(2003) 08 JH CK 0023

Jharkhand High Court

Case No: AFAD No. 157 of 1988 (R)

Suresh Mahto and Another		APPELLANT
	Vs	
Sant Kumar Mahto		RESPONDENT

Date of Decision: Aug. 18, 2003

Acts Referred:

- Benami Transactions (Prohibition) Act, 1988 - Section 4
- Civil Procedure Code, 1908 (CPC) - Section 100

Citation: AIR 2004 Jhar 44 : (2004) AIR Jhar HCR 207 : (2003) 4 JCR 398

Hon'ble Judges: Vishnudeo Narayan, J

Bench: Single Bench

Advocate: Manjul Prasad, Manoj Kumar, Shahkar Shekhar and Pd. Sinha, for the Appellant; Rajendra Prasad, for the Respondent

Judgement

Vishnudeo Narayan, J.

This appeal at the instance of the plaintiff-appellants is directed against the judgment and decree dated 21.6.1988 and 1.7.1988 respectively passed in Title Appeal No. 41 of 1976 by Shri Satyendra Singh, 4th Additional District Judge. Palamau at Daltonganj whereby and whereunder the appeal on remand was again dismissed affirming the judgment and decree dated 15.9.1976 and 3.11.1976 respectively passed in Partition Suit No. 3 of 1968 by Shri Shyam Narain Shukla, Subordinate Judge, Palamau.

2. The plaintiff-appellants had filed the said partition suit for partition of the joint family properties claiming. If share therein detailed in Schedule of the plaint and allotment of a separate Thakta of their half share and putting them in exclusive possession thereof. The plaintiff-appellants have also sought further relief by way of amendment of the plaint that their title and possession in respect of properties appertaining to Khata No. 34 of village Itko detailed in Schedule of the plaint be declared in their favour.

3. The case of the plaintiff-appellants, in brief, is that Ram Sewak Mahto is the common ancestral of the parties to the suit and he was the head and karta of the joint family consisting of the parties to the suit and he had acquired the suit lands by purchase. Said Ram Sewak Mahto had two sons. Raj Keshwar Mahto and Loknath Mahto. Original plaintiff No. 4 Maheshwari Kuar (since dead) is the widow of Raj Keshwar Mahto deceased. Original defendant No. 2, Fulmati Kuar is the widow of Loknath Mahto deceased aforesaid. Defendant/respondent No. 1 Sant Kumar Mahto is the son of Loknath Mahto, Raj Keshwar Mahto aforesaid had three sons, namely, original plaintiff No. 1 Brajnandan Mahto (since dead), plaintiff-appellant No. 2, Suresh Mahto and plaintiff-appellant No. 3, Chandresh Mahto. According to the case of the plaintiff-appellants Raj Keshwar Mahto had predeceased his father Ram Sewak Mahto on 16.5.1946 and, thereafter, Ram Sewak Mahto also expired on 2.1.1947 whereas Loknath Mahto died in the month of Baishak of the year 1947. It is alleged that Ram Sewak Mahto acquired 1.1.76 acres of land of Khata No. 18 in auction sale benami in the name of defendant-respondent No. 1, Sant Kumar Mahto in the year 1938. It is also alleged that Ram Sewak Mahto purchased land of Khata No. 34 benami in the name original defendant No. 2 Fulmati Kuar in the year 1945. The further case of the plaintiff-appellants is that Ram Sewak Mahto also purchased the land of Khata No. 3, 6/2, 7 and 5 in the benami name of original plaintiff No. 4 Maheshwari Kaur and all the aforesaid purchases were made by Ram Sewak Mahto from the joint family fund and thus all the descendants. Ram Sewak Mahto are jointly interested in the same and the share of the plaintiffs-appellant, in the suit land is to the extent of half and the other half belongs to the defendants-respondent. It is also alleged that parties of the suits are separately cultivating the suit land for sake of convenience and there has been no metes and bounds partition between them regarding the suit property and the plaintiffs-appellant are feeling difficulties in making further improvement and proper utility of the suit land as it is joint between them.

