
(2004) 05 CAL CK 0026
In the Calcutta High Court
Case No : F.A. No. 185 of 1974

Ava Rani Sengupta and Others

APPELLANT

Vs

Laxmi Sengupta and Others

RESPONDENT

Date of Decision : 20-05-2004

Acts Referred:

Benami Transactions (Prohibition) Act, 1988 — Section 7
Civil Procedure Code, 1882 — Section 377
Civil Procedure Code, 1908 (CPC) — Section 66, 66(1)
General Clauses Act, 1897 — Section 6

Citation : AIR 2005 Cal 84 : (2004) 3 CHN 585

Hon'ble Judges : Tapan Kumar Dutt, J;Ajoy Nath Ray, J

Bench : Division Bench

Advocate : Sudhis Dasgupta, Jiban Ratan Chatterjee, Amit Kr. Pan, Sabyasachi Mondal and Aniruddha Chatterjee, for the Appellant; Siddhartha Chowdhury, Gora Chand Dey and Basudev Ghosh, for the Respondent

Final Decision : Dismissed

Judgement

Ajoy Nath Ray, J.—This is an appeal by the plaintiff from a decree of dismissal of their partition suit which was filed in 1963. The decree was passed in 1973.

2. Partition was claimed of about five cottahs of land on the basis that the parties to the suit were the heirs of one Kulalakshmi Sen who had bought the property at a Court sale in or about 1934; the said Kulalakshmi Sen died thereafter in the late 1930's.

3. Resistance to partition was put up by those defendants/respondents who are now the clients of Mr. Chowdhury. They were the sons of the eldest son of Kulalakshmi by her husband Biseswar. These resisting defendants put forward the claim that the property had been purchased benami and the real owner was Biseswar himself who had provided the purchase money, and who had gifted the property to them in 1967.

4. The suit was tried on evidence. Biseswar was fortunately alive at that time and

he gave evidence, although on commission taken at Allahabad; it is on record that the then learned Registrar of our Court sold in 1934 about eight cottahs of land, comprising also of the five cottahs in the present appeal for a total sum of Rs. 1,900/- only. Out of this Rs. 475/- was deposited on the date of confirmation of sale and the balance money was thereafter paid in time. Biseswar gave evidence that he worked in the postal department during his service career and that he sent the money under insurance, so that the purchase could be made. Mr. Dasgupta appearing for the appellant/plaintiffs was at pains to point out that there were serious discrepancies in the evidence about sending money, that Biseswar once said that he sent the whole amount and at another time said that he had sent only Rs. 1,400/-.

5. The fact remains that Biseswar did send the largest part of the consideration. The evidence also shows that at that time Biseswar's son-in-law Jiten wanted to buy part of the land and become a sharer therein, and as such, he provided Rs. 500/-.

6. As against this a son of Kulalakshmi gave evidence that he saw his mother carrying money in a box. Considering the entirety of the evidence the Trial Judge has accepted the case of Biseswar. It is impossible to upset that finding and enter a different finding in the Court of Appeal, holding that Biseswar was telling a complete set of lies about sending money.

7. We have examined the judgment under appeal and we find that the learned Judge has correctly enumerated the factors which determine benami. He has placed due importance on the factors of possession of title deed, possession of property, dealing with the property and such like. Biseswar also named the contractor who built the house on the property at his behest, his name being Pulinbehari Ghosh.

8. The benami aspect of the case, which was the main issue in the Court below did not pose much of a problem before us. Mr. Dasgupta, however, raised a new point in appeal and said that because of Section 66 of the CPC it would not be permissible for the respondents/defendants today to set up a case of benami against a Court sale; so as to defeat the plaintiffs claim for partition. The said section, as amended by the 1976 Act, is set out below :

"In Section 66 of the principal Act, in Sub-section (1) the following shall be inserted at the end, namely :

"and in any suit by a person claiming title under a purchase so certified, the defendant shall not be allowed to plead that the purchase was made on his behalf or on behalf of someone through whom the defendant claims ".

9. The decree being passed in 1973 and the amendment prohibiting the setting up of benami in defence being introduced only in 1976, a point arose whether such prohibition of 1976 would have to be taken into account by us in appeal. In this regard Mr. Dasgupta gave us the CPC (Amendment) Act, 1976 and placed

strong reliance on Section 97 Sub-section (3) of the said Act:

"97. (3) Save as otherwise provided in Sub-section (2), the provisions of the principal Act, as amended by this Act, shall apply to every suit, proceeding, appeal or application, pending at the commencement of this Act or instituted or filed after such commencement, notwithstanding the fact that the right, or cause of action, in pursuance of which such suit, proceeding, appeal or application is instituted or filed, had been acquired or had accrued before such commencement".

