Bench of this Court had occasion to consider the effect of a property purchased by husband in the name of his wife. In paragraph 88 of the above judgment the Division Bench held that:

> 88. When husband purchases property as part of his real estate business joining his wife as a name lender in the title document, even availing bank loans in her name to pay the consideration, it cannot be said that the purchase was for the benefit of the wife, when there is clear evidence to prove the benami nature of the transaction. But when there is evidence to show that the husband purchased the property or executed document in favour of his wife, unless the contrary is proved, it will be treated as the property of the wife purchased for her benefit. The intention of the parties is a key factor in determining the nature of the transaction, which could be gathered from the relationship between parties, their conduct previous and subsequent to the transaction, source of money for purchase, possession of the property, possession of the

title documents, repayment of loan, etc. etc.

21. The fact that during the year 2014, when Exhibit B1 Sale Deed was executed, the respondent and the appellant were in cordial terms is not in dispute. As we have already noted above, the respondent has succeeded in proving that the entire sale consideration for purchase of the schedule property was paid by him. Therefore, his contention that he happened to purchase the schedule property in the name of the appellant, who is none other than his wife, is due to his love and affection towards her cannot be disbelieved. Since they are husband and wife, there exists a fiduciary relationship between them. Moreover, the appellant has no case that the respondent purchased the schedule property in her name for her beneficial enjoyment. In the above circumstance, the finding of the trial court that the appellant was only a trustee of the respondent in respect of the schedule property could not be disbelieved. The marital relationship between the respondent and the appellant got strained and they got divorced. It was in the above context the respondent filed this O.P.

22. As noted above, the appellant has no case that the respondent purchased the property in her name for the benefit of the appellant. On the other hand, the specific case of the appellant is that the said property was purchased using her own money. At the same time she had miserably

failed to prove that the schedule property was purchased using her own money. On the other hand the respondent had succeeded in proving that the schedule property was purchased using his own money. In the above circumstance we do not find any irregularity or illegality in the finding of the trial Court that the schedule property belongs to the respondent and that the appellant is only a name lender in the title document. We do not find any merit in this appeal and it is liable to be dismissed. Point answered accordingly.

In the result, this appeal is dismissed.

Sd/-
ANU SIVARAMAN,
JUDGE

Sd/-
C. PRATHEEP KUMAR,
JUDGE

sou.