THE HONOURABLE SRI JUSTICE U.DURGA PRASAD RAO

C.C.C.A.No.52 of 1991,

Cross-Objections (SR) No.27079 of 1999
and
C.R.P. Nos.2852, 2853 and 2854 of 1995

COMMON JUDGMENT:

Both the 1st defendant and defendants 2 to 7 in O.S.No.272 of 1989 have challenged the judgment dated 06.07.1991 passed by the Additional Chief Judge-cum-II Additional Metropolitan Sessions Judge, Hyderabad, the former in the form of instant appeal and the latter in the form of cross-objections. Under the impugned judgment, the trial Court granted preliminary decree holding that the plaintiffs are entitled to partition and separate possession of 101 out of 320 shares in plaint schedule items Nos. 1 and 4 and 30% business profits in item No.3 from the date of suit till 27.04.1984 with 6% interest per annum which should be worked out by appointment of a Commissioner, while dismissing the claim in item No.2.

2) The factual matrix of the case is thus:

a) Plaintiffs' case was that D1—Syed Jaffar Ali and late Syed Raheem were sons of late Ayesha Bi. Syed Raheem had two wives viz. 1st plaintiff—Mehmooda Bi and 2nd defendant—Hafiza Bi. Plaintiffs 2 to 10 were the children of late Syed Raheem born through 1st plaintiff and D3 to D7 were the children born through D2.

b) It was their case that Ayesha Bi was the absolute owner and possessor of the plaint schedule items 1, 2 and 4 immovable properties and she died intestate in the year 1967-68. On her death, her two sons viz. D1

and Syed Raheem were entitled to half share each therein. There was no partition and they continued to live jointly.

c) The further case of the plaintiffs was that D1 and his brother—Raheem started hotel business jointly in the name and style '*Fair Cafe*' in item No.4 mulgies at Khairtabad and later they converted the same into '*Bulaqi Kashmiri Bakery and Tea Stall*'. (It may be noted the said business is referred as item No.3 business). While so, Syed Raheem died on 27.04.1984 leaving behind plaintiffs and D2 to D7. After the death of Raheem, the defendants, due to adverse attitude against the plaintiffs, did not allow them to participate in joint family business.

Hence, the suit for partition.

d) D1 filed written statement admitting the relationship between the parties. He, however, would contend that his mother late Ayesha Bi was not the owner and possessor of items 1, 2 and 4 of suit schedule properties; he purchased items 1 and 4 with his income but obtained sale deeds in the name of his mother as Benami; whereas he purchased item No.2 with his money in his own name; his mother and plaintiffs and defendants 2 to 7 have no right therein; after the death of their mother in the year 1968, he obtained municipal sanction on 04.11.1976 and constructed a building in item No.1 and living therein; item No.3 business is concerned, initially he was running hotel under the name and style '*Fair Cafe*' by obtaining licence in the name of his brother—Syed Raheem and later he closed the said business and started bakery business in the said premises by himself with his own earnings and thus his brother—Syed Raheem and his legal

heirs have nothing to do with the said business; his brother—Syed Raheem did not claim any partition during his life time and therefore, the plaintiffs who are his legal heirs were excluded from claiming partition as per their personal law. He prayed to dismiss the suit.

e) D2 to D7 filed a memo adopting the written statement of D1.

f) D8, the son of D1, who was subsequently added, also supported the claim of D1 by filing written statement similar to D1.

g) Basing on the above pleadings, the following issues were framed for trial:

1) *Whether item No.1 of the plaint schedule property is Matruka property?*
2) *Whether the plot at Khairthabad shown as item No.2 of the plaint schedule is property of first defendant and whether it was kept Benami in the name of late Aisha Bi?*
3) *Whether the plaintiffs are entitled to relief of division of plaint schedule properties?*
4) *Whether the plaintiffs are entitled to dissolution of partnership?*
5) *Whether the first defendant is liable to account?*
6) *To what relief?*

The following additional issue was framed on **03.08.1988.**

> *Whether the plea of Benami taken by the defendants in their statements is maintainable in view of the Benami Transactions (Prohibition of the right to Recovery Property) Ordinance, 1988 (No.2 of 1988)*

Additional issue framed on **13.03.1990**

> *Whether the plaintiffs are not entitled to the share of Matruka in view of the death of first plaintiff's husband?*

Additional issue framed on **09.04.1991**.

