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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE &

THE HONOURABLE MRS. JUSTICE SOPHY THOMAS

MONDAY, THE 13TH DAY OF JUNE 2022 / 23RD JYAISHTA, 1944

MAT.APPEAL NO.242 OF 2012

AGAINST THE JUDGMENT AND DECREE DATED 31.12.2011 IN

OP.NO.775/2006 OF FAMILY COURT, THRISSUR

APPELLANT/1ST RESPONDENT IN O.P.:

C.C.JOY, AGED 49 YEARS, S/O.C.O.CHAKKUNNY,
CHERADAI HOUSE, KOTTANELLUR P.O,
KADUPPASSERY VILLAGE, THRISSUR-680 662.

BY ADVS.

SRI.S.SREEKUMAR (SENIOR.)

SRI.AKHIL K.MADHAV

SRI.T.R.JERRY SEBASTIAN

SRI.THOMAS M.JACOB

RESPONDENT/PETITIONER & 2ND RESPONDENT IN O.P.:

- 1 C.D.MINI, AGED 44 YEARS
D/O.LATE C.L.DEVASSY, CHELLAKKUDAM HOUSE,
PALLIPPURAM.P.O, PALLIPPURAM VILLAGE,
MUKUNDAPURAM TALUK, THRISSUR DISTRICT,
PIN-680 732.
- 2 MILAN, AGED 10 YEARS, S/O.K.A.KALA,
KODUMPULLIL HOUSE, ALATHOOR, MALA,
MUKUNDAPURAM TALUK,PIN-680 741, MINOR,
REPRESENTED BY HIS MOTHER AND NEXT FRIEND
K.A.KALA, AGED ABOUT 32 YEARS,
D/O.LATE ARAVINDAKSHAN,KODUMPULLIL HOUSE,
ALATHOOR, MUKUNDAPURAM TALUK,MALA,PIN-680741.

BY ADVS.

SRI.P.C.HARIDAS

SRI.G.S.REGHUNATH

THIS MATRIMONIAL APPEAL HAVING BEEN FINALLY HEARD ON
06.04.2022,ALONG WITH MAT.APPEAL NOS.243/2012 AND
317/2012,THE COURT ON 13.06.2022 DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE

&

THE HONOURABLE MRS. JUSTICE SOPHY THOMAS

MONDAY, THE 13TH DAY OF JUNE 2022 / 23RD JYAISHTA, 1944

MAT.APPEAL NO. 243 OF 2012

AGAINST THE JUDGMENT AND DECREE DATED 31.12.2011 IN

OP.NO.559/2006 OF FAMILY COURT, THRISSUR

APPELLANT/PETITIONER IN O.P.:

C.C.JOY, AGED 49 YEARS, S/O.C.O.CHAKKUNNY,
CHERADAI HOUSE, KOTTANELLUR P.O,
KADUPPASSERY VILLAGE, THRISSUR-680 662.

BY ADVS.

SRI.S.SREEKUMAR (SENIOR.)

SRI.AKHIL K.MADHAV

SRI.T.R.JERRY SEBASTIAN

SRI.THOMAS M.JACOB

RESPONDENT/RESPONDENT IN O.P:

C.D.MINI, AGED 44 YEARS
D/O.LATE C.L.DEVASSY, CHELLAKKUDAM HOUSE,
PALLIPPURAM.P.O, PALLIPPURAM VILLAGE,
MUKUNDAPURAM TALUK, THRISSUR DISTRICT,
PIN-680 732.

BY ADVS.

SRI.P.C.HARIDAS

SRI.G.S.REGHUNATH

THIS MATRIMONIAL APPEAL HAVING BEEN FINALLY HEARD ON
06.04.2022, ALONG WITH MAT.APPEAL NOS.242/2012 AND
317/2012, THE COURT ON 13.06.2022 DELIVERED THE
FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE

&

THE HONOURABLE MRS. JUSTICE SOPHY THOMAS

MONDAY, THE 13TH DAY OF JUNE 2022 / 23RD JYAISHTA, 1944

MAT.APPEAL NO. 317 OF 2012

AGAINST THE COMMON ORDER DATED 31.12.2011 IN
OP.NO.775/2006 AND ANOTHER CONNECTED CASES OF THE FAMILY
COURT, THRISSUR

APPELLANT/PETITIONER:

C.D.MINI, AGED 44 YEARS
D/O.(LATE) DEVASSY, CHELLAKKUDAM HOUSE,
MALA, PALLIPPURAM.P.O, PALLIPPURAM VILLAGE,
MUKUNDAPURAM TALUK, THRISSUR DISTRICT.

BY ADVS.
SRI.P.C.HARIDAS
SRI.G.S.REGHUNATH

RESPONDENTS/RESPONDENTS:

- 1 C.C.JOY, AGED 49 YEARS, S/O.CHAKKUNY,
CHERADAYI HOUSE, KOTTANELLUR P.O.,
KADUPPASSERY VILLAGE, MUKUNDAPURAM TALUK,
PRESENT ADDRESS: C.C.JOY, S/O.CHAKKUNNY,
(NEAR) LOURD HOSPITAL, GREEN GARDEN, KARSHAKA
ROAD, PACHALAM P.O., ERNAKULAM-682012.
- 2 MILAN (MINOR), S/O.K.K.KALA, AGED 10 YEARS,
KODUMBILLY HOUSE, ALATHUR, MALA, MUKUNDAPURAM,
REPRESENTED BY HIS MOTHER AND GUARDIAN,
K.A.KALA, D/O.LATE ARAVINDAKSHAN, KODUMBULLY
HOUSE, ALATHUR, MALA, MUKUNDAPURAM TALUK,
TRISSUR DISTRICT, PRESENT ADDRESS: K.A.KALA
(NEAR LOURD HOSPITAL, GREEN GARDEN, KARSHAKA
ROAD, PANCHALAM, ERNAKULAM-682012.)

BY ADVS .
SRI .S .SREEKUMAR (SENIOR .)
SRI .AUGUSTUS BINU
SRI .M .ANJU THOMAS

THIS MATRIMONIAL APPEAL HAVING BEEN FINALLY HEARD ON
06.04.2022, ALONG WITH MAT.APPEAL NOS.242/2012 AND
243/2012, THE COURT ON 13.06.2022 DELIVERED THE
FOLLOWING:

C.R

**A.MUHAMED MUSTAQUE &
SOPHY THOMAS, JJ.**

Mat.Appeal Nos.242, 243 & 317 of 2012

Dated this the 13th day of June, 2022

J U D G M E N T

Sophy Thomas, J.

PRELUDE

“Brood parasitism” is a breeding strategy adopted by some birds, insects and fishes to raise their young. The most familiar example is a cuckoo laying eggs in a crow's nest to raise their young by befooling the crow. Homosapiens also seem to have started adopting that strategy to befool their life partners.

2. Here is a case where a husband, after begetting a child in his employee, took that child to his wife, a barren lady, as if that child was abandoned by an unwed Nurse and offered for adoption. The innocent wife nurtured that child believing the child to be an adopted one, giving the love and warmth of a mother. The wicked husband continued his illicit relationship

with the employee and often took the child to its biological mother to be in company with her. After about five years, the wife realised that, her husband was the biological father of that child and the child was born in his illicit relationship with the employee. Realising the height of cheating she was subjected to, she returned to her paternal home. When her brothers intervened, he admitted paternity of the child but he was not ready to give up his illicit relationship with the employee who delivered his child. Thereafter the wife did not come back to continue her marital relationship with the husband. Their life boat which was otherwise sailing smoothly sunk in deep sea due to the infidelity and distrust of her life partner. The wife was compelled to break the nuptial tie as her dreams and aspirations regarding the sanctity of marriage were shattered due to the illicit connection, which her husband had with his employee. Bringing the child born out of his illicit relationship, to be taken care of by his wife as if it was an adopted child, added insult upon injury.

3. The couple lived together for about 16½ years smoothly, doing various business activities and acquiring lot of properties in their name jointly and severally. The wife left the

husband on 07.03.2006 knowing about the cheating played upon her by the husband. As the husband was not ready to give up his illicit connection with the employee, she filed Divorce O.P before the Family Court, Thrissur on 23.03.2006. Thereafter, the husband filed O.P No.559 of 2006 against the wife for a declaration that he was the beneficial owner and the wife was only a name lender/*benamidar* in the property transactions, and claiming injunction against her with respect to item No.1 to 17 properties. Subsequently, the wife filed O.P No.775 of 2006 before the very same court, against the husband, and the minor son born to him in his employee, for a declaration that she is the beneficial owner and the respondents are only name lenders/*benamidars* in 'F' to 'P' schedule properties and in the alternative, for a partition, and injunction - both mandatory and prohibitory, with respect to 'A' to 'E' schedule properties, and also to get back 'Q' schedule movables or its equivalent value.