4. The case of the defendant-respondent, inter alia, is that the genelogy as mentioned in the plaint by the plaintiff-appellants is correct except that defendant-respondent No. 1 Sant Kumar Mahto is born of Madodri Mahtowain, the first wife of Loknath Mahto and after the death of Madodri Mahtowain, Loknath Mahto resolemnized his marriage with original defendant-No. 2, Fulmati Kuar but Loknath Mahto has no issue from original defendant No. 2 Fulmati Kaur. The case of the defendant- respondent is that defendant-rospondent No. 1 is the real purchaser of the land of Khata No. 18 in the auction sale from the money of his natural mother on her death and his natural mother had obtained the said amount from her parent''s house and it is false to say that the land of Khata No. 18 had been purchased by Ram Sewak Mahto, benami in his name. The further case of the defendant-respondents is that original-defendant No. 2 Fulmati Kuar on her marriage had received handsome amount in gift and she has got a small house constructed from the aforesaid money over the portion of land belonging to one

Balram Sao as she was ill treated in the family by original plaintiff No. 4 Maheshwari Kuar and thereafter, she had purchased the land of Khata No. 34 including the land which she had built her house and it is equally false to say that Ram Sewak Malito had acquired the land of Khata No. 34 benami in her name. It is also alleged that the land of Khata No. 3, 6/2 and 7 was acquired in the year 1950 by sale by original plaintiff No. 4, Maheshwari Kuar after the death of Ram Sewak Mahto and it is false to say that the said acquisition is benami made by Ram Sewak Malito in her name and the plaintiff-appellants have deliberately set up a false case in respect thereof. It is also alleged that plot No. 450 appertaining to Khata No. 5 having an area of 85 decimals does not belong to original plaintiff No. 4 Maheshwari Kuar nor was it ever purchased benami in her name whereas defendant-respondent No. 1 had purchased plot No. 450 aforesaid along with several other plots by virtue of the registered sale deed dated 11.7.1949 and he is in exclusive possession thereof since then. It is alleged that no house stands over plot No. 513 under Khata No. 34 of village Itko but the fact is the house stands on plot No. 517 and the plaintiff-appellants have no semblance of right, title and interest in the suit plot except plot Nos. 451, 454 and 449 which are the raiyati plots of original plaintiff No. 4 aforesaid and there is no unity of title and possession in respect of the suit properties between the parties. Lastly it has been alleged that the plaintiff-appellants had filed a Title Suit No. 156 of 1949 in respect of the land of Khata Nos. 3 to 8 of village Sinjo against defendant-respondent No. 1 Sant Kumar Mahto and the said suit was dismissed on compromise and the plaintiff-appellants have instituted this suit for partition by suppression the facts aforesaid and the suit of the plaintiff-appellants is barred by res judicata and the plaintiffs-appellant have no cause of action for the suit which is liable to be dismissed.

5. In view of the pleadings of the parties the trial Court had framed the following issues for adjudication in the case :--

"(i) Is the suit as framed maintainable?

(ii) Have the plaintiffs got case of action for this suit?

(iii) Is the suit barred by law of limitation?

(iv) Are the suit lands held benami by the parties or in the names of real owners?

(v) Is some part of claim barred by the law of res judicata ?

(vi) Are the plaintiffs entitled to a decree for partition in respect of any part of the suit land ?'' If so what is the share of the plaintiffs?

(vii) To what relief or reliefs, if any, are the plaintiffs entitled?

6. While deciding issue Nos. 4 and 6, the trial Court has held that the lands of Khalas No. 18, 34, 3, 6/2, 7 and 5 were not acquired by Ram Sewak Mahto in the benami name of the defendant-respondents and original plaintiff No. 4 Maheshwari Kuar.

The trial Court further held that original plaintiff No. 4 Maheshwari Kuar had never acquired plot No. 450 of Khata No. 5. The learned trial Court further held that the lands of village Itko and Sinjo were acquired by Most. Fulmati Kuar and Maheshwari Kuar respectively and in view of the finding aforesaid it is not sale to decide the question of acquisition of the land of Khata No. 18 of village Sinzo on the basis of the presumption of jointness regarding the family property as the individual members of the parties to the suit owned separate properties and in the absence of direct evidence it would be risky to hold that Ram Sewak Mahto acquired property of Khata No. 18 from the joint family fund and the suit of the plaintiff-appellant was, accordingly, dismissed.