> *Whether the 8th defendant is the partner of the firm of first defendant. If so what relief can be granted against him?*

h) During trial, PW1 was examined and Exs.A1 to A5 were marked on behalf of plaintiffs. DWs.1 and 2 were marked and Exs.B1 to B10 were marked on behalf of defendants.

i) The judgment would show, the trial Court considering the facts and evidence, has recorded the findings that by virtue of Benami Transactions Ordinance 2/1988 it was no longer open for D1 to question the ownership of his late mother—Ayesha Bi in respect of items 1 and 4 of plaint schedule properties since the sale deeds in respect of those items admittedly stood in her name; even otherwise, by facts and evidence, it had to be held that the two properties were the self-acquired properties of Ayesha Bi and she was not a Benamidar of D1; item No.2 was concerned, it was admitted by the plaintiffs that the said property since stood in the name of D1, they were not claiming any right in that property; item No.3 business was concerned, since the documents produced from the Commercial Tax Department were showing that late Syed Raheem had 30% share in the business and as the partnership was dissolved on his death on 27.04.1984, the plaintiffs were entitled to 30% profits in item No.3 business from the date of suit till the date of death of Raheem i.e. 27.04.1984.

The trial Court accordingly passed a preliminary decree while dismissing the claim in respect of item No.2.

3) Challenging the decree and judgment, D1 filed appeal—CCCA No.52 of 1991.

a) He also filed three Civil Revision Petitions—CRP Nos.2852, 2853 and 2854 of 1995.

4) Pending appeal, appellant/D1 died and appellants 2 to 8 were brought on record as his legal representatives as per order dt.24.09.1993 in CMP No.13906 of 1993.

Like wise, pending appeal 3rd appellant died and appellant Nos.9 to 16 were brought on record as his legal representatives.

Initially the appellant showed R11 to R16/D2 to D7 as "*not-necessary parties*". However, as they proposed to file cross-objections to claim 59 shares, they filed CMP No.6109 of 1999 and requested the Court to treat them as "*effective parties*" and the said petition was allowed on 22.03.1999.

R11 died on 17.02.2004 and R12 to R16 who are her legal representatives, are already on record.

R16 died on 03.09.2002 and her legal representatives were brought on record as R18 to R26 as per Court order dated 31.10.2008 in CCCA MP No.727 of 2008.

R12 died on 17.08.2004 and his wife was added as R27 as per Court order dated 31.10.2008 in CCCA MP No.729 of 2008.

CCCAMP Nos.204 and 205 of 2016 are filed by the daughter of R12, who died on 17.08.2004, to implead her as Cross-objector No.17 in

the Cross-objections and R28 in the main appeal and this Court by order dt.14.06.2016 allowed those petitions.

5) The three CRPs. are concerned, it may be noted, pending appeal, on the request of appellants, this Court by its order dated 24.09.1991 in CMP No.12601 of 1991 had, initially granted stay of passing of final decree while permitting final decree proceedings to go on and directed the appellants to deposit suit costs. Later, respondents/plaintiffs filed CMP No.3885 of 1994 to vacate the stay and this Court passed a common order on 19.04.1994 in CMP Nos.12601 of 1991 and 3855 of 1994 directing that the Court below could determine *mesne* profits on the basis of report of Commissioner and thereafter the appellant had to deposit, one half of the amount to be determined by the Court below within the time granted by it and on such deposit it was open for the respondents/plaintiffs to withdraw the same without furnishing any security. Pursuant to the above order, the trial Court in its order dated 25.07.1995 in I.A.No.184 of 1991 in O.S.No.272 of 1989 determined the *mesne* profits on the basis of report of advocate commissioner and accordingly awarded Rs.1,56,123/- in favour of respondents/plaintiffs and directed the appellants to deposit one half of the said amount i.e. Rs.78,061.50 ps. within six weeks from the date of order. Challenging the said order the appellants herein filed CRP No.2852 of 1998.