4. The Family Court tried those three cases together treating O.P No.366 of 2006, the O.P for divorce filed by the wife, as the leading case. PWs 1 to 7 were examined and Exts.A1 to A72 were marked from the side of the wife. RWs 1

to 69 were examined and Exts.B1 to B237 were marked from the side of the husband. Exts.X1 to X324 were marked as witness exhibits and Ext.C1 and C1(a) were marked as Court Exhibits.

5. The Family Court, Thrissur, after evaluating the facts, evidence and circumstances, allowed O.P No.366 of 2006 dissolving their marriage, dismissed O.P No.559 of 2006, and decreed in part O.P No.775 of 2006 as per common judgment dated 31.12.2011.

6. Challenging the decree of divorce in O.P No.366 of 2006, the husband filed Mat.Appeal No.244 of 2012. Against dismissal of O.P No.559 of 2006, the husband filed Mat.Appeal No.243 of 2012. Against the relief granted to the wife vide decree in O.P No.775 of 2006, the husband filed Mat.Appeal No.242 of 2012. Against the relief which was declined in O.P No.775 of 2006, the wife filed Mat.Appeal No.317 of 2012.

7. Divorce was granted in O.P No.366 of 2006, on the ground of adultery committed by the husband with the 2nd respondent in that O.P., who was an employee in his shop. Though the husband preferred Mat.Appeal No.244 of 2012 against that judgment and decree, subsequently he not

pressed that appeal, and hence it was dismissed as not pressed by which the decree of divorce on the ground of adultery stands confirmed.

FACTUAL BACKGROUND

8. The brief facts necessary for the appeals under consideration could be summarised as follows:

Sri.C.C Joy married Smt.C.D Mini on 10.09.1989. At that time, he was running a home appliances shop. After marriage, a telephone booth and a beauty parlour were started in a portion of that shop and Smt. Mini was its licensee. As they could not bear a child even after continued treatment, Smt.Mini agreed for adopting a child, and they went to an institution and got registered there. Later Sri.Joy told Smt.Mini that an unwed Nurse delivered a child, and as she is going abroad, the child is offered for adoption. Smt.Mini went along with Sri.Joy to meet the child in the house of his sister at Muringoor. On the 9th month, the child was taken to their house, and baptised, naming him 'Milan'. Smt.Mini nurtured and brought up that child as her own child, believing that the child was adopted by them. Later she realised that Sri.Joy was playing fraud upon her, and the child was born in his illicit

connection with his employee named Smt.Kala. Unable to bear the height of cheating, she went back to her paternal house. Though her brothers and relatives intervened, Sri.Joy was not ready to give up his illicit connection with Smt.Kala, which resulted in wreckage of her family life.

9. Sri.Joy is admitting that, now his son Milan, and his mother Smt.Kala, who was once his employee, are residing in the house constructed by him at Ernakulam, and he often visits the school, and signs the school diary, as his father. He is admitting that he is having joint Bank accounts with Smt.Kala, and obviously, now Sri.Joy and Smt.Kala are residing together at his house at Ernakulam along with their son Milan. Though he had a contention that he had physical relationship with Smt.Kala with the knowledge and blessings of Smt.Mini, that is not a believable story as Smt.Mini went back to her paternal house, immediately on knowing that Sri.Joy was the biological father of that child. By not pressing the Mat.Appeal No.244 of 2012 against the decree of divorce granted on the ground of adultery, now Sri.Joy is endorsing paternity of the child born out of his adulterous life with Smt.Kala.

10. During subsistence of their marriage, several properties were acquired by them jointly and severally and after their separation, Sri.Joy filed O.P No.559 of 2006 for declaration with respect to item No.1 to 17 properties as his own and Smt.Mini filed O.P No.775 of 2006 claiming absolute right with respect to 'A' to 'P' schedule immovable properties and 'Q' schedule movables.

11. Regarding 'F' to 'N' schedule properties standing in the joint name, Smt.Mini has sought for an alternative relief of partition also, to allot her separate share.

12. Sri.Joy says that, the whole properties scheduled in both cases exclusively belong to him, he expended money to purchase those properties, he is possessing and improving the same, and the title documents of those properties are still with him. According to him, he purchased those properties for his own benefit and not for the benefit of his wife. So, according to him, even if some properties stand in the name of Smt.Mini also, she has no right, title or interest over any of those properties, and she was only a name lender in the respective documents.

13. The case of Smt.Mini also is that, she is the absolute owner of the whole properties scheduled, and Sri.Joy was only a name lender in the documents. He had no business or income and the source of money for purchasing those properties was the income derived from her telephone booth, beauty parlour and share business. She purchased those properties for her own benefit, and not for the benefit of Sri.Joy. So, their contention is that the properties were purchased in '*benami*' in the name of their spouse, and since the spouse being only a name lender and trustee, he/she will not get any right, title or interest over those properties.

14. Sri.Joy admitted that he started his business with a watch repairing shop and at the time of marriage, he was running a home appliances shop. According to him, he had various businesses by the names See See's Time House, United Agencies, Crown Computers, Investors Consultancy, real estate business, share market business, old car business etc. etc. But he admitted that, he had not renewed his sales tax registration after 1991. He has not adduced any specific evidence to prove his income from his various businesses except the Bank Pass Books showing some financial

transactions and some income tax returns. Though Smt.Mini filed a petition calling upon him to produce the details of his businesses and income derived therefrom, he could not produce any such documents.

15. During cross examination in page 68, Sri.Joy deposed that his income was too high than shown in the income tax returns and the income shown in the returns was not correct. In the argument notes titled "the business of Sri.Joy and benefit of purchase", in paragraph 19, it is stated that all the real estate transactions of Sri.Joy are not brought on record, to maintain his business secrecy, and also due to fear that Smt.Mini might create impediments for sale of some of the properties that are not on record. In paragraph 27, he would admit that he had purchased properties in the name of Smt.Mini, which she was not even aware of, as part of his real estate business.

16. The case of Smt.Mini is that Sri.Joy had lost his home appliance business, and after marriage, in a portion of that shop, a beauty parlour and a telephone booth were started by her and she was getting income therefrom, and with that income, she purchased the properties. But, PW1

Smt. Mini herself admitted in page No.4 of her cross examination that, she was getting monthly income of Rs.10,000/- from the beauty parlour and Rs.1,500 from the telephone booth. It is difficult to believe that she could purchase commercial plots in Thrissur town and Ernakulam City with the income she was deriving from the beauty parlour and the telephone booth. According to Smt. Mini, Sri. Joy was transferring money belonging to various persons into his Bank account for some period, and thereafter it was returned to them. So, according to her, the entries in his Bank pass book were fake, and it will not prove his source of income to purchase the properties.

17. At this juncture, Sri. G.S. Reghunath, learned counsel appearing for Smt. Mini brought to our notice Annexure A, certified copy of the judgment in Calendar Case No.5/2008 in the Court of Special Judge (SPE/CBI)-I Ernakulam, which was accepted, as per order in I.A No.1 of 2022 in Mat. Appeal No.317 of 2012. In that case, Sri. Joy was the 12th accused, and he was charged under Section 120B read with Sections 13(1)(d), 13(2) of PC Act, and Sections 420, 468 and 471 of IPC. The allegation against him was that, Sri. Joy, who

was a real estate broker, hatched a criminal conspiracy with A1, Bank Manager of Union Bank of India, Cherpu branch, A13 Sri.K.T Thomas, a Chartered Accountant, and A14 Sri.G. Jyothi, a Tax Practitioner, and entered into an illegal agreement to canvass persons for loans, irrespective of their ineligibility and capacity to repay the same, and collected part of the loan sanctioned amount as commission, and canvassed A2 to A11 somewhere in 2004, and A1 Bank Manager processed and sanctioned housing loans to them, without making proper pre-sanction verifications, and accepting forged income tax returns, and without ensuring the end use of funds. Sri.Joy was found guilty and convicted along with the other accused, and he was sentenced to undergo simple imprisonment for two years each and fine, under Section 120B read with Sections 420, 468 and 471 of IPC with a default sentence, directing that the substantive sentences shall run concurrently.