7. Aggrieved by the judgment and decree of the trial Court the plaintiff-appellants preferred Title Appeal No. 41 of 1976. The lower appellate Court agreed with the findings of the trial Court and dismissed the appeal. The plaintiff-appellants, thereafter, preferred Second Appeal No. 172 of 1980 which was allowed by this Court and the judgment of the appellate Court below was set aside and the case was remitted to the lower appellate Court for a fresh decision keeping in view the observation made by this Court. The observation of this Court runs thus :--

"The Court below has failed to notice the law set by Mulla in paragraph 233 of the Hindu Law, although it noticed part of it. The case of blending was never the case of the appellants. The Court below was, therefore, not at all required to go into that question. From the perusal of the judgment, it appears that the Court below had failed to keep in mind the correct decision in law as noticed above for deciding where the appellants had proved their case for acquisition of the suit property from joint family fund, so far Sant Kumar and Most. Phulwati were concerned. So far the property of Khata Nos. 3, 6/2 and 7 were concerned, the Court below held that it belonged to Most. Maheshwari (original plaintiff No. 4). After recording this finding, the Court below count not have dismissed the suit in toto because the appellants had prayed for alternative relief for declaration of title. Since the properties of these three khatas belonged to Most. Maheshwari, the appellants were entitled to the declaration prayed for. However, the main relief prayed for by the appellants was for partition of all the properties. In view of the fact that the Court below failed to appreciate the respective case of the parties by applying the concerned law."

8. The learned Court below on remand and keeping in view of the observation of this Court referred to above again dismissed the appeal as per the impugned judgment dated 21.6.1988 and affirmed the judgment and decree of the trial Court. The appellate Court below came to the finding of the fact that the plaintiff-appellants failed to prove that the suit land were acquired by Ram Sewak Mahto from joint family fund or the joint family had a nucleus from the income of which suit lands were acquired or the suit lands were purchased as benami by Ram Sewak Mahto from the joint family fund.

9. Again aggrieved by the impugned judgment and decree passed on remand the plaintiff-appellants preferred this appeal before this Court.

10. This Court while admitting the appeal for hearing formulated the substantial question which runs thus :--

"In view of the observation made by this Court in Second Appeal No. 172 of 1980 (R), whether the Court below was correct in holding that since the appellants have failed to prove the sufficiency of nucleus for acquiring the property standing in the names of defendant No. 1, deceased defendant No. 2 and deceased plaintiff No. 4 and were not joint family property."

11. Assailing the impugned judgment it has been submitted by the learned counsel for the plaintiff-appellant that the learned appellate Court below did not consider the observation and direction contained in the order dated 3.10.1985 passed in SA No. 172 of 1980 by this Court and has erred in dismissing the appeal of the plaintiff-appellants. It has further been submitted that the learned appellate Court below has once again wrongly interpreted law in coming to the finding that the suit land was neither acquired by Ram Sewak Mahto from joint family fund nor the joint family had sufficient nucleus from the income of which suit land was acquired nor the suit land was purchased as benami by Ram Sewak Mahto from the joint family fund nor the joint family had sufficient nucleus from the income of which suit land was acquired nor the suit land was purchased as benami by Ram Sewak Mahto from the joint family fund. It has also been submitted that the approach of the Court in interpreting the law is erroneous as the appellate Court below is of the view that the plaintiff-appellants have to establish not only that there is existence of joint family property but also that there was sufficient nucleus of the joint family property for acquiring the suit property. It has been submitted that the proposition of law in respect thereof contained under Article 233 of the Mulla''s Hindu Law is that to render the property joint the plaintiff has to prove that the joint family was possessed of some property with the income of which the suit properties could have been acquired and where it is established or admitted that the joint 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 presumption arises that it was joint property and the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family and where the existence of the nucleus is shown and no other source of income is disclosed, the presumption may be made that the nucleus was sufficient to enable the property to be acquired and such being the presumption, if any member of the family claims any portion of the property, as his separate property, the burden lies upon him in any such case to show that it was acquired by him in the circumstance which would constitute it his separate property. It has also been submitted that there is specific averment in paras 1 and 4 of the plaint that Ram Sewak Mahto as head and karta of the joint family acquired the suit