a) It appears, during enquiry, the advocate commissioner examined PWs.1 and 2 but they were not cross-examined by appellants/defendants. Hence, they filed I.A.Nos.101 and 102 of 1994 in I.A.No.184 of 1991 to

reopen the matter and recall PWs.1 and 2 and permit them to cross-examine those witnesses. However, those two petitions were dismissed by the trial by a common order dated 24.04.1995. Aggrieved, the appellants filed CRP No.2853 of 1995 against the order in I.A.No.101 of 1994 and C.R.P.No.2854 of 1995 against the order in I.A.No.102 of 1994.

6) Then, Cross-Objections (SR) No.27079 of 1999 is concerned, the same was filed by R11 to R16/D2 to D7 aggrieved by the judgment of the trial Court holding that they were not entitled to any share. Their contention in cross-objections is that they are entitled to 59 out of 320 shares.

7) Heard arguments of Sri M.Papa Reddy, learned counsel for appellants; Sri O.Manohar Reddy, learned counsel for R1 to R10; Smt.C.Vani Reddy, learned counsel for R13 to 15; and Sri Nanduri Srinivas, learned counsel for R27. None appeared for R16 to 26 and 28.

8) The parties in the appeal are referred as they were arrayed in the Court below.

9 a) Challenging the judgment, learned counsel for appellants would firstly argue that the trial Court wholly misconceived the purport of Section 4 of Benami Transactions (Prohibition) Act, 1988 (for short 'Benami Act') and held that D1 was precluded from contending that his mother was only a Benamidar in respect of items 1 and 4 of plaint schedule properties and that he was the real owner. Learned counsel vehemently contended that those properties were in fact purchased by D1 from out of his earnings from his

hotel business long prior to advent of Benami Act and even the suit was also filed prior to the Act and therefore, he has every right to plead that sale transactions covered by items 1 and 4 were only benami in nature. In this regard, he relied upon the following decisions.

1. R.Rajagopal Reddy v. P.Chandrasekharan[1]

2. Samittri Devi v. Sampuran Singh[2]

Learned counsel further argued that if his contention that he could raise benami plea under the aforesaid circumstances is approved, on factual side the mother of D1 was only a housewife and had no properties or income of her own to acquire items 1 and 4, whereas D1 owned hotel business and had sufficient income and therefore, his contention that he purchased the properties with his monies can be believed and accepted. He relied upon the following citations on the aspect of burden of proof and mode of its discharge relating to benami plea.

1. Jaydayal Poddar v. Mst. Bibi Hazra[3]

2. Union of India v. Moksh Builders & Financiers[4]

b) Secondly, learned counsel would argue that the properties covered by items 1, 3 and 4 belonged to D1 was evident from the fact that his brother—Syed Raheem never claimed any share therein during his life time and therefore plaintiffs and R11 to R16/D2 to D7 who are his legal representatives, also cannot claim any share. In that view of the matter, the

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[1] AIR 1996 SC 238
[2] (2011) 3 SCC 556
[3] AIR 1974 SC 171
[4] AIR 1977 SC 409

suit is liable to be dismissed and also the Cross-objections filed by R11 to R16/D2 to D7. He thus prayed to allow the appeal and set aside the decree and judgment of the trial Court.

10 a) In oppugnation, while supporting the judgment, learned counsel for respondents 1 to 10, Sri O.Manohar Reddy, would argue that by virtue of Section 4 of Benami Act, D1 was debarred from contending that he was the real owner and his mother was only benami in respect of items 1 and 4 since the said Act was very much applicable to pending suits and hence his plea of benami cannot be entertained. Even assuming that he had right to raise such contention, the burden of proving sale transactions covered by items 1 and 4 were benami rests on D1. He cited the following decisions on the aspect of burden of proof.