10. It is not necessary to set out Sub-section (2) wholly but it is common ground before us that the said Sub-section makes no mention of Section 66. Clause (g) of Sub-section (2) mentions Section 60 and then Clause (h) of the said Sub-section mentions Section 80. Section 66 which is in between is left out.

11. Thus, with the argument of Mr. Dasgupta is that the Court has to give effect to the 1976 Amendment in the pending appeal. In answer thereto Mr. Chowdhury submitted that that might be so, but after 1976 there has now come the Benami Transaction (Prohibition) Act, 1988. Section 7 of the said Act has repealed Section 66 of the Code, of Civil Procedure.

12. The said Section 7 of the Benami Transaction (Prohibition) Act, 1988 is set out below :

"7. Repeal of provisions of certain Acts.--(1) Sections 81, 82 and 194 of the Indian Trusts Act, 1882(2 of 1882), Section 66 of the Code of Civil Procedure, 1908 (5 of 1908), and Section 281A of the Income Tax Act, 1961 (43 of 1961), are hereby repealed.

(2) For the removal of doubts, it is hereby declared that nothing in Sub-section (1) shall affect the continued operation of Section 281A of the Income Tax Act, 1961, in the State of Jammu and Kashmir".

13. According to him, the substantive portions of law which were repealed, like those contained in the Trusts Act would have prospective effect as decided in the case of R. Rajagopal Reddy and Others (deceased by legal representatives) Vs. Padmini Chandrasekharan (deceased by legal representatives), especially at para 14 at page 643. This case has overruled the earlier contrary view given by the Supreme Court in Mithilest Kumari's case but as regards the mere procedural law, Mr. Chowdhury submitted that, the ruling of the Supreme Court would not apply.

14. Mr. Dasgupta answered this point by saying that although Section 66 is in the Code of Civil Procedure, yet it is not procedural law itself. He gave us the case of Guda Vijayalakshmi Vs. Guda Ramachandra Sekhara Sastry, and showed us a paragraph at page 1145 where the Supreme Court has stated about Section 11 of the Code. It has said that although it may be a rule of estoppel or a rule of evidence, yet it is more correctly viewed as substantive law. Accordingly, he argued that Section 66 is not procedural merely because it occurs in the Code of

Civil Procedure.

15. He gave us next the high authority of a Division Bench of three Hon''ble Judges of our Court sitting to resolve a dispute between two earlier Judges. The case is Promotha Nath Pal's case reported at 24 CWN page 1011. He showed us passages from page 1014 and particularly relied on a dictum of Sir Ashutosh at page 1076 where His Lordship pronounced Section 377 of the Code of 1882 as imposing a fetter on title.

16. It is not necessary to set out Section 377 in detail but we need merely point out that that Section was roughly the same as the first para of Section 66(1) of the present Code. By that Section the real owner was prohibited from claiming in a suit against the Court purchaser himself. The section, however did not go so far as to prohibit a claim against somebody who is claiming under the Court purchaser. Section 66 went that far in 1908, and in 1976 when even further to stop defences of benami just like claims of benami.

17. In our opinion, these changes in the Statute do not detract from the high authoritative statements in Promotha Pal's case. Those were followed in a later Division Bench presided over by His Lordship Hon''ble Justice Dr. Radha Binode Pal in the case of Sarat Chandra, reported at 47 CWN page 5446 (see pages 553 and 554). On the basis of these authorities there could be no doubt that Section 66 whether from the side of the plaintiff or from the side of the defendant puts a fetter upon title and is therefore in the nature of a substantive law affecting title itself.

18. On this view the repeal of Section 66 by Section 7 of the Benami Act can only be prospective. Moreover, Section 6 of the General Clauses Act, which prohibits curtailment of accrued rights, even in cases of repeal, would support the case of Mr. Dasgupta. That Section would be found dealt with in the case of M/s. Ambalal Sarabhai Enterprises Ltd. Vs. M/s. Amrit Lal and Co. and Another, . The net result is that Section 66 is a substantive right, it was made retrospectively applicable to appeals by the 1976 Act amending the Code; by reason of that amendment an accrued right came into being in favour of Mr. Dasgupta a clients at the date the Benami Act came into force; by reason of Section 6 of the General Clauses Act the repeal of Section 66 did nothing to the already accrued right of the appellants.