18. Sri.Joy also is admitting that, he was arranging loans on commission basis. Annexure A judgment will show that, he was canvassing people for availing bank loans as part of a criminal conspiracy and he might have received huge amounts as commission. 'D' to 'P' schedule properties in O.P No.775 of

2006 were seen purchased in the year 2004 and 2005. The alleged criminal conspiracy and illegal transactions were carried out by Sri.Joy somewhere in 2004 as seen from Annexure A judgment. His bank passbooks might have been showing the amounts which he might have received in that manner, as no scrap of paper has been produced to prove his business and income therefrom, to think otherwise. But we are not supposed to go into the legality of the transactions done by Sri.Joy, or the benefit he had derived therefrom. There is Vigilance and Income Tax Department to look into those aspects.

19. Now the question mooted before us is that, whether the transactions involved in the above O.Ps are *benami* transactions or not, and if it is *benami*, who is the real owner?

LEGAL ASPECTS

20. Before proceeding further, let us have an understanding of what is meant by the word '*benami*', the transactions treated as '*benami*', and the basic ingredients which determines a '*benami*' transaction.

21. The word '*benami*' is a Persian compound word made up of two different words namely, '*be*' which means

'without' and 'nam' which denotes 'name'. It, therefore, literally means, 'without a name', that is nameless or fictitious, and is used to denote a transaction which is really done by a person without using his own name but in the name of another. *Benami* transfer or transaction means the transfer by or to a person who acts only as an ostensible owner in place of the real owner, whose name is not disclosed. The question whether such transfer or transaction was real or *benami* depends upon the intention of the beneficiary. The real owner in such cases may be called the beneficiary and the ostensible owner the *benamidar* (Hindu Code by Gour, 4th edition, Page 726).

22. The *benamidar* has no beneficial interest in the property or business that stands in his name; he represents in fact the real owner and so far as the relative legal position is concerned, he is a mere trustee for him. The Hon'ble Supreme Court in **Java Dayal Peddar** vs. **Bibi Hazra** (AIR 1974 Supreme Court 171) laid down the following tests to determine whether a transaction is *benami* or not.

- i) The source from which the purchase money came.

- ii) The nature and possession of the property after the purchase.
- iii) Motive, if any, for giving the transaction a *benami* colour.
- iv) The position of the parties and the relationship, if any, between the claimant and the alleged *benamidar*.
- v) The custody of the title-deeds after the sale, and
- vi) The conduct of the parties concerned in dealing with the property after the sale.

23. The Apex Court re-affirmed the six tests to determine the nature of a transaction as benami or not, in a subsequent decision **Valliammal** vs. **Subramanian** (AIR 2004 SC 4187).

24. Section 3(1) and (2) of the Benami Transactions (Prohibition) Act, 1988 (before its amendment in the year 2016) reads thus:

“3. Prohibition of benami transactions.—

(1) No person shall enter into any *benami* transaction.

(2) Nothing in sub-section (1) shall apply to—

- (a) the purchase of property by any person in the name of his wife or unmarried daughter and

it shall be presumed, unless the contrary is proved, that the said property had been purchased for the benefit of the wife or the unmarried daughter...".

25. The amendment Act 43 of 2016 came into effect on 01.11.2016 renaming the Act as 'The Prohibition of Benami Property Transactions Act, 1988 (45 of 1988). In **Binapani Paul** vs. **Prathima Ghosh** ((2007) 6 SCC 100), the Hon'ble Supreme Court held that the Benami Transactions (Prohibition) Act, 1988 has no retrospective effect. The transactions disputed in the case on hand were spanning over the period 1998 to 2005 i.e. when the Benami Transactions (Prohibition) Act, 1988 was holding the field.

26. Section 2(a) of the Benami Transactions (Prohibition) Act, 1988 defines a '*benami transaction*' as 'any transaction in which property is transferred to one person for a consideration paid or provided by another person'.

27. Going by Section 3(2)(a) of the said Act, nothing prevents a person from purchasing property in the name of his wife or unmarried daughter, and unless the contrary is proved, it is presumed that the said property has been purchased for

the benefit of the wife or the unmarried daughter, as the case may be.

28. So, in order to find out whether the transaction alleged is a '*benami transaction*' or not, we have to apply the six tests set out by the Hon'ble Supreme Court in *Java Dayal Peddar's* case (supra). If it is found that the person in whose name the property stands was only a name lender, and the property was actually purchased for the benefit of the beneficial owner, expending his own money, then of course, the *benamidar* may not get any right, title or interest over the properties held in his/her name.

29. We have to test each and every transaction involved in O.P Nos.559 of 2006 and 775 of 2006, in the touchstone of six acid tests set out by the Hon'ble Supreme Court, to find out whether those transactions were *benami* or not, and if it was a *benami* transaction, who was the *benamidar* and who was the beneficiary.

30. In O.P No.775 of 2006, the wife Smt.Mini has scheduled 'A' to 'P' schedule immovable properties and 'Q' schedule movables. In O.P No.559 of 2006, the husband Sri.Joy has included 17 items of immovable properties.

ANALYSIS**I. Item No.17 in O.P No.559 of 2006**

31. Item No.17 in O.P No.559 of 2006 is in the joint name of Smt.Mini, Sri.Joy and Milan. That property is extending 70 and odd cents in Kadupassery village comprised in survey No.380/1. That property was purchased as per Ext.B18 document. Though that property stands in the joint name of Smt.Mini, Sri.Joy and Milan, Smt.Mini has not made any claim over that property. She has not scheduled that property in O.P No.775 of 2006 filed by her. According to Sri.Joy, he is possessing and improving that property. PW1 Smt.Mini admitted that, she is not in possession of that property, and she is not taking income therefrom. She has no case that, she expended any money for purchasing item No.17, though that property stands in her name also. Since Smt.Mini is not making any claim over that property, and she has not included that property in the schedule of properties in O.P No.775 of 2006, obviously that property was purchased by Sri.Joy in the joint name of himself, his wife Smt.Mini and son Milan, for his own benefit and not for the benefit of Smt.Mini or Milan. So, regarding item No.17 in O.P No.559 of 2006, he

was entitled for the declaration as prayed for and dismissal of O.P No.559 of 2006 by the Family Court with respect to item No.17 is liable to be set aside.

II. 'E' (item No.1 to 3 in O.P No.559 of 2006) and 'O' schedule property in O.P No.775 of 2006

32. Item No.1 to 3 in O.P No.559 of 2006, corresponds to 'E' schedule properties in O.P No.775 of 2006. According to Sri.Joy, he entered into Ext.B1 sale agreement for purchasing 125.500 cents of land in Thrikkakkara North Village for a consideration of Rs.60,000/- per cent. Out of that property, 10 cents was sold to one Mr.K.V Kuriakose as per sale deed No.3984/1/2005 dated 28.05.2005 which was marked as Ext.B114. 57 $\frac{3}{4}$ cents was purchased in the name of Smt.Mini, his wife, as per Ext.B5 document, and the balance 57 $\frac{3}{4}$ cents was purchased in his own name as per Ext.B19 document. Though Ext.B1 sale agreement was executed in the name of Sri.Joy alone, as he wanted to take a bank loan for purchase of that property, and as there was limit for personal loan upto Rs.30 lakh, he decided to include his wife Mini also, for the purpose of availing loan in her name. He could prove payment of advance from his own account and availing of separate loan

for himself and his wife. The Family Court relied upon Ext.A72 agreement to find that, there was separate sale agreement in favour of Smt.Mini and so, Ext.B1 sale agreement was not accepted.

33. Ext.B1 sale agreement is dated 28.02.2005 and Sri.Joy agreed to purchase 125.500 cents of land within three months from the date of agreement. Exts.B5 and B19 sale deeds were executed on 28.05.2005, exactly three months from the date of Ext.B1. Ext.A72 sale agreement with respect to 57³/₄ cents is dated 20.05.2005 i.e. just eight days prior to the execution of the sale deed. RW13, the vendor, deposed that his father Pareed Haji and others executed Ext.B1 sale agreement in favour of Sri.Joy, and subsequently, his father passed away. So, obviously, in Ext.A72 sale agreement, Sri.Pareed Haji is not a party.

34. RW26 Bank Manager supported the case of Sri.Joy that, the personal loan that could have been sanctioned per person was only Rs.30 lakh. The total cash requirement for the purchase of Exts.B5 and B19 property was more than Rs.70 lakh including registration fee and value of stamp paper. So, the maximum personal loan of Rs.30 lakh might not have

been sufficient for Sri.Joy to purchase that property. So, his case that in order to avail maximum loan amount from the Bank, he decided to split the purchase in his name as well as in the name of his wife, seems to be a probable one.