1. Jaydayal Poddar v. Mst. Bibi Hazra (3 supra)

2. Bhim Singh v. Kan Singh[5]

3. Valiammal v. Subramaniam[6]

b) He argued that D1 miserably failed to discharge his burden inasmuch as, though he claimed that he purchased items 1 and 4 with the income from his hotel business, he could not prove that fact. In fact the hotel "*Fair Cafe*" stood in the name of his brother—Syed Raheem and therefore, D1 cannot claim that he raised funds from his own hotel business. Similarly, though he claimed that for construction of house in item No.1 and for purchase of item No.4 he obtained amount from his in-laws, he did not

[5] AIR 1980 SC 727 (1)
[6] AIR 2004 SC 4187 (1)

examine them in substantiation of his plea. Moreover, the sale deeds and even the house construction plan in respect of item No.1 also stood in the name of his mother. Above all, D1 could not explain as to why he purchased items 1 and 4 in the name of his mother when he purchased item No.2 much prior to those properties in his own name. Learned counsel argued that considering all the above facts, the trial Court rightly held that D1 could not prove that the sale transactions covered by items 1 and 4 were benami in nature.

c) Opposing the contention of the appellants that when late Syed Raheem did not claim any partition during his life time, his LRs. shall be deemed to be excluded, learned counsel argued that items 1 and 4 belonged to the mother of D1 and Raheem and as she died intestate, both the brothers succeeded her property in equal shares and therefore, right accrued on them is a vested right and similarly the bakery business is concerned, Syed Raheem had 30% share in it which is also a vested right and under Mohammedan law, if a legal heir dies before distribution of vested inheritance, it would pass on to his heirs and they cannot be excluded. On this proposition he relied upon the following decision:

Mt. Jawal v. Hussain Baksh[7]

Learned counsel thus prayed to dismiss the appeal.

11) Smt. C.Vani Reddy, learned counsel for Cross-objectors would argue that the trial Court erred in denying a share to R11 to R16/D2 to D7 on an

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[7] AIR 1922 Lahore 298

erroneous ground that they adopted the written statement of D1 and claimed no share. She would submit that they were cheated by D1 as he promised them to engage an advocate but he got filed a memo on their behalf adopting his written statement and due to that they innocently believed him and adopted his written statement without their knowledge. In spite of their adopting the written statement of D1, still they are entitled to 59 out of 320 shares for the reason that admittedly D2 to D7 are wife and children of late Syed Raheem who was held to have right in the suit properties and bakery business. When plaintiffs, who are the second wife and children were allotted share from out of the share of Syed Raheem, D2 to D7 are also entitled to be allotted their due share. She thus prayed to allow the Cross-objections.

12) In the light of above rival arguments, the points for determination are:

1) *Whether the appellants are entitled to raise the plea of Benami in respect of items 1 and 4 of pliant schedule properties in view of the provisions under Benami Transactions (Prohibition) Act, 1988?*

2) *If point No.1 is held in affirmative, whether the appellants could discharge their burden and establish that Ayesha Bi was only a Benamidar and D1 was the real owner of items 1 and 4?*

3) *Whether the bakery business covered by item No.3 was the exclusive business of D1 and plaintiffs have no share therein?*

4) *Whether the Cross-objectors are entitled to any share in the suit schedule properties?*

5) *To what relief?*

13) **POINT No.1**: The precise contention of the appellants is that D1 in fact had purchased items 1 and 4 under Exs.A1 and A2 sale deeds with the income earned from hotel business but he obtained sale deeds in the name of his mother—Ayesha Bi as she was the head of their family and therefore she was only a Benamidar. It is contended that since sale deeds covered by Exs.Ex.A1 and A2 and the suit—O.S.No.883 of 1984 (renumbered as O.S.No.272 of 1989) were all prior to the Benami Transactions Ordinance 2 of 1988 and Benami Transactions (Prohibition) Act, 1988, they are not hit by Section 4 of Benami Transactions (Prohibition) Act as the said section has no retrospective operation. He would mean, the said section has no application to the pending suits. Whether the appellants could raise the plea of benami in the wake of Benami Transactions (Prohibition) Act, 1988 again falls for consideration in the appeal as the trial Court disallowed such a plea to D1 by virtue of Benami Transactions Ordinance 2/1988 which was later replaced by Benami Transactions (Prohibition) Act, 1988.

a) Per contra, the contention on behalf of R1 to R10 is that Section 4 of the Act applies to pending suits also and thereby the appellants are precluded from contending that transactions are benami.