land by purchase made with joint family fund which was in his hand and as such all the descendants of Ram Sewak Mahto are jointly interested in the same and there is no specific denial in respect thereof in the averment in the written statement of the defendant-respondents and, therefore, it becomes an admitted fact that the joint family was possessed of joint property and the joint family had nucleus from which the suit property has been acquired and the said acquisition is joint family property. It has also been submitted that the suit of the plaintiff-appellants cannot be dismissed in toto in spite of the concurrent findings of the Court below regarding the acquisition of the suit land when it was held that land of Khata Nos. 3, 6/2 and 7 belong to original plaintiff No. 4 Most, Maheshwari Mahtowain and in view of the alternative relief, the plaintiffs-appellant are entitled for declaration of their title in respect thereof and thus the finding of facts arrived at by the learned appellate Court below is erroneous.

12. Refuting the contention aforesaid it has been submitted by the learned counsel for the defendant-respondent that the land of Khata No. 18 and 34 are the self acquired properties of the defendant-respondent which have been acquired by their separate income and these acquisitions have never been made by Ram Sewak '' Mahto in the benami name of Fulmati Kuar and Sant Kumar Mahto. It has also been contended that the defendant-respondent Sant Kumar Mahto is the real purchaser of the land of Khata No. 18 in the auction sale from the money of his natural mother after her death and his natural mother had obtained the said amount from her parents and Ram Sewak Mahto had no nucleus for its acquisition and defendant-respondent Sant Kumar Mahto is the real purchaser and the sale certificate is conclusive evidence that he being the Court auction purchaser is a true owner and shall not be liable to be ousted on the ground that his purchase was made by Ram Sewak Mahto benami in his name. It has also been contended that the land of Khata No. 34 is the self-acquired property of original defendant No. 2 Fulmati Kumar from the money which she has received as gift on the eve of her marriage and it is not benami acquisition in her name made by Ram Sewak Mahto and the case of benami acquisition as set up by the plaintiffs-appellant in respect thereof is not at all tenable in view of the fact there is no presumption of joint-ness regarding the property standing in the name of female members of the alleged joint family and Section 4 of the Benami Transactions (Prohibition) Act, 1988 mandates that no suit to enforce any right shall lie in respect of any property alleged to be held benami against the person whose name the property is held as real owner of such property and in view of the fact that she is not a coparcener in the family. Elucidating further it has been submitted that the parties were separate and cultivating their land separately for the sake of convenience and they were acquiring properties from their own income and the plaintiffs-appellant in para 6 of the plaint has averred regarding separate cultivation of the family property for their convenience and thus there had been severance of the joint family in the life lime of Ram Sewak Mahto itself and the plaintiff-appellant has wrongly set up a case that