35. The advance amount as per Ext.B1 sale agreement was Rs.5 lakh and Sri.Joy paid that amount by way of cheque drawn from his X-40 Account in Syndicate Bank, Palace road, Thrissur. When two separate sale agreements were executed for the purpose of availing separate loans in the name of Sri.Joy and Smt.Mini, the advance amount was also split up as Rs.2.5 lakh, in each agreement. RW69 Jayesh admitted receipt of cheque for Rs.8,66,400/- drawn from Ext.X-40 Account of Sri.Joy, for purchasing the stamp paper on 26.05.2005. RW39, the document writer who wrote Exts.B5 and B19, deposed that he prepared those documents as instructed by Sri.Joy. RWs13 and 14, the vendors, RW15 attesting witness all deposed that, Exts.B5 and B19 properties were purchased by Sri.Joy, and Smt.Mini was not involved in that transaction. RW44, the coconut climber, RW54, the immediate neighbour, and RW55, a surety in their Bank loan, deposed that after execution of Ext.B5 and B19 documents, Sri.Joy was

possessing and improving that land.

36. 57³/₄ cents of land purchased in the name of Smt.Mini as per Ext.B5 sale deed is item No.1 to 3 in O.P No.559 of 2006, and it corresponds to 'E' schedule in O.P.No.775 of 2006. The balance 57³/₄ cents purchased in the name of Sri.Joy as per Ext.B19 document is 'O' schedule property in O.P.No.775 of 2006. That property is not scheduled in O.P No.559 of 2006, filed by Sri.Joy, may be because the document stands in his exclusive name. The 'E' and 'O' schedule properties in O.P No.775 of 2006 are lying together as a single plot as reported by RW64 Advocate Commissioner in Ext.B113 commission report. Smt.Mini is not disputing that fact. At the same time she admits that Sri.Joy is in possession of that property.

37. Regarding repayment of loan amount with respect to 'E' and 'O' schedule properties, RW1 Sri.Joy deposed that, he was remitting amounts to the two loan accounts, by way of one cheque. RW26 Bank Manager supported Sri.Joy by producing the cheque discounting forms X-100 to X-102. The Bank Manager adduced evidence to show that, the payments were made from X-103 SB Account of Sri.Joy in Syndicate

Bank, M.G road branch. The Bank Manager further stated that, the payments through the cheque discounting forms were made by Sri.Joy. Smt.Mini has not adduced any evidence to show that, she paid the loan instalments with respect to 'E' and 'O' schedule properties. She has got a case that 'O' schedule property was also purchased by her, using her own funds, in the name of her husband and so she is the absolute owner and Sri.Joy is only a name lender.

38. What is exempted under Section 3(2) of the Benami Transactions (Prohibition) Act, 1988 is the purchase of properties by any person in the name of his wife or unmarried daughter and it shall be presumed, unless the contrary is proved, that the said property had been purchased for the benefit of the wife or the unmarried daughter. That exemption does not include purchase of property by any person in the name of her husband. So much so, the purchase if any made by the wife in the name of her husband is not covered under the saving clause of Section 3(2) of the Benami Transactions (Prohibition) Act, 1988.

39. It is quite explicit from the available facts and evidence that, in order to arrange separate Bank loans for

purchasing 'E' and 'O' schedule properties, in spite of executing Ext.B1 agreement in the name of Sri.Joy, separate agreements were executed in the name of Smt.Mini and Sri.Joy.

40. As we have seen, there is nothing to show that Smt.Mini paid the loan instalments to loan A/c Nos.1986 and 1987. She admitted that, she had given Ext.A28 letter to the Bank not to accept repayment of loan from Sri.Joy. When the Bank initiated SARFAESI proceedings, Sri.Joy obtained a stay order regarding 'E' and 'O' schedule properties. But, Smt.Mini approached the court for a relief with respect to 'E' schedule property alone, and no relief was sought with respect to 'O' schedule, though her claim was that 'O' schedule property also absolutely belongs to her. Though she obtained an order to repay the dues amounting to Rs.30 lakh with respect to 'E' schedule property in six equal monthly instalments, she did not make any payment as admitted by her. PW1 Smt.Mini admitted during her cross examination that, she addressed the Bank, not to accept repayment of loan amount from Sri.Joy, as she knows that, if instalments are defaulted, the property would be auctioned by Bank, so that she could bid the

property in public auction. That itself will show that 'E' and 'O' schedule properties were not purchased by her.

41. The King Solomon's wisdom in judgment, is narrated in Holy Bible 1 Kings 3, 16-18. Two mothers came to King Solomon, each claiming an infant son as her own. Calling for a sword, Solomon declared his judgment, the baby would be cut into two, and each woman to receive half. One mother did not contest the ruling declaring that, if she could not have the baby, then neither of them could. But, the other begged Solomon to give the baby to other lady and not to kill the baby. The King declared the second woman to be the true mother, as a mother would even give up his baby if that was necessary to save its life, and awarded custody of the child to her.

42. We are reminded of this story on going through the statement of PW1 Smt.Mini that, she did not repay the loan amount and requested the bank not to accept the loan repayment from Sri.Joy hoping that, on default of the loan, Bank would auction those properties, and then she could bid the property in auction. That itself will show that, she was not the real owner of 'E' and 'O' schedule properties, and she was

only a name lender in the real estate business transactions of her husband.

43. Smt.Mini claims that she withdrew amounts from her Bank Account in the year 2003 for purchasing 'E' and 'O' schedule properties. It is difficult to believe that, she withdrew amounts in the year 2003 for the purchase made in the year 2005. In Ext.X135 income tax return of Sri.Joy for the assessment year 2006-2007, 'E' and 'O' schedule properties are included. That also is a circumstance to believe that, those properties were purchased by Sri.Joy.

44. On analysing Exts.B5 and B19 transactions with the six tests set out by the Hon'ble Supreme Court in *Java Dayal Peddar's* case (supra), it satisfies the requirements of a *benami* transaction. The parties are husband and wife in a fiduciary relationship. There is nothing to show that 'E' schedule property was purchased in the name of Smt.Mini for her benefit. So, regarding 'E' schedule property (item Nos.1 to 3 in O.P No.559 of 2006) and 'O' schedule property in O.P No.775 of 2006, Sri.Joy could prove that, he purchased those properties expending his own money and 'E' schedule property was registered in the name of Smt.Mini only as a

name lender, and Sri.Joy was intended to be its beneficiary.

45. The Family Court found that 'O' schedule property in the name of Sri.Joy covered by Ext.B19 sale deed belongs to him, whereas 'E' schedule property in the name of Smt.Mini covered by Ext.B5 sale deed belongs to her. The finding of the Family Court with respect to 'E' schedule property is liable to be set aside. Since Smt.Mini was only a name lender in the sale deed as well as in the Bank loan, she cannot have any liability towards the Bank also with respect to loan A/c No.1987 in Syndicate Bank, Housing Finance Branch, if at all that loan is still outstanding.

III. 'D' (item No.4 in O.P No.559 of 2006) and 'P' schedule property in O.P No.775 of 2006

46. Item No.4 in O.P No.559 of 2006 corresponds to 'D' schedule in O.P No.775 of 2006. It is 4.875 cents of land covered by Ext.B7 sale deed in Chembukavu village. That property stands in the name of Smt.Mini.

47. 'P' schedule property in O.P.No.775 of 2006 is the adjoining 4.875 cents of land covered by Ext.B46 sale deed in the name of Sri.Joy. That property is not scheduled by Sri.Joy in O.P.No.559 of 2006, may be because, that property stands

in his exclusive name. Exts.B7 and B46 sale deeds were executed on the very same day i.e., 14.06.2004. Ext.B113 commission report shows that these two properties are lying together.

48. 'P' schedule property originally belonged to Smt.Leela, mother of RW7. She executed settlement deed in favour of her son Sri.Suresh. Smt.Leela and Sri.Suresh executed Ext.B136 sale agreement in favour of Sri.Joy agreeing to sell that property for Rs.97,500/- per cent. The advance amount was seen withdrawn from the account of Sri.Joy evidenced by Ext.X33. Since Sri.Suresh died, subsequently Ext.B3 sale agreement was entered into between Smt.Leela and the other legal heirs of Sri.Suresh with Sri.Joy. In Ext.B3 agreement also, the advance amount paid as per Ext.B136 agreement is mentioned. PW1 Smt.Mini is not aware of any such agreements, and according to her, she had not written any agreements with respect to that property.