14) Hence, it is useful to extract Section 4 of the Act which reads thus:

> ***"Section 4: Prohibition of the right to recover property held benami. –***
> *(1) No suit, claim or action to enforce any right in respect of any property 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.*

(2) No defence based on any right in respect of any property held benami, whether against the person in whose name the property is held or against any other person, shall be allowed in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property.

(3) Nothing in this section shall apply –
(a) where the person in whose name the property is held is a coparcener in a Hindu undivided family and the property is held for the benefit of the coparceners in the family; or

(b) Where the person in whose name the property is held is a trustee or other person standing in a fiduciary capacity, and the property is held for the benefit of another person for whom he is a trustee or towards whom he stands in such capacity."

As can be seen, Section 4(2) of the Act precludes a person from raising a defence against the Benamidar or any other person. In the instant suit under appeal, since D1 defends the suit on the plea of benami, Section 4(2) of the Act is germane for consideration. Whether, Section 4 in general and Section 4(2) in specific is prospective or retrospective in operation is no more *res integra*.

a) In ***R.Rajagopal Reddy***'s case (1 supra), the three Judges Bench of Hon'ble Apex Court has expounded that Sec.4 of the Act is only prospective in operation. Section 4(1) of the Act is concerned, Hon'ble Apex Court made it clear that said provision is prospective in operation in the sense, no suit, claim or action contending that a transaction relating to a property is benami is maintainable after the advent of the Benami Transactions (Prohibition) Act, 1988. The Apex Court made it further clear that the said provision has a limited sphere of retrospectivity to the effect

that though a transaction took place prior to the advent of the Act, still, a suit or claim contending that the said transaction was benami cannot be instituted after the Act came into force. To this extent only, Sec.4 (1) of the Act was held retrospective. However, it was emphasized that if a benami transaction and institution of the suit, were both taken place prior to the advent of the Benami Transactions (Prohibition) Act, 1988, Sec.4(1) of the Act would have no application.

b) Then Sec.4 (2) of the Act is concerned, the Apex Court held thus:

> *"**Para 12**: So far as Section 4(2) is concerned, all that is provided is that if a suit is filed by a plaintiff who claims to be the owner of the property under the document in his favour and holds the property in his name, once Section 4(2) applies, no defence will be permitted or allowed in any such suit, claim or action by or on behalf of a person claiming to be the real owner of such property held benami. The disallowing of such a defence which earlier was available, itself suggests that a new liability or restriction is imposed by Section 4(2) on a pre-existing right of the defendant. Such a provision also cannot be said to be retrospective or retroactive by necessary implication. It is also pertinent to note that Section 4(2) does not expressly seek to apply retrospectively. So far as such a suit which is covered by the sweep of Section 4(2) is concerned, the prohibition of Section 4(1) cannot apply to it as it is not a claim or action filed by the plaintiff to enforce right in respect of any property held benami. On the contrary, it is a suit, claim or action flowing from the sale deed or title deed in the name of the plaintiff. Even though such a suit might have been filed prior to 19-5-1988, if before the stage of filing of defence by the real owner is reached, Section 4(2) becomes operative from 19-5-1988, then such a defence, as laid down by Section 4(2) will not be allowed to such a defendant. However, that would not mean that Section 4(1) and Section 4(2) only on that score can be treated to be impliedly retrospective so as to cover all the pending litigations*

in connection with enforcement of such rights of real owners who are parties to benami transactions entered into prior to the coming into operation of the Act and specially Section 4 thereof. It is also pertinent to note that Section 4(2) enjoins that no such defence "shall be allowed" in any claim, suit or action by or on behalf of a person claiming to be the real owner of such property. That is to say no such defence shall be allowed for the first time after coming into operation of Section 4(2). If such a defence is already allowed in a pending suit prior to the coming into operation of Section 4(2), enabling an issue to be raised on such a defence, then the Court is bound to decide the issue arising from such an already allowed defence as at the relevant time when such defence was allowed Section 4(2) was out of the picture.