the land of Khata No. 3, 6/2 and 7 has been acquired benami in the name of original plaintiff No. 4, Maheshwari Kuar by Ram Sewak Mahto vide sale deed Ext. D, dated 8.8.1950 as admittedly Ram Sewak Mahto had died in January, 1947. It has also been submitted that plot No. 450 appertaining to Khata No. 5 besides several other plots is the self acquisition of defendant-respondent Sant Kumar Mahto by virtue of the sale deed Ext. D/1 dated 8.8.1950 i.e., after the death of Ram Sewak Mahto and also after the severance of the joint status of the family and the plaintiffs-appellant has wrongly set up that the said plot of Khata No. 5 has been acquired by Ram Sewak Mahto in the benami name of original plaintiff No. 4, Maheshwari Kuar. It has also been submitted that there has also been an inter se transaction by virtue of the sale deed Ext. D/2, dated 8.8.1950 executed by the defendant-respondent in favour of the plaintiffs-appellant. It has further been contended that the defendant-respondent does not claim the suit land appertaining to Khata Nos. 3, 6/2 and 7 which has been acquired by original plaintiff No. 4, Maheshwari Kuar by virtue of the sale deed Ext. D, dated 8.8.1950. It has also been contended that evidence on the record considered by both the learned Courts below clinchingly established the fact that the acquisition of the land of Khata No. 34, Khata No. 18 and plot No. 450 of Khata No. 5 are the self-acquisition of the defendant-respondent and the joint family had no nucleus at all for the acquisition of the said properties and the concurrent finding of fact arrived at by the Courts below is in accordance with law. Relying upon the ratio of the case Kondiba Dagadu Kadam v. Savitribai Sopan Gujar and Ors. AIR SC 2213, it has been submitted that the right of appeal u/s 100 of the CPC is neither a natural nor an inherent right attached to the litigation. Being a substantial statutory right it has to be recorded in accordance with law in force at the relevant time and the conditions mentioned u/s 100 of the CPC must be strictly fulfilled before a Second Appeal is maintained and no Court has the power to add to or enlarge those grounds and the Second Appeal cannot be decided on merely equitable grounds. The concurrent findings of facts howsoever erroneous cannot be disturbed by the High Court in exercise of the powers under this section. It has further been contended that this Court cannot substitute its opinion for the opinion of the first appellate Court unless it is found that the conclusions drawn by the lower appellate Court were erroneous being contrary to the mandatory provisions of law applicable or its settled position on the basis of pronouncements made by the Apex Court, or was based upon inadmissible evidence or arrived at without evidence. It has also been submitted that the appellate Court below has properly scrutinized and considered the evidence on the record and has exercised its discretion in the judicial manner and it cannot be termed to be an error either of law or of procedure requiring any interference in the Second Appeal and viewed thus there is no illegality in the impugned judgment but the defendant-respondent shall have no objection in respect of the title of the plaintiffs-appellant being declared in respect of the suit land of Khata No. 3, 6/2 and 7 only in view of the alternative relief as claimed by the plaintiffs-appellant.

13. There is no denying the fact in view of the pleadings of the parties that Ram Sewak Mahto was the common ancestor of the parties to the suit and he died on 2.1.1947 leaving behind his son Lok Nath Mahto and his elder son Raj Keshwar Mahto had already predeceased him on 16.5.1946. Original plaintiff No. 4. Maheshwari Kuar (since dead) is the widow of Raj Keshwar Mahto aforesaid who had died during the pendency of this case and the plaintiff-appellant are the sons of Raj Keshwar Mahto, the deceased aforesaid, defendant-respondent Sant Kumar Mahto is the son of Loknath Mahto, deceased, aforesaid who had died in the month of baishak in the year 1947. Fulmati Kuar, widow of Loknath Mahto figured as defendant-respondent No. 2 and she has also died during the penendency of this case. Acquisition of the land of Khata No. 18 is in the name of defendant-respondent Sant Kumar Mahto by virtue of the sale certificate dated 26.7.1939 (Ext. G) and if was auction purchased on 18.5.1938 for Rs. 51/- in Case No. WE/395 of 1937-38 and the land of Khata No. 34 was acquired by virtue of the sale deed dated 12.5.1945 (Ext. D/3) and the said sale deed stands in the name of original defendant No. 2 Fulmati Kuar. Plot No. 450 of Khata No. 5 besides several other plots of different khatas stands acquired by virtue of the sale deed dated 11.7.1949 (Ext. D/1) and this sale deed stands in favour of defendant-respondent Sant Kumar Mahto whereas land of Khata Nos. 3, 6/2 and 7 stands acquired by virtue of the sale deed dated 8.8.1950 and this sale deed stands in the name of original plaintiff No. 4, Maheshwari Kuar. It is relevant to mention here that plot No. 450 of Khata No. 4 has not been acquired by original plaintiff No. 4 Maheshwari Kuar. The plaintiffs-appellant has made out a specific case that all the aforesaid acquisitions either in the name of original plaintiff No. 4, Maheshwari Kuar and defendant-respondent Sant Kumar Mahto or his mother DW 2, Fulmati Kuar were acquired by Ram Sewak Mahto in the benami name of the aforesaid persons from the joint family fund. It is an admitted fact that Ram Sewak Mahto had died on 2.1.1947. Thus it is crystal clear that the acquisition of the land of Khata Nos. 3, 6/2 and 7 by virtue of the sale deed dated 8.8.1950 (Ext. D) standing in the name of original plaintiff No. 4, Maheshwari Kuar and the acquisition of plot No. 450 of Khata No. 5 by virtue of the sale deed dated 11.7.1949 (Ext. D/1) standing in the name of defendant-respondent Sant Kumar Mahto was made after the death of Ram Sewak Mahto aforesaid and as such case of the plaintiffs-appellant that these acquisitions are the benami acquisitions in the name of Maheshwari Kuar and Sant Kumar Mahto is not at all tenable. It is equally relevant to mention here that plot No. 450 of Khata No. 5 acquired by virtue of sale deed dated 11.7.1949 in the name of defendant-respondent Sant Kumar Mahto cannot be said to be the acquisition by original plaintiff No. 4, Maheshwari Kuar and as such said Maheshwari Kuar has no right, title and interest in respect thereof. Therefore, the matter in controversy between the parties now only centres around the acquisition of land of Khata No. 18 in the Court auction sale read with the sale certificate (Ext. D) dated 26.7.1939 and of the land of Khata No. 34 by virtue of the sale deed dated 12.5.1945 (Ext. D/3) which are in favour of defendant-respondent Sant Kumar Mahto and original defendant Ful-mati Kuar respectively as to whether

