

**(1985) 01 KL CK 0010**

**High Court Of Kerala**

**Case No:** A.S. No. 108 of 1978

M.R. Venkiteswara Prabhu

APPELLANT

Vs

M. Surendranatha Prabhu and  
Others

RESPONDENT

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**Date of Decision:** Jan. 2, 1985

**Acts Referred:**

- Trusts Act, 1882 - Section 82

**Citation:** (1985) KLJ 155

**Hon'ble Judges:** T. Kochu Thommen, J; M. Fathima Beevi, J

**Bench:** Division Bench

**Advocate:** T. S. Venkiteswara Iyer, P. K. Balasubramoniam and D. Narayana Pai, for the Appellant; Joseph A. Vadakkal, George K. Varghese, S. Venkitasubramonia Iyer, S. Parameswaran, R. Nithyanandan, M.V. Joseph and E.M. Thomas, for the Respondent

**Final Decision:** Dismissed

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### **Judgement**

Fathima Beevi, J.

The appeal is directed against the decree and judgment, in O. S. No. 71/73 before the Principal Sub Judge, Alleppey, dated 29-9-1976, dismissing the suit for declaration of title and recovery of possession. The plaintiff-appellant instituted the suit for declaration of title over items 1 to 7 in the A schedule and the building in the B schedule and for recovery of possession of these properties with consequential reliefs. Defendants 1 and 4 are the sons and defendants 5 and 6 daughters of the plaintiff. Defendants 2 and 3 are the sons of the 1st defendant. Lakshmi Bai, the wife of the plaintiff, died in February 1971. She had executed Ext. B1 Will dated 27-7-1970 asserting full rights over the scheduled items and bequeathing the same in favour of defendants 2 and 3. On the basis of the Will, defendants 2 and 3 alienated a portion of item No. 1 in favour of defendants 7, 8 and 9 and the 9th defendant had created some interest in favour of the 10th defendant. The alienees are in possession of the property purchased, while the rest of the properties are in the

possession of defendants 1, 2 and 3.

2. The properties described in the A schedule were purchased in the name of Lakshmi Bai under sale deeds Exts. A14, A15, A16, A17 and A18. The properties were subject to mortgage liability at the time of the purchase. The assignment of the mortgage right over items 1, 4, 5 and 7 had been taken in the name of the plaintiff under Exts. A6, A10 and A1. The release of the mortgage in respect of item No, 3 was taken under Ext. B2 in the name of Lakshmi Bai. The leasehold right in respect of item No. 6 was also assigned under Ext. B5 in the name of Lakshmi Bai. The buildings in items 1, 2, 3, 4 and 7 were let on rent on execution of rent deeds in favour of Lakshmi Bai as evidenced by Exts. A45, A46, A47, A48 and A49. The building in the B schedule was constructed in 1968-70 in the property allotted to the 1st defendant under partition.

This building in the name of Lakshmi Bai was occupied by her and defendants 2 and 3. The plaintiff and Lakshmi Bai were living together until her death with no estrangement. The sanction for the construction of the building was obtained in the name of Lakshmi Bai and the building on completion stood assessed in her name and she was paying the tax. Defendants 2 and 3 continued to reside in the building even after the death of Lakshmi Bai.

3. The plaintiff in claiming title and possession alleged: The items in A schedule were purchased by the plaintiff with his funds in the name of his wife and he got possession by taking the assignments of the mortgage in his favour. The building in B schedule was also constructed by him. The 2nd defendant was residing along with the plaintiff. While so, the defendants 1, 2 and 3 trespassed into the property on 1-1-1982. Lakshmi Bai had no right over the, properties. Defendants 2 and 3 did not derive any right under the will executed by her. The alienations effected by defendants 2 and 3 are not valid and no title could pass under the documents in favour of defendants 7 to 9. The impugned documents are liable to be set aside and the plaintiff is entitled to recover possession with mesne profits. The defendants 2, 7 to 10 contested the suit. They contended inter alia that Lakshmi Bai was the real owner of the properties purchased under the sale deeds standing in her name, and she was in possession of the properties as full owner. The will had been executed with the knowledge and concurrence of the plaintiff and it is valid. The alienations effected are valid and binding and the plaintiff is not entitled to any relief in the suit. The court below upheld these contentions and non-suited the plaintiff. The court found that Lakshmi Bai was not a Benamidar, that she was in possession of the properties "as full owner through formal release deeds in respect of items 1, 4, 5 and 7 had not been taken from the plaintiff, that the plaint B schedule building also belonged to her and Ext. B1 will is genuine and plaintiff is not therefore entitled to any relief. The plaintiff being aggrieved is in appeal.