49. Sri.Joy wanted to construct a multi storied building in 'D' and 'P' schedule properties as that land was close to St.Thomas College, and Entrance Coaching Centre of Prof.P.C Thomas. For that purpose he wanted to get maximum

possible loan from the Bank. As the maximum personal loan that could have been sanctioned per person was only Rs.20 lakh, he decided to split the loan by adding his wife also. RW24 Bank Manager supported the statement of Sri.Joy, that the maximum loan permissible per person from his Bank was only Rs.20 lakh. Since loan had to be availed in the name of Smt.Mini also, two separate agreements were needed and it was prepared accordingly. Ext.X53 is the sale agreement in the name of Smt.Mini dated 08.06.2004. Ext.B7 sale deed was executed in the name of Smt.Mini on 14.06.2004 i.e. six days after execution of Ext.X53 agreement. So, obviously, Ext.X53 sale agreement was executed in the name of Smt.Mini for the purpose of availing a separate loan in her name from Syndicate Bank, Palace road branch, Thrissur. RW39, the document writer, identified Ext.B3 agreement as well as Exts.B7 and B46 sale deeds written by him. He categorically stated that, those documents were written as instructed by Sri.Joy and the expenses also were met by him.

50. Sri.Joy obtained plan and permit for constructing a multi storied building. Since the sale deeds were separate, the plan and permit were also separately obtained. Sri.Joy

entered into a contract with RW56 contractor for constructing a building in 'D' and 'P' schedule properties. RW56 gave evidence to the effect that, as per instructions given by Sri.Joy, he carried out the piling work and foundation work. PW1 Smt.Mini also is admitting the fact that, the foundation has been built up in that property. According to Sri.Joy, he expended Rs.18 lakh for the foundation work. But, according to Smt.Mini, it is only Rs.13 lakh, and it was spent by her, but no evidence is forthcoming. The testimony of RW2, RW7 and RW44 support the case of Sri.Joy that, he is possessing and improving that property. All the documents with respect to the construction work in 'D' schedule property is in possession of Sri.Joy. Smt.Mini also admitted that, Sri.Joy is in possession of the property at Thrissur.

51. According to Sri.Joy, he was making repayment of the loan by giving standing instructions to the Bank. Even after Smt.Mini went back to her paternal house, he continued to make repayment. Meanwhile, Smt.Mini issued Ext.A34 letter to the Bank, not to accept repayment of the loan amount from Sri.Joy with respect to 'D' schedule property. So the Bank stopped taking repayment from his account, as per the

standing instructions. But, subsequently, he closed the loan account in the name of Smt.Mini by way of One Time settlement. Smt.Mini is not disputing that fact.

52. On analysing Ext.B7 and B46 transactions with the six tests to be applied, it satisfies the requirements of a benami transaction. So, regarding 'D' schedule (item No.4 in O.P No.559 of 2006) and 'P' schedule property in O.P No.775 of 2006, Sri.Joy could prove that, he purchased those properties expending his own money for his own benefit, and the 'D' schedule property was registered in the name of Smt.Mini only as a name lender.

53. The Family Court found that 'P' schedule property in the name of Sri.Joy covered by Ext.B46 sale deed belongs to him, whereas 'D' schedule property in the name of Smt.Mini covered by Ext.B7 sale deed belongs to her. The facts and circumstances narrated above clearly show that, the finding of the Family Court with respect to 'D' schedule property is liable to be set aside. Since Smt.Mini was only a name lender in the sale deed as well as in the Bank loan, she cannot have any liability towards the Bank with respect to Ext.X52 loan A/c No.1046 with Syndicate Bank, Palace road branch, Thrissur, if

at all that loan is still outstanding.

IV. 'J' schedule property (item No.5 in O.P No.559 of 2006) in O.P No.775 of 2006.

54. This property is in the joint name of Sri.Joy and Smt.Mini as per Ext.B6 sale deed. That document was registered on 12.05.2004. RW3 Ratnapalan and his wife are the vendors in Ext.B6 document. Sri.Joy and his friend RW12 Sri.K.T Thomas entered into a sale agreement with the vendors and an advance amount of Rs.1,20,000/- was given as deposed by RW3. Ext.B6 stamp paper was purchased in the name of Sri.Joy alone. Out of the total extent, the eastern portion was conveyed to RW12 and the western portion was assigned in the joint name of Sri.Joy and Smt.Mini. RW3, the vendor, deposed that, it was as instructed by Sri.Joy. The stamp paper for Ext.B6 is in the name of Sri.Joy alone, though the document was executed in the joint name of Sri.Joy and Smt.Mini. Sri.Joy availed loan from Vijaya Bank, Thrissur and Ext.X322 is the legal opinion given for Bank loan. The loan was sanctioned in May 2004 and so the document was registered on 12.05.2004. The credit vouchers for repayment of the loan were signed by Sri.Joy and RW29 and RW67, Bank

Managers, produced Ext.X118 to Ext.X125 to prove that fact. When the repayment became irregular, the Bank initiated SARFAESI proceedings and then Sri.Joy approached DRT, Ernakulam and obtained stay order. Later he settled the loan by One Time Settlement remitting full amount and closing the loan.

55. PW1 Smt.Mini would say that, she purchased that property expending her own money in the joint name of herself and her husband. She is not even aware of the description of that property. In item No.5, two items of properties are involved. The first item is 7 and odd cents and the second item is 4 and odd cents in Chiyaram Village. In O.P No.775 of 2006, when Smt.Mini scheduled that property as 'J' schedule, the second item of 4 and odd cents was excluded. Though she would say that, there was a sale agreement for this property, she does not know its details. She is not able to say anything about the agreement for purchasing that property. The total consideration for that property was Rs.3,60,000/-. Though she deposed that she has got some documents to prove repayment of Rs.25,000/- towards the loan amount, no documents are there to support. She is

admitting that, she had requested the Bank not to accept repayment from Sri.Joy, as she knows that, on default, the property would be auctioned, and then she could bid the same.

56. The repayment and closing of the loan by Sri.Joy is not disputed by Smt.Mini. RW3, the vendor, and RW39, the scribe, deposed that the document was prepared and executed as instructed by Sri.Joy. RW42 and RW44 speaks about the possession of that property by Sri.Joy. So, there is evidence to show that though Ext.B6 sale deed is in their joint name, Sri.Joy was the beneficial owner and Smt.Mini was a name lender. There is nothing to show that Sri.Joy purchased that property for the benefit of his wife Smt.Mini. So Ext.B6 document satisfied the requirements of a *benami* transaction.

57. The finding of the Family Court that, Smt.Mini is a joint owner of 'J' schedule property is liable to be set aside in the light of the facts and evidence discussed above. Since Smt.Mini was only a name lender in the sale deed as well as in the Bank loan, she cannot have any liability with respect to the Bank loan availed from Vijaya Bank, if at all that loan is still outstanding.

V. 'A' schedule property (item No.8 in O.P No.559 of 2006) in O.P No.775 of 2006

58. 'A' schedule property is 14 cents of land in Kadupassery village. That property stands in the name of Smt.Mini as per Ext.B20 sale deed. According to Sri.Joy, it is his residential property and it is situated just opposite to his tharavad house. According to him, 84 and odd cents of land was purchased by his father Sri.Chakkunni from his brother in the name of his two sons Sri.Joseph and Sri.Antu, who are the elder brothers of Sri.Joy. Later father gave another property to his son Sri.Joseph for building a house, and so, Sri.Joseph relinquished his right over the 84 and odd cents in favour of his brother Sri.Antu. Later, Sri.Antu constructed a house in another property given to him by his father. So, as permitted by father, Sri.Joy constructed a house in 84 and odd cents of property which was standing in the name of Sri.Antu. The house construction was started in the year 1994, and it was over within an year. Pursuant to enquiry from Income Tax Department regarding the source for the building construction, Sri.Antu executed a power of attorney in favour of Sri.Joy with respect to 84 and odd cents standing in his name. Sri.Joy

executed Ext.B20 sale deed regarding 14 cents of land and the house situated therein, in favour of his wife Smt.Mini. According to him, it was done in trust, and it was not supported by consideration, and so that property along with the house absolutely belongs to him, in spite of Ext.B20 sale deed.

59. According to Smt.Mini, she belonged to an affluent family and her brothers were working abroad. At the time of marriage, she was given 75 sovereigns of gold ornaments and Rs.2 lakh in cash. Her 60 sovereigns of gold ornaments and the cash given from her family were all utilised for the house construction and so, Sri.Joy executed Ext.B20 sale deed in her favour using the power of attorney given by his brother Sri.Antu.

60. RW4 Sri.Antu supported his brother Sri.Joy by saying that Ext.B20 was not supported by consideration, and as part of a family settlement, the said property was given to Sri.Joy. There are no documents to prove the family settlement, except the oral testimony of RW1 and RW4. But in O.P No.775 of 2006, Smt.Mini is admitting that Sri.Joy started construction of the house in the property obtained from his

tharavad. But, according to her, since her patrimony was utilised for construction of the house, Sri.Joy had agreed to convey the house and the appurtenant land in her name. Though Sri.Joy is disputing the quantum of gold and money received from her family, he has no case that no gold or money was received from her family. During cross examination, he was even pleading ignorance regarding employment of brothers of Smt.Mini in foreign countries, though they lived together as husband and wife for about 16½ years. But later he admitted that some of them are working abroad. When he was asked whether the family members of Smt.Mini are educated and financially well off, he pleaded ignorance and added that he had not enquired into. That itself will speak volumes about his nature and character.