these two acquisitions are banami in their respective names acquired by Ram Sewak Mahto. It is equally pertinent to mention here that the family of the parties were joint of which Ram Sewak Mahto was the head and karta and the said joint family had some fund and according to the plaintiffs-appellant these two acquisitions were made by Ram Sewak Mahto from the nucleus of the joint family fund. The defendant-respondent have categorically averred in their written statement that both these acquisitions are their self acquired properties purchased from their own fund; the source in respect of which has also been averred therein. In this connection the averment made in para 6 of the plaint has its significance which recites that parties to suit are separately cultivating the land in suit for sake of convenience but there has been no partition by metes and bounds. However, the plaintiffs-appellant has not disclosed the specific date or year regarding the separate cultivation of the parties to the suit. The evidence on the record on behalf of the plaintiffs-appellant also does not thrown light in respect thereof. In this connection the sale deed dated 8.8.1950 (Ext. D/2) executed by defendant-respondent Sant Kumar Mahto in favour of original plaintiff No. 1 Brijnandan Mahto (since dead) along with the plaintiffs-appellant is very significant which is an inter se document between the parties which clearly establish the fact that there had already been severance in the joint family and before this there had been a Title Suit No. 156 of 1949 for partition filed by the plaintiffs-appellant against the defendant-respondent in the year 1949 of the joint family properties and these documents support that the joint family of the parties had already disrupted and it further appears that the defendants appellant have deliberately suppressed the period of separate cultivation of the parties in the averment made in para 6 of the plaint. It is equally relevant to mention here that defendant-respondent had acquired some properties on 11.7.1949 vide (Ext D/1) and original plaintiff No. 4, Maheshwari Kuar has also acquired properties vide sale deed dated 8.8.1959 (Ext. D) in respect of the land of Khata Nos. 3, 6/2 and 7. It, therefore, means that parties to the suit were making separate acquisitions soon after the death of Ram Sewak Mahto, the common ancestor. However, the acquisition by the sale certificate of Khata No. 18 and the land of Khata No. 34 vide sale deed 12.5.1945 (Ext. D/3) are during the period in which Ram Sewak Mahto is said to be alive. Both the Courts below have concurrently held that the land of Khata No. 18 and Khata No. 34 are the acquisitions made by defendant-respondent Sant Kumar Mahto and original defendant No. 2 Fulmati Kuar and these acquisitions were not made by Ram Sewak Mahto read with the proposition of law that there is no presumption that a property standing in the name of female is joint family property. Both the learned Courts below had disbelieved the case of acquisition of the land of Khata Nos. 18 and 34 by Ram Sewak Mahto in the benami name of defendant-respondent Sant Kumar Mahto and original defendant No. 2 Fulamti Kuar from the nucleus of the joint family. Both the Courts below have also concurrently held that there was no sufficient nucleus of the joint family for the aforesaid acquisition and the defendant-respondent Sant Kumar Mahto and his mother Fularnti Kuar had their amount of Ext. G, the sale

certificate and Ext. D/3, the sale deed dated 12.5.1945 is of Rs. 51/- and Rs. 90/-respectively and as per averments in the plaint parties of the suit were separately cultivating the land and there had also been inter se transaction between them. It has been stated in Article 233 of the Principles of Hindu Law by Mulla (16th edition) at page 260 that :--