4. Shri. T. S. Venkiteswara Iyer, the learned counsel for the appellant has mainly taken up two grounds. Firstly, he argued that the purchases in the name of Lakshmi

Bai have been proved to be with the funds provided by the plaintiff and therefore the presumption of resulting trust in his favour arises in the absence of a specific plea of gift in favour of Lakshmi Bai. Secondly, it is argued that even if the beneficial interest under the deeds in the name of Lakshmi Bai vested in her, mortgage liability in respect of items 1, 4, 5 and 7 had not been extinguished and as mortgage with possession of these items, the plaintiff is entitled to hold the same until redemption. So on the strength of the possessory title, the plaintiff is entitled to recovery of items, 1, 4, 5 and 7 from the defendants who had not pleaded or proved adverse possession or limitation.

5. The first contention proceeds on the assumption that the plaintiff supplied the funds for the purchase of the plaint A schedule items in the name of his wife with no intention that the beneficial interest shall vest in her. It is said that Lakshmi Bai had no funds at her disposal for making the purchases of the plaint items or put up the building in the plaint B schedule property, that the possession and command of resources by the plaintiff for making the purchases of the suit properties and for putting up the building in the plaint B schedule property are undisputed and are amply established, that once it is shown that the purchase price for the acquisition of the A schedule properties proceeded from the plaintiff and could not have proceeded from Lakshmi Bai, the presumption is that the purchases enure to the benefit of the plaintiff though the documents are in the name of Lakshmi Bai, the plaintiff's wife. The doctrine of advancement is not applicable to transactions of purchase by a Hindu husband in the name of his wife and the burden is on the defence to set up and prove a gift and in the absence of that, there is a resulting trust and that the plaintiff would be the real owner, the argument proceeds. Thus the appellant's case is that Lakshmi Bai was only an apparent and not a real title-holder and the title vests in him. The contesting defendants did not plead that the purchase by the plaintiff were intended as gift to his wife and only stated that the acquisitions enured to the benefit of Lakshmi Bai alone. Their definite plea is that the purchases had been made with the funds of Lakshmi Bai and not with that of the plaintiff.

6. 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. The source whence the purchase money came, is by far the most important test for determining whether the sale standing in the name of one person, is in reality for the benefit of another, (See- [Jaydayal Poddar \(Deceased\) through L.Rs. and Another Vs. Mst. Bibi Hazra and Others](#) ). The doctrine of advancement is not in vogue in India. The counterpart of the English Law of resulting trust is the Indian law of benami transactions. Where a person buys a property with his own money but in the name of another person without any intention to benefit such other person, the transaction is called benami. In such a case, the transferee holds the property for the benefit of the person who has contributed the purchase money, and he is the real owner. The principle is statutorily recognised in Section 82 of the Indian Trusts

Act 1882, which provides that where property is transferred to one person for a consideration paid or provided by another person and it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration. The initial burden in all such cases is on the party who asserts title with him to prove the source of the consideration as well as the intention of the person who has contributed the purchase money. The question as to what his intention was has to be decided on the basis of the surrounding circumstances, the relationship of the parties, the motives governing their action in bringing about the transaction and their subsequent conduct, etc. (See- [Thakur Bhim Singh \(Dead\) by Lrs and Another Vs. Thakur Kan Singh,](#) , [Indranarayan Vs. Roop Narayan and Another,](#) , F. J. R. Kerwick v. K. M. Kerwick (AIR 1921 privy Council 56) and [Kanakarathanammal Vs. V.S. Loganatha Mudaliar and Another,](#) .