Section 4(2) of the Act is concerned, the Apex Court observed that no defence that a transaction was a Benami shall be allowed for the first time after coming into operation of Section 4(2), but, if such a defence was already taken in a pending suit prior to the coming into operation of Section 4(2), then the validity of such a plea has to be decided by the Court. Basing on the above observation, the Apex Court overruled its earlier decision reported in ***Mithilesh Kumar vs. Prem Behari Khare***[8] which propounded a contra view.

c) In a subsequent judgement in ***Samittri Devi***'s case (2 supra), the Apex Court relied upon ***R.Rajagopal Reddy***'s case (1 supra).

15 a) When above precedential jurisprudence is applied to the facts of the case, the partition suit—O.S.No.883 of 1984 was filed on 06.07.1984 (renumbered as O.S.No.272 of 1989) claiming partition in respect of plaint schedule items 1, 2 and 3. D1 filed his written statement on 04.12.1984

[8] AIR 1989 SC 1247

contending that in respect of item No.1 his mother was only a Benamidar and he was the real owner. Item 2 is concerned, his plea was that he was the real owner and sale deed also obtained in his name. Item No.3 is concerned, he contended that he himself started the Bakery business. Since defence plea of benami in respect of item No. 1 was taken by D1 prior to Section 4 came into operation (as per Section 1(3) of Act, Section 4 came into operation w.e.f. 19.05.1988), the said plea was not hit by Section 4.

b) It may be noted that the plaintiffs got added item No.4 to the plaint schedule by virtue of order dated 08.09.1987 in I.A.No.243 of 1985 and claimed that they are entitled to a share in the said property because Ayesha bi was the owner of the said property also. Against this plea, D1 filed additional written statement on 21.06.1988 and in para-4(a) of his additional written statement, he took a specific plea that he in fact purchased item No.4 and his mother was only a Benamidar. Since the aforesaid defence plea of benami in respect of item No.4 was taken subsequent to Section 4 came into operation, he is debarred from taking such a plea in view of decision in ***R.Rajagopal Reddy***'s case (1 supra). Thus, in essence, D1 and the present appellants are entitled to take the plea of benami only in respect of item No.1 but not item No.4 of the plaint schedule. However, the trial Court on an erroneous appreciation of law, held as if D1 was debarred from raising the plea of Benami in respect of both items 1 and 4 which cannot be countenanced.

This point is answered accordingly.

16) **POINT No.2**: In view of finding in point No.1, it has now to be seen whether the appellants could able to establish that D1 was the real owner of the property covered by item No.1 and late Ayesha Bi was only a Benamidar thereof.

a) As already stated, both parties cited decisions on the aspect of burden of proof. The substance of those decisions is that the burden of proving that a particular sale is a benami and appellant/purchaser is not the real owner always rests on the person asserting it to be so. In deciding whether particular sale is a benami or not the Courts are usually guided by the circumstances viz. (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 relationship, if any, between the claimant and 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.

17) Admittedly, Ex.A1 (equivalent to Ex.B2) sale deed relating to item No.1 stands in the name of Ayesha Bi as its purchaser. D1's contention is that he in fact purchased item No.1, tin shed admeasuring area of 520 sq. yds. bearing Municipal D.No.6-3-611 situated at Khairtabad from Hidayat Ali Mirza and others under Ex.B2—sale deed dated 23.09.1963 but obtained the sale deed in the name of his mother as Benamidar and later constructed house in that property by removing the tin shed. Needless to emphasize that the burden of proof rests on him. No doubt, the original sale deed covered by Ex.B2 was produced by him in the Court showing his