"Where it is established or admitted 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 presumption arises that it was joint property and the burden shifts to the party alleging self acquisition to establish affirmative that the property was acquired without aid of the joint family. But no such presumption would arise if the nucleus is such that with its help the property claimed to be joint could not have been acquired. In order to give rise to the presumption the nucleus must be such that with its help the property claimed to be joint could have been acquired." It has also been stated that :--

"Where, however, the existence of the nucleus is shown and no other source of income is disclosed, the presumption may be made that the nucleus was sufficient to enable the property to be acquired. Such being the presumption, if any member of the family claims any portion of the property, as his separate property, the burden lies upon him in any such case to show that it as acquired by him in circumstances which would constitute it his separate property."

Ram Sewak Mahto was the head and karta of the joint family and there was also existence of joint family fund. There is total lack of evidence on the record brought by the plaintiffs-appellant that there was adequate nucleus with Ram Sewak Mahto out of which the acquisition of land of Khata Nos. 18 and 34 could have been made. There is also no evidence on the record brought by the plaintiffs-appellant to establish the fact regarding the income of Ram. Sewak Mahto which had yielded the nucleus. There is also total absence of any legal evidence on the record that the joint family headed by Ram Sewak Mahto as a result of the nucleus had surplus income from which the subsequent acquisition which are in controversy could have been made. Here in this case even the joint family had the nucleus but it cannot be said that the said nucleus was sufficient to enable the property to be acquired in view of the fact that the defendant-respondent had ex parate fund required for the acquisition of land of Khata Nos. 18 and 34. The defendant-respondent by cogent evidence had discharged his onus regarding the acquisition of the suit property by him from his own income without the aid of the nucleus of the joint family. Therefore, the learned Court below has rightly held that the acquisition of the land of Khata No. 18 and Khata No. 34 are the self acquisition of the defendant-respondent and there was no sufficient nucleus at all of the joint family for the said acquisition. Both the Courts below have property considered the principle of law in respect thereof and has rightly interpreted it in the facts and circumstances of this case. Therefore, there is no infirmity at all in the concurrent

finding of the facts arrived at by the Courts below. It has been observed by the Apex Court in the case of Kondiba Dagadu Kadam (supra) which runs thus.-

"the right of appeal is neither a natural nor an inherent right attached to the litigation. Being a substantial statutory right it has to be recorded in accordance with law in force at the relevant time and the conditions mentioned in the section must be strictly fulfilled before a Second Appeal is maintained and no Court has the power to add to or enlarge those grounds and the Second Appeal cannot be decided on merely equitable grounds. The concurrent findings of the facts however erroneous cannot be disturbed by the High Court in exercise of the powers under this section."