61. RW4 Sri.Antu, the brother of Sri.Joy, admitted before court that he is working in Bombay and he used to come to his native, two three times in an year, and every time he used to see his brother Sri.Joy. He obtained half right over 84 and odd cents of property in the year 1981. Subsequently, his brother Sri.Joseph relinquished his half right in favour of Sri.Antu in the year 1986. Sri.Joy was permitted to construct the house

in that property and he started construction in the year 1994 and according to Sri.Joy, the construction was completed within one year. Even according to Sri.Joy, the Income Tax Department enquired about the source only in the year 1996-1997. In order to avoid trouble to Sri.Antu, change of ownership was necessary for which Sri.Antu executed Ext.B21 power of attorney on 01.06.1998.

62. Ext.B21 power of attorney shows that Sri.Antu was very much available in his native for executing and registering that document before Vadakkumkara SRO. If the entire 84 and odd cents was intended to be given to Sri.Joy as part of family settlement, instead of executing Ext.B21 power of attorney, straight away he could have executed a sale deed or settlement deed in favour of Sri.Joy. The explanation given by Sri.Joy is that, in order to avoid ceiling problems and income tax issues, 14 cents and the house situated therein were transferred in the name of Smt.Mini. There is nothing to show that in the year 1998 or on any day prior to that, Sri.Joy was having any land registered in his name. He was not an income tax payee during that period. If so, there was no necessity for executing Ext.B20 document in the name of

Smt.Mini to save the land ceiling limit of Sri.Joy or to escape from income tax problems. According to Sri.Joy, since he was the power of attorney holder, if the property was transferred into his own name, in future transactions, it might have been subjected to legal scrutiny, and that is why the document was not executed in his name. But, using the very same power of attorney, he transferred the balance 70 and odd cents in the name of himself, his wife Smt.Mini and son Milan. So, it is not a justification for not transferring 'A' schedule property his name on the basis of the power of attorney, if the property was really intended to be given to him.

63. In Ext.B20, the consideration shown is Rs.40,000/-. Smt.Mini would say that during that period, the business of Sri.Joy was dull, and using her patrimony the house was constructed and that was also a consideration for transferring that property along with the house into her name. Sri.Joy himself is the vendor in Ext.B20 sale deed. According to him, that transaction was only a benami, and it was not intended to benefit his wife.

64. A person alleging benami transaction has to prove the same, otherwise the property standing in the name of a

person could be presumed as, that person is its real owner. In Ext.B20 sale deed, it is clearly mentioned that Smt.Mini is a business woman. It is mentioned in that document that the property was worth Rs.15,000/- and the partly constructed house was worth Rs.25,000/-. Thus the total consideration was fixed at Rs.40,000/-. Moreover, there is recital in that document that the said property and partly constructed house was given possession to Smt.Mini even prior to that document. Sri.Joy signed that document as the power of attorney holder of Sri.Antu. The stamp paper for executing that document was purchased in the name of Smt.Mini.

65. In paragraph 11 of the counter affidavit filed by Sri.Joy in O.P No.775 of 2006, it is categorically admitted that he had informed the Income Tax authorities that, with the help of Smt.Mini and her parents, the house was constructed. Ext.A3 Basic Tax Register, A4 encumbrance, A5 building tax, A8 ownership certificate are all in the name of Smt.Mini. There is nothing to disbelieve the case of Smt.Mini that, for her patrimony utilised for the house construction, Sri.Joy agreed to transfer the house and the appurtenant land in her favour. If the entire 84 and odd cents were transferred in

favour of Smt.Mini, we could have presumed that for the purpose of saving the ceiling or to defraud the Income Tax authorities, such a document was executed. Keeping 70 and odd cents with him, he transferred only the house and appurtenant 14 cents of land in favour of his wife. So, obviously, his intention was to give that property and house in favour of his wife.

66. Initially, at the time of construction, the documents of the house such as electricity connection, building tax assessment etc. were in the name of Sri.Joy. Subsequently, the house was transferred in favour of Smt.Mini. Being husband and wife living together without any problems, they might not have been eager to change the name in those registers, soon after the transfer of the property. So, the fact that still the electricity connection and building tax assessment register are in the name of Sri.Joy is of no avail to him, as it is quite common in every family relationship.

67. Learned Senior Counsel appearing for Sri.Joy, Sri.S.Sreekumar, pointed out that during cross examination Smt.Mini took a stand that she paid money to RW4 Sri.Antu in cash, as sale consideration, but there is no evidence to prove

that fact. Sri.Joy also has no case that he paid any consideration to Sri.Antu. If it was part of a family settlement, Sri. Antu might have executed a settlement deed in favour of Sri.Joy. Since her patrimony was utilised for the construction of the house, the document might have executed as a sale deed on valid consideration. The recitals in Ext.B20 document itself shows that the property and the house were given prior possession to Smt.Mini and the house in that property was an incomplete one. Sri.Joy cannot deny the recitals in that document as he himself executed that document in favour of his wife. If at all that property was set apart to him as a family arrangement, there was arrangement between Sri.Joy and Smt.Mini, to give the house and the appurtenant land to Smt.Mini for the patrimony utilised for the house construction and also the financial assistance received from her family, and that is why only 14 cents of land and the house was conveyed in favour of Smt.Mini, keeping the balance 70 cents with him. Smt.Mini is not making any claim over that 70 cents of land which is item No.17 in O.P No.559 of 2006. Moreover, there is categoric admission from the part of Sri.Joy that he had informed the Income Tax authorities that the house was

constructed with the financial assistance of Smt.Mini and his parents. So, even if there is no evidence to prove payment of any amount by Smt.Mini to Sri.Antu, it could be treated as a valid transfer from her husband on consideration of her patrimony he had taken.

68. So the available facts and evidence are sufficient to hold that Ext.B20 document was not a benami transaction. It was knowingly executed by the husband in favour of his wife for the financial assistance received from the wife and her family for constructing the house. She was not a benamidar and the husband was not the beneficial owner to claim title over that property.

69. When the relationship between the parties is so close as husband and wife, the source of consideration plays a minor part, the more important and significant factor will be the motive behind the transaction. Sri.Joy failed to prove the alleged motive that for the purpose of saving the land ceiling and to answer the Income Tax Department, such a document was executed in favour of his wife. As already stated, there is nothing to show that Sri.Joy was having an inch of land or taxable income in his name during that period. So, Smt.Mini is

the absolute owner of 'A' schedule property and the house situated therein and so, she is entitled to get the relief of mandatory injunction as well as prohibitory injunction prayed for with respect to 'A' schedule property. So, the finding of the Family Court with respect to 'A' schedule property is liable to be upheld.

VI. 'B' & 'C' schedule property (item 6 & 7 in O.P No.559 of 2006) in O.P No.775 of 2006

70. These properties stand in the name of Smt.Mini as per Ext.B8 and B9 documents. The consideration for item No.6 ('B' schedule) is Rs.75,000/- and the consideration for item No.7 ('C schedule') is Rs.52,500/-. These properties are lying together as a single plot. Sri.Joy is a witness in these two documents. RW17 Sri.Nandakumar entered into a sale agreement with Sri.Joy on the basis of power of attorney executed by its owners. He deposed that, the document was executed in the name of Smt.Mini as instructed by Sri.Joy and he had never seen Smt.Mini when the agreement was drawn up or the document was registered. But, no such sale agreement was produced by Sri.Joy to show that an agreement was there between himself and RW17. According

to Sri.Joy, the fixed deposits in Union Bank of India, Nenmara Branch was utilised for purchasing these properties. He is relying upon Ext.X117 ledger extract produced by RW28 Bank Manager to say that 10 fixed deposits of Rs.43,150/- each was closed on 10.04.1999. The total consideration needed as per the document was only Rs.1,27,500/-. Even if he closed fixed deposits worth Rs.4,31,500/- it might have been for some other purpose. The document was executed on 12.04.1999 and it was registered on 13.04.1999. So, we cannot expect that the amount was withdrawn from the Bank three days prior to the execution and registration of the document.