custody of title deed. The source of income is concerned, his version in his evidence is that for purchasing item No.1 and later for construction of house thereon, he invested his own money but not the money of his mother. He deposed that he purchased the property in the year 1963 and for constructing the house he obtained permission from Municipal Corporation of Hyderabad in the year 1977 vide Ex.B1—plan in the name of his mother. It should be noted that though in his chief examination he claimed that he purchased item No.1 and later constructed house thereon with his own money, he did not elaborate as to how he secured the money. It was only in cross-examination he clarified that the sale consideration for Ex.B2 was paid by him out of the earnings from his hotel business. He admitted that he did not maintain any accounts for his small hotel. He stated in the cross-examination that he spent an amount of Rs.75,000/- for construction of house in item No.1 and he got the said amount from his in-laws. He admitted that he has not filed any document to show that he got the amount from his in-laws. So, the source of income is concerned, for purchase of item No.1 he allegedly utilised the income from his hotel business and for construction of a house thereon he secured Rs.75,000/- from his in-laws. The veracity of his submission has to be scrutinized with reference to his evidence and other attending circumstances.

a) According to him, initially he started a hotel by name Jafer Ali in 1952 and subsequently he closed the said hotel and started another hotel in the name of '*Fair Cafe*' in Khairtabad. He continued the said business upto 1978. He stated that since he was already running another hotel in

Khairtabad, he took the licence for '*Fair Cafe*' in the name of his brother—Syed Raheem since two licences cannot be granted in the name of same person. It may be noted at this juncture, item No.1 was purchased under Ex.B2 in the year 1963. So, if the version of D1 were to be true, he must have purchased item No.1 from the income secured from the hotel Jafer Ali. However, except his oral assertion, he did not produce any iota of evidence that, earlier he maintained a hotel—Jafer Ali. If he really maintained a hotel in his own name for a considerable period, it would not be difficult for him to produce documentary proof to that effect. Therefore, his claim cannot be accepted. Regarding construction of house in item No.1, D1 neither produced documentary proof nor examined his in laws to prove that he secured Rs.75,000/- from them. If really they invested money, generally they would insist him to obtain the municipal permission either in his name or in the name of his wife, but not in the name of his deceased mother. So, there is no reliable evidence to hold that D1 purchased item No.1 with his hotel income and constructed house thereon with the amount given by his in-laws. It is not out of place to mention here that admittedly D1 purchased item No.2 under Ex.B6 sale deed dated 18.02.1954 in his own name. Ex.B6 was long prior to Ex.B2. As rightly pointed out by trial Court, Ex.B6 would show that D1 was in the habit of acquiring property in his own name but not others. D1 did not explain as to why he purchased properties covered by items 1 and 4 in the name of his mother when he purchased item No.2 in his own name. From this, it can be inferred that late Ayesha bi was the real owner of item 1 and 4 and she was not just a Benamidar. It may be noted that the capacity of late Ayesha Bi

to acquire properties is concerned, PW1 deposed she acquired funds from the hotel Nafhez Cafe which was run by her in Begum Bazar from 1952. Of course, he did not produce any documentary evidence to that effect. Here it must be noted that the burden to show that the transaction covered by item No.1 was a benami was heavy on D1 and when he failed to discharge the same he cannot take advantage on the weakness of other side.

b) Sofaras possession of item No.1 is concerned, D1 admitted that his brother—Syed Raheem was residing in it till his death in the year 1984. His version was that he permitted his brother to reside in that house, as the doctor who was treating him was nearer to that house. Thus as per D1, his brother was only a licensee. As observed by trial Court, if really plaintiffs continued to reside in item No.1 after the death of Syed Raheem as licensees, D1 ought to have taken steps to evict them when according to him, they unjustly claimed partition. That he did not do so infers that Raheem and later his LRs. were residing in their own right. Therefore, point No.2 is concerned, it is held that appellants could not establish that D1 was the real owner of item No.1 and his mother was only a Benamidar.

This point is answered accordingly.