There is also another aspect of the matter involved in this case. The plaintiffs-appellant have not made out the case of the purchase of land of Khata No. 18 and kahta No. 84 by Ram Sewak Mahto the common ancestor in favour of the coparceners Sant Kumar Mahto or a member of the joint family i.e., original defendant No. 2 Fulmati Kuar rather the case of the plaintiffs appellant is that the acquisition of the aforesaid land made by Ram Sewak Mahto is benami in the name of defendant-respondent Sant Kumar Matho and Fulamti Kuar. In view of the case as set up by the plaintiff-appellant question of application of the principle enumerated in Article 233 of the Mulla''s Principle of Hindu Law cannot be said to have any application. There is a clear prohibition u/s 4 of the Benami Transaction (Prohibition) Act, 1988 (hereinafter referred to as the Act) that no suit claim or action to enforce any right in respect of any properly 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 or claiming through the said real owner of such property. It is well settled that an appeal is a continuation of suit. There is no manner of dispute that the suit had been filed by the plaintiff-appellant claiming that Ram Sewak Mahto was the real owner of the property and the names of the defendant-respondent were mentioned in the sale certificate (Ext. G) and the sale deed (Ext. D/3) as benami. Section 4 of the said Act is a total prohibition against any suit based on benami transaction and therefore the plaintiffs-appellant claiming title through Ram Sewak Mahto would not be entitled to get any decree in respect of the suit land for its partition. I am fortified in my view as per ratio of the case of Om Prakash and another Vs. Jai Prakash, , read with the ratio of the case of Mithilesh Kumar and Another Vs. Prem Behari Khare, And last but hot the least defendant-respondent Sant Kumar Mahto is a certified purchaser and Section 66(1) of the CPC was in force when auction sale took place and sale certificate (Ext. G.) was issued. However, Section 66 now stands repealed in the year 1988 by virtue of the provision contained in the Benami Transaction (Prohibition) Act. It has been observed by the Apex Court in the case of S.M. Karim Vs. Mst. Bibi Sakina, , that :--

"The appellant''s claim based upon the benami nature of the transaction cannot stand because Section 66 of the CPC bars it. That section provides that no suit shall be maintained against any person claiming title under a purchase certified by the Court on the ground that the purchase was made on behalf of the plaintiff or on behalf of someone through whom the plaintiff claims. Formerly, the opening words, were, no suit shall be maintained against the certified purchaser, and the change was made to protect not only the certified purchaser but any person claiming title under the purchase certified by the Court. The protection is thus available not only against the real purchaser but also against anyone calming through him. In the present case, the appellant as plaintiff was hit by the section and the defendants were protected by it."

Here in this case there is no reason at all for this Court to substitute its opinion for the opinion of the 1st Appellate Court as the conclusions drawn by the lower appellate Court cannot be said to be erroneous being contrary to mandatory provisions of law applicable or its settled provision on basis of pronouncements made by the Apex Court and it can also not be said that the concurrent findings of the learned Court below are based on inadmissible evidence or arrived at without evidence. Both the Courts below has property scrutinized and considered the evidence on the record and has exercised its discretion in the judicial manner and it cannot be termed to be an error either of law or of procedure requiring any interference in the Second Appeal. Viewed, thus the plaintiffs-appellant are not at all entitled to claim partition of the land of Khata No. 18, Khata No. 34 and plot No. 450 of Khata No. 5 and the suit in respect thereof filed by the plaintiffs-appellant was rightly dismissed by both the Courts below.

14. The plaintiffs-appellant have also sought a relief for declaration of their title in respect of land of Khata No. 34 which cannot be acceded to for the reasons stated above. However, the schedule of the suit land at the foot of the plaint also incorporates therein the land of Khata Nos. 3, 6/2 and 7. The defendant-respondent do not at all claim any right, title or interest therein. Admittedly land of Khata Nos. 3. 6/2 and 7 stands acquired by original plaintiff No. 4, Maheshwari Kuar by virtue of the sale deed dated 8.8.1950 (Ext. D) after the demise of Ram Sewak Mahto though she has wrongly and falsely set up a case in respect of this acquisition benami in her name by Ram Sewak Mahto. There is, therefore, no legal obstacle in declaring the title of the plaintiffs-appellant in respect of the land of Khata Nos. 3, 6/2 and 7 in view of the facts that the defendant-respondent do not dispute their title in respect thereof. Therefore, decree of both the Courts below has to be, accordingly, modified. As such the right, title and interest of the plaintiffs-appellant are hereby declared only in respect of the land of Khata Nos. 3, 6/2 and 7.

15. Thus, the judgment and decree of both the Courts below are hereby set aside. The suit of the plaintiffs-appellant is hereby decreed in part and the right, title and interest of the plaintiffs-appellant are hereby declared only in respect of the land of

Khata Nos. 3, 6/2 and 7 aforesaid. However, the relief of partition claimed by the plaintiffs-appellant in respect of the land of Khata Nos. 18, 34 and plot No. 450 of Khata No. 5 is hereby negatived. There is no order to costs in the facts and circumstances of thiscase. Suit partly decree.