71. Smt.Mini deposed that business of Sri.Joy was dull during that period and that is why in a portion of his rented shop, a telephone booth and beauty parlour were started for her. She was getting income from there. Moreover her family members who were employed abroad financially assisted her. Even if it is taken for argument's sake that Sri.Joy expended money and purchased that property, in the name of his wife, there is nothing to show that it was not for her benefit. The purchase by the husband in the name of his wife, unless a different intention is proved, it could only be treated as a

purchase for her own benefit, and not for the benefit of the husband.

72. Smt.Mini is relying on Ext.A52 Account to show that on the date of execution of Exts.B8 and B9 documents, Rs.80,000/- was withdrawn from her account. Though Sri.Joy is admitting that withdrawal, according to him, all money in the account of Smt.Mini belonged to him and he was dealing with the money in all her bank accounts. That statement cannot be accepted, as Smt.Mini was also having income from telephone booth and beauty parlour, and she was an income tax assessee.

73. Smt.Mini deposed that she is possessing and taking income from 45 cents of land. 'A', 'B' and 'C' schedule properties together comes around to 45 cents. There is nothing to suggest that Exts.B8 and B9 transactions were benami transactions made by the husband in the name of wife, for his own beneficial interest. He himself is a witness in these two documents, and even if he expended any money for purchasing that property, it was for her benefit only, as his wife. It was not part of his real estate business, which seemingly started in the year 2004. So, Smt.Mini is the

absolute owner of 'B' and 'C' schedule properties and so, she is entitled to get the relief of mandatory injunction as well as prohibitory injunction with respect to those properties. So, the finding of the Family Court with respect to 'B and 'C' schedule property (item 6 and 7) is liable to be upheld.

VII. 'H' schedule property (item 15 in O.P No.559 of 2006) in O.P No.775 of 2006

74. This property is extending 2.200 cents in Kaduppassery village in the joint name of Sri.Joy and Smt.Mini. The total consideration shown is Rs.5,500/-. It was purchased for laying pipelines and also as a pathway to the house in 'A' schedule and to the properties of Sri.Joy. As we have seen, 'A' schedule property was transferred by Sri.Joy in favour of his wife Smt.Mini as per Ext.B20 sale deed. We found that the said property along with the partly constructed house was transferred by Sri.Joy in her name, in consideration of the patrimony and financial assistance received from her family. So, when a small strip of land was purchased for the purpose of providing pathway to that house and also to the remaining properties of Sri.Joy, we cannot presume that the said pathway was purchased by Sri.Joy for his own benefit,

and his wife was included in that document only as a name lender.

75. It is true that, RW1 Sri.Joy produced Ext.B16 original title deed of that property. RW5 deposed that his father sold that property to Sri.Joy. According to Smt.Mini, she purchased that property in the joint name of herself and husband, for the benefit of herself and Sri.Joy was only a name lender. As we have already seen, Section 3(2)(a) of the Benami Transactions (Prohibition) Act, 1988 does not contemplate purchase of property by a person in the name of her husband so as to claim exemption under Section 3(2). Moreover, there is nothing to show that even if Smt.Mini purchased that property, it was for her own benefit and not for the benefit of her husband also. So, Ext.B16 document cannot be termed as a *benami* transaction by which Sri.Joy remained the beneficiary, though the document was executed in the joint name of himself and his wife.

76. According to Sri.Joy, 'H' schedule property is lying contiguous with his remaining properties. He himself would admit that the said property was purchased for the purpose of pathway to the house, as well as to his remaining properties.

Smt.Mini was running a telephone booth and a beauty parlour and she was an income tax assessee during that period. So, we cannot assume that she was not in a position to pay consideration of Rs.5,500/- for purchasing that property. If at all the consideration was paid by Sri.Joy, the property was purchased in the joint name of husband and wife for the benefit of both, and so, it cannot be termed as a *benami* transaction. No motive to infer otherwise is conspicuously absent, except the self-serving statement of Sri.Joy.

77. Production of the original title deed by the husband is of no significance as due to some matrimonial discord, on a fine morning the wife returned to her paternal house. When her life itself was put on a question mark, we cannot expect her to take the documents of the properties purchased over a period, to prosecute or defend the cases which may arise in future. PW1 Smt.Mini deposed that after she left to her paternal house, her brothers mediated to settle their issues, but Sri.Joy was not ready to give up his illicit connection with Smt.Kala and so she filed Divorce O.P without any delay.

78. From the available facts and circumstances, the finding of the Family Court that Sri.Joy and Smt.Mini are joint

owners of 'H' schedule property (Item No.15 in O.P.No.559 of 2006) is to be upheld.

VIII. 'L' schedule property (item No.9 in O.P No.559 of 2006) in O.P No.775 of 2006

79. This property is extending 15 cents of land and it was purchased in the joint name of Sri.Joy, Smt.Mini and Milan as per Ext.B10 sale deed. RW9 Sri.Jose and his brother executed Ext.B10 document and he would say that the name of Smt.Mini and Milan were included as instructed by Sri.Joy. The sale consideration of Rs.15,000/- was paid by Sri.Joy by withdrawing amounts from his account as seen from Ext.X33. The stamp papers for executing the sale deed was purchased in the name of Sri.Joy alone. The possession of the property was also handed over to Sri.Joy as deposed by RW9. Sri.Joy is possessing and improving that property even going by the admission of PW1 Smt.Mini. The case of Smt.Mini was that she paid the entire consideration for purchasing that property. But, during cross examination, she would say that, they together paid the consideration. There is nothing to show that Smt.Mini was engaged in real estate business, whereas from the very beginning the case of Sri.Joy is that he was doing real

estate business and he had purchased large extent of properties in the name of various persons including his wife and child even without their knowledge. There is no positive evidence from the side of Smt.Mini to show that she expended money for purchasing 'L' schedule property. There is nothing to show that Sri.Joy purchased that property for the benefit of Smt.Mini and Milan. It has to be found that Smt.Mini and Milan were only name lenders and the property was purchased by Sri.Joy for his own benefit as part of his real estate business and not for the benefit of Smt.Mini or Milan. So the finding of the Family Court with respect to 'L' schedule property is liable to be set aside.

IX. 'N' schedule property (item No.10 in O.P No.559 of 2006) in O.P No.775 of 2006

80. This property is extending 12 cents of land and it was purchased in the joint name of Sri.Joy, Smt.Mini and Milan as per Ext.B11 sale deed dated 03.09.2005. RW68, the vendor of that property is a relative of Sri.Joy. He deposed that Sri.Joy paid the consideration, and as per his instructions, the name of Smt.Mini and Milan were included in that document. Possession of that property was given to Sri.Joy.

The sale consideration was paid by way of cheque drawn from the account of Sri.Joy with Syndicate Bank, Palace road, Thrissur, as borne out from Ext.X40 bank statement. The stamp paper for Ext.B11 was purchased in the name of Sri.Joy alone. That property is paddy land and PW1 Smt.Mini also admitted in her cross examination that Sri.Joy had made plantain cultivation in that property. The testimony of RW44 and RW49 supported possession of that property by Sri.Joy. Smt.Mini was not able to say about the details of that purchase, or the payment of consideration with respect to that property.

81. Since there is clear evidence to show that Sri.Joy paid the entire consideration, it has to be held that the said property was purchased by him and there is nothing to show that it was purchased for the benefit of Smt.Mini or Milan. As part of his real estate business, he might have purchased that property in the name of his wife and son, and there is nothing to show that it was purchased for their benefit. So, the finding of the Family Court that Smt.Mini is a co-owner of 'N' schedule property along with Sri.Joy and Milan is liable to be reversed. It has to be found that Smt.Mini and Milan were only name

lenders and the property was purchased by Sri.Joy for his own benefit and not for the benefit of Smt.Mini or Milan.

X. 'M' schedule property (item No.11 in O.P No.559 of 2006) in O.P No.775 of 2006

82. This property is extending 15 cents of land and it was purchased in the joint name of Sri.Joy, Smt.Mini and Milan as per Ext.B12 sale deed dated 30.03.2005. RW8, the vendor of that property is a relative of Sri.Joy. He deposed that Sri.Joy paid the consideration, and as per his instructions, the name of Smt.Mini and Milan were included in that document. Possession of that property was given to Sri.Joy. The sale consideration was Rs.22,500/-. Exts.X33 and X160 were relied upon by Sri.Joy to prove withdrawal of amounts to pay the consideration. Smt.Mini was not serious in challenging Exts.X33 and X160 documents.