18) **POINT No.3**: This point is concerned, the claim of the plaintiffs is that D1 and Raheem started joint business under the name and style 'Fair Cafe' in item No.4 mulgies and later they stopped hotel business and converted the same as bakery-cum-tea stall under the name '*Bulaqi Kashmiri Bakery and Tea Stall*'. D1's contention is that since he had another hotel business, he obtained licence for 'Fair Café' in the name of

his brother and later he closed Fair Cafe and started Bakery-cum-tea stall and therefore, he is the exclusive owner of item 3 business.

a) Be that it may, Ex.A5—Check Memo, which is an application for registration under APGST and CST Acts submitted by D1 before the authorities would show, the licence for bakery business no doubt stands in his name, but, late Syed Raheem had 30% share therein as a partner. Therefore, it is preposterous for D1 to contend that plaintiffs had no share in item 3.

b) It is heavily contended that since Syed Raheem did not claim any share during his life time, his LRs. are deemed to be excluded from inheritance. This argument has no legs to stand for the reason that Syed Raheem had a vested right to an extent of ½ share in items 1 and 4 and 30% in item 3 business. Merely because he died without claiming share, his LRs. cannot be deprived of his share.

In ***Mt.Jawal***'s case (7 supra) it was observed thus:

> *"Under Mahammadan Law, a "vested inheritance" is the share which vests in a heir at the moment of the ancestor's death. If the heir dies before distribution, the share of the inheritance which has vested in him will pass to his heirs at the time of his death. The shares have to be determined at each death."*

Therefore, plaintiffs' right cannot be denied.

This point is answered accordingly.

So, from the findings under points 1 to 3, it is clear that plaintiffs have 101 out of 320 shares in Items 1, 3 and 4 of the plaint schedule properties.

19) **PONT No.4**: The cross-objectors are the first wife, children and other LRs. of Syed Raheem. Their case is that they are entitled to 59 out of 320 shares. The trial Court denied them any share in view of the fact that they adopted the written statement of D1 without claiming any share in the plaint schedule properties. I am afraid, this approach is not correct. It is true that in the suit D2 to D7 adopted the written statement of D1 without claiming any share for themselves. Their contention in the appeal is that they were cheated by D1 inasmuch he promised them to engage an advocate but got filed a memo in the Court as if they adopted his written statement. Be that it may, irrespective of the fact whether D2 to D7 were cheated or not, still by virtue of findings to the effect that Syed Raheem had half share in items 1 and 4 and 30% share in item 3, all his LRs. i.e. plaintiffs on one hand and D2 to D7 on the other are entitled to succeed him. Denying due share to D2 to D7 would mean, undue enrichment of D1 at their cost. This anomaly needs to be corrected to do justice to cross-objectors. Hence, it is held that the cross-objectors are entitled to 59 out of 320 shares in the plaint schedule properties.

This point is answered accordingly.

20) **CRP Nos.2852, 2853 and 2854 of 1995**: In these CRPs. the appellants challenged the report of advocate commissioner in final decree proceedings on the grounds that he had no right to take evidence and that they were not given opportunity to cross-examine PWs.1 and 2. At the outset, I find no merits in the CRPs. The trial Court in its orders has clearly mentioned that in commission warrant it has authorised the commissioner to compel the

evidence of the witness and production of documents and accordingly the commissioner examined PWs.1 and 2. The trial Court vividly mentioned how the appellants delayed mesne profits enquiry by their non-cooperation in spite of several notices issued by the commissioner and how the commissioner finally examined PWs.1 and 2. The trial Court thus found no merits in the petitions under revisions. It is held that impugned orders under revisions are immaculate and impregnable. Hence, the CRPs. are liable to be dismissed.

21) **POINT No.5**: In the result,

1) ***CCCA No.52 of 1991 and CRP Nos.2852, 2853 and 2854 of 1995*** *filed by the appellants/revision petitioners are dismissed.*

2) ***Cross-objections(SR) No.27079 of 1999*** *are allowed and the decree and judgment in O.S.No.272 of 1989 passed by the trial Court is modified to the effect that plaintiffs/ respondents 1 to 10 in the appeal are entitled to 101 shares; defendants 2 to 7/respondents 11 to 16 and 18 to 28 are entitled to 59 shares and defendants 1 and 8/ appellants 1 to 8 are entitled to 160 shares in Items 1, 3 and 4 of pliant schedule properties.*

3) *There shall be no order as to costs.*

As a sequel, miscellaneous applications pending, if any, shall stand closed.

U. DURGA PRASAD RAO, J

Date: 20.09.2016

Murthy/Scs