7. The appellant herein had undoubtedly the burden to prove that he supplied the funds for making the purchase and the construction in the name of Lakshmi Bai. It is not a matter for speculation or surmises. There must be positive proof that the consideration emanated from the appellant. No such proof is forthcoming on the materials on record. Apart from the assertion by the plaintiff we have no material to show that plaintiff had in fact advanced the consideration for the purchase. His wife Lakshmi Bai a senior member of an affluent family was a person of resources. She had been holding properties. She had the capacity to make substantial donations to the defence fund. The purchases under Exts. A14, A15, A16, A17 and A18 spread over a period of two years had been made for small amounts which she could easily command. So in the absence of clear evidence in the case that consideration for sales and the cost of construction of the B schedule building had been supplied by the plaintiff, there is no scope for invoking the presumption of a resulting trust or the doctrine of Benami. Further the presumption of a resulting trust can be rebutted by evidence of the actual intention of the purchaser and it is only where there is no evidence to contradict it that the presumption will prevail. The 2nd defendant has specifically pleaded that even assuming but not conceded that the funds proceeded from the plaintiff, the acquisition enured to the benefit of Lakshmi Bai alone. The evidence of possession with Lakshmi Bai, the conduct of the parties and the attendant circumstances fully justify the inference that the beneficial interest under the sale deeds was intended to be vested in Lakshmi Bai alone, even if funds had proceeded from plaintiff and the construction of the building was for her benefit. Thus rite apparent tenor of the document prevails and Lakshmi Bai has to be treated as the real owner of the properties.

8. The only other question to be considered is whether the plaintiff can have any relief as mortgagee of items 1, 4, 5 and 7, as argued, The assignment of item 1 was taken in the name of the plaintiff under Ext. A6 dated 14-4-1119 after execution of Ext. A18 sale deed dated 7-2-1119 in favour of Lakshmi Bai. The assignment of the mortgage over items 4 and 5 was taken in the name of the plaintiff under Ext. A10

dated 6-5-1116 before Ext. A16 sale deed dated 1-3-1119. The mortgage over item 7 was assigned in the name of the plaintiff under Ext. A1 dated 18-4-1117 and the sale deed Ext. A15 in the name of Lakshmi Bai was executed on 9-8-1118, Ext. B2 release in respect of mortgage over item 3 and Ext. B5 assignment of the leasehold right over item 6 stand in the name of Lakshmi Bai. All these items are admitted to be in the possession of the defendants. The documentary evidence clearly shows that Lakshmi Bai was in exclusive possession and enjoyment of items 1 to 7 to the knowledge of the plaintiff and Exts. B7 and B9 are registered documents conceding such possession.

9. Several rent deeds had been executed in her name at early as 1124 as evidenced by Exts. B45 to B49. The plaintiff's Karyastha was attesor in some of these deeds relating to the buildings in the schedule items. Usufructs from the coconut trees used to be collected through the Karyastha. The plaintiff who was an income tax assessee did not include the rental income or the agricultural income in his returns and never treated the property as his own. In ordinary Hindu families, the property belonging exclusively to a female member could also be managed by the Manager of the family. So, even if Lakshmi Bai did not take actual part in the management of the property it would not materially affect the case that the property belonged to her. The evidence however clearly establishes that Lakshmi Bai had been actually managing the properties collecting the rent and usufructs therefrom and disposing of land in favour of Kudikidappukars as full owner. The parties thus treated the rights of the mortgagor as well as that of the mortgagee having united in the same person. The purchase of both rights had been with intention to benefit they same person. They never considered the mortgage right subsisting as a distinct and separate right after Lakshmi Bai was put in possession. The plaintiff by his conduct has clearly indicated the intention to benefit his wife even by the assignment taken in his name. He lived with Lakshmi Bai until her death and Ext. B1 will was executed by her on consultation with the plaintiff. This is evident from the circumstance that Lakshmi Bai was taken to the plaintiff's lawyers. There is also the clear admission of the plaintiff that he knew that the will had been executed. The genuineness of the will has not been challenged. It would have come into existence at the instance and under the instructions of the plaintiff in view of the cordial relationship between the spouses and their conduct, and the surrounding circumstances of the case. This circumstance also shows that the plaintiff did not treat the mortgage right as separate and distinct and to his knowledge Lakshmi Bai had been holding the property as full owner. In the plaint, there is no specific prayer for declaration of the mortgage right or for recovery of possession as mortgagee, though it has been averred that the mortgage liability has not been extinguished and the defendants would be entitled to possession only on determination of that right. When the evidence clearly establishes that Lakshmi Bai had been in inclusive possession and it is that possession which had passed to the defendants, the dealings by Lakshmi Bai to the knowledge of the plaintiff lead to the inference that the mortgage right under

assignment taken in the name of the plaintiff also vested with Lakshmi Bai as intended by the parties. In this view, it has to be held that the plaintiff is not entitled to any relief as mortgagee. It is unnecessary to consider whether a claim for possession by the plaintiff on the basis of title as mortgagee would be barred by limitation in the view we have taken. We find no merit in the appeal.

In the result the appeal is dismissed, in the circumstances without costs.