83. Item No.17, 9 ('L' schedule) and this property were all purchased by Sri.Joy on the very same date i.e. on 03.03.2005. The stamp paper for executing Ext.B12 document was purchased in the name of Sri.Joy alone. RW16, the scribe, deposed that as per the instructions of Sri.Joy, the document was written in the joint names of Sri.Joy, Smt.Mini

and Milan. Possession of that property by Sri.Joy is spoken to by RWs 44, 48 and 49. There is nothing to show that Smt.Mini purchased that property in the joint name of her husband and his son, paying consideration, as claimed by her. Since there is clear evidence to show that Sri.Joy paid the entire consideration, it has to be held that the said property was purchased by him, and there is nothing to show that it was purchased for the benefit of Smt.Mini or Milan. As part of his real estate business, he might have purchased that property, along with item No.9, 11 and 17 on the very same day, including the name of his wife and son and there is nothing to show that it was purchased for their benefit. So, the finding of the Family Court that Smt.Mini is a co-owner of 'M' schedule property along with Sri.Joy and Milan is liable to be set aside.

XI. 'I', 'G' and 'F' schedule property (item No.12, 13 and 16 in O.P No.559 of 2006) in O.P No.775 of 2006

84. These three properties were purchased in the joint name of Sri.Joy and Smt.Mini as per Exts.B13, B14 and B17 documents respectively. All the three documents were executed on 20.04.2004 and registered on 21.04.2004 and 22.04.2004. The original sale deeds of all these properties

were produced by Sri.Joy. Schedule 'I' (item 12) was purchased from one Sri.Davis, and RW46, the brother of the vendor, deposed that Sri.Joy purchased that property paying consideration to Sri.Davis. 'G' schedule (item No.13) was purchased from RW6 Sri.Chandran. He also deposed that the property was purchased by Sri.Joy and the consideration also was paid by him. 'F' schedule property (item No.16) was purchased from RW11 Smt.Annie and she also deposed that the property was purchased by Sri.Joy and he paid the consideration. According to the document writer, as instructed by Sri.Joy, the name of Smt.Mini was included in the document.

85. Sri.Joy produced Bank Account statements to prove the source of money to pay the consideration, and Smt.Mini has no serious disputes with respect to the bank statements produced by Sri.Joy. According to her, his bank statements, were fake and money of several persons credited in his account were returned to the parties concerned. As already stated in paragraph 18, we are not aware of the legality of the money dealings made by Sri.Joy and the concerned authorities will look into it. The stamp papers for executing those

documents were all purchased in the name of Sri.Joy alone. His possession is spoken to by the witnesses. There is nothing to show that Smt.Mini purchased that property in the joint name of herself and her husband, paying consideration, as claimed by her. Since there is clear evidence to show that Sri.Joy paid the entire consideration, it has to be held that the said property was purchased by him and there is nothing to show that it was purchased for the benefit of Smt.Mini also. As part of his real estate business, he might have purchased those properties on the very same day, in the name of his wife also. So, the finding of the Family Court that Smt.Mini is a co-owner along with Sri.Joy with respect to 'I', 'G' and 'F' schedule property is liable to be set aside.

XII. 'K' schedule property (item No.14 in O.P No.559 of 2006) in O.P No.775 of 2006

86. This property is extending 38½ cents of land and it was purchased in the joint name of Sri.Joy, and Smt.Mini as per Ext.B15 sale deed. The total consideration for that property was Rs.16,500/-. Ext.B24 is the sale agreement with respect to that property dated 22.04.2004. In the sale agreement itself, possession handed over to Sri.Joy is

specifically stated. That property is part of paddy land where Sri.Joy cultivated plantains and PW1 Smt.Mini also admitted cultivation of that property by Sri.Joy. Possession of that property by Sri.Joy is spoken to by neighbours. Ext.X3 Account substantiates payment of advance amount from the account of Sri.Joy and Smt.Sreekala by way of Demand Draft. The case of Smt.Mini that she entrusted money with Sri.Joy to purchase that property is not correct in the light of Ext.X3 bank statement. There is nothing to show that Smt.Mini purchased that property in the joint name of herself and her husband paying consideration as claimed by her. Since there is clear evidence to show that Sri.Joy paid the entire consideration, it has to be held that the said property was purchased by him, and there is nothing to show that it was purchased for the benefit of Smt.Mini also. As part of his real estate business, he might have purchased that property in the name of his wife also. So, the finding of the Family Court that Smt.Mini is a co-owner along with Sri.Joy in 'K' schedule property is liable to be set aside.

XIII. 'Q' schedule property in O.P No.775 of 2006

87. Smt.Mini included 19 items of movables in 'Q'

schedule, which, according to her, were given from her family, which includes fridge, washing machine, furniture, microwave oven etc. worth Rs.3 lakh. Sri.Joy specifically denied entrustment of the movables from her family and according to him, he purchased the same and he produced Exts.B33, B34, B36 etc. to prove purchase of washing machine, fridge, T.V etc. The furniture also belongs to him as deposed. Though Smt.Mini could not produce any bills for purchase of the furniture or household articles, it is a custom in Kerala that when daughters are married away, household utensils and furniture like cot, almirah etc. are gifted from her family. In connection with housewarming ceremony also, it is a practice that household articles like fridge, washing machine, microwave oven etc. are being gifted from her family. The very fact that, Sri.Joy is denying any kind of furniture or household articles received from her family will speak about his unfair nature. Though reluctantly he is admitting that the brothers of Smt.Mini were working abroad and all her siblings were well placed. In such a situation, his statement that no furniture or household articles were received from her family is liable to be disbelieved. He is not denying 'Q' schedule

movables in the house situated in 'A' schedule. He produced Ext.B33 bill for washing machine, Ext.B34 bill for fridge and Ext.B34(a) bill for T.V and Ext.B36 bill for the mixer grinder. We have found that the 'A' schedule property and the house situated therein absolutely belongs to Smt.Mini and so much so, the movables if any in that house also belongs to her, except the items over which Sri.Joy is claiming title as per the bills produced by him. So, he has to vacate the house in 'A' schedule property along with the movables therein except the movables over which he is claiming title as per Ext.B33, Ext.B34, Ext.B34(a) and Ext.B36 bills. The total claim of Smt.Mini towards 'Q' schedule movables is Rs.3 lakh. The bills produced by Sri.Joy amounts to Rs. 51,150/- in total. If he fails to hand over the movables in 'A' schedule house to Smt.Mini, she can recover Rs.2,48,850/- towards the value of movables.

CONCLUSION

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.

In the light of the analysis we have made, Mat.Appeal Nos.242 of 2012, 243 of 2012 and 317 of 2012 are allowed in part as follows:

- (i) The finding of the Family Court with respect to 'A' , 'B', 'C' and 'H' schedule (item No.8, 6, 7 and 15 in O.P No.559 of 2006) in O.P No.775 of 2006 is hereby upheld.
- (ii) The finding of the Family Court with respect to 'O' and 'P' schedule in O.P No.775 of 2006 is confirmed.
- (iii) It is declared that Sri.Joy is the beneficial owner of item No.17 in O.P No.559 of 2006,

and Smt.Mini is injuncted from alienating that property.

- (iv) The finding of the Family Court with respect to all other properties (immovable) in both the O.Ps are set aside as Sri.Joy is its beneficial owner, and Smt.Mini is injuncted from alienating the same.
- (v) Regarding 'Q' schedule movables, Smt.Mini is entitled to receive the movables in the house situated in 'A' schedule property except the articles covered by Ext.B33, Ext.B34, Ext.B34(a) and Ext.B36 bills produced by Sri.Joy, or its equivalent value Rs.2,48,850/- from Sri.Joy and his assets.
- (vi) No order is made as to costs.

Sd/-
A.MUHAMED MUSTAQUE
JUDGE

Sd/-
SOPHY THOMAS
JUDGE

APPENDIX OF MAT. APPEAL NO.317/2012

APPELLANT'S ANNEXURES :

- ANN.A: ORIGINAL COPY OF THE LOAN CLOSURE
LETTER DATED 24.04.2017 OF THE
SYNDICATE BANK, MG ROAD BRANCH.
- ANN.A IN TRUE COPY OF THE CERTIFIED COPY OF THE
I.A.1/22: JUDGMENT DATED 16.12.2017 IF THE COURT
OF THE SPECIAL JUDGE (SPE/CBI)-I,
ERNAKULAM
- ANN.B: TRUE COPY OF THE STATEMENT OF THE LOAN
ACCOUNT OF THE PETITIONER
- ANN.C: TRUE COPY OF THE STATEMENT OF ACCOUNT
OF THE CANARA BANK IN RESPECT OF THE
SB ACCOUNT OF THE PETITIONER.

RESPONDENT'S ANNEXURES :

- ANN.1: TRUE COPY OF STATEMENT OF ACCOUNTS OF
ACCOUNT NO.1987 FROM 28.05.2005 TO
25.01.2010.

True Copy

P.S to Judge

smp