19. As a result, the written statement of the respondent which was filed in 1963 and was good then became bad after 1976. It was good in 1963 because Section 66 prohibited suits against Court purchasers or persons claiming under them although it did not then prohibit defences taken against suits by Court purchasers or those claiming under them. In 1976 this additional prohibition came. Because of this additional prohibition the written statement of 1963 became bad retrospectively some thirteen years after it was filed. In fact, the written statement of 1963 became as bad as if it had been filed, say, in 1993.

20. Apart from Section 66 being of a substantive nature, we would in this regard

be inclined to hold in favour of the appellant even if Section 66 were construed to be procedural. A recent English case of the House of Lords reported at 2003 Volume 4 All England Reports page 97 has dealt with the issue of retrospective legislation in detail. It is Mrs. Wilson's case. Their Lordships have consistently held that Court do not give retrospective operation because they try to avoid injustice and unfairness. In the present day, it would not be right to classify a Statute as substantive or procedural, and then mechanically say that the substantive enactment is prospective, and a procedural amendment is retrospective. On the other hand, the following dictum of Lord Justice Staughton is to be taken as a guiding rule; it was enunciated by His Lordship in the case of Secretary of State for Social Security v. Tunncliffe 1991(2) All ER 712 . We quote the passage as appearing in paragraph 19 of the judgment in Mrs. Wilson's case:

"This was well-identified by Staughton LJ in Secretary of State for Social Security v. Tunncliffe 1991(2) All ER 712:

"..... the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree - the greater the unfairness, the more it is to be expected that Parliament will made it clear if that is intended".

21. The passage has been quoted in more than one place in the judgment.

22. We would be inclined to hold that the bar of Section 66 is such an important bar, that even if it were procedural, it would require express words in a statute to make it retrospective. Otherwise, the result would be unjust and unfair. If Mr. Chowdhury's submission were to be accepted the repeal of Section 7 of the Benami Act would remove Section 66 from the Statute Book as if from 1908 itself; that would not be either just or reasonable.

23. On these grounds the appellants are certainly entitled to succeed as regards this point of theirs. But there is another problem which still states them in the face. Although the entire eight cottahs of land stood in the name of Kulalakshmi all through and still stands in her name, two registered deeds were executed in 1961 to both of which Biseswar was a party. By the first of the said two deeds a partition was effected as between Biseswar and his daughter named Sushila who is Jiten's wife, which Jiten had provided Rs. 500/- out of the total consideration in 1934; a division took place as between Biseswar and Sushila in the rough proportion of five cottahs to three. Sushila has since constructed a partition wall and house and is living there. These three cottahs of land were left out by the plaintiffs from their suit. If their case for partition is to be run logically to its extreme, then these three cottahs would also be encompassed in their claim but they have chosen to leave it out. The next registered deed, also executed in 1961 was made between Biseswar and the six sons of his eldest son Bijoy, out of

whom only Salil the original defendant No. 6 has died.

24. This deed of gift squarely covers the property claimed by the plaintiffs to be the joint property. It is a registered deed of gift. The plaint contains no claim for setting aside of this deed of gift. It is mentioned and pleaded and talked about by both the plaintiffs and the defendants in the suit.

25. An issue was framed in the Court below to the following effect:

Issue No. 4 :--"Is the suit maintainable without setting aside the deed of gift and without prayer for recovery of possession"?

26. The learned Judge in the Court below held as follows in the judgment:

"So, accordingly to him, Biseswar Sen, his father, had no right to dispose of the properties in favour of his grandsons, defendant Nos. 1 to 6, on the strength of the deed of gift. If it is found from the evidence and other circumstances on the record that the properties belonged to Kulalakshmi then certainly he will get a decree for his one-third share in the properties in suit even in the fact of the aforesaid deed of gift. In that event, it must be held that the deed of gift executed by Biseswar in favour of the defendant Nos. 1 to 6 void ab initio and a void deed need not be set aside. I, therefore, hold that this suit for partition is maintainable without a prayer for recovery of possession and also for setting aside the deed of gift".

27. We are afraid that we are unable to agree with the learned Judge in this part of the judgment. The deed of gift is in no manner void ab initio. In 1961, or in 1934 being respectively the years of gift, and of Court purchase, benami itself was not illegal. The purchase by Biseswar in the name of Kulalakshmi was neither illegal nor punishable by law. The deed of gift in 1961 purported to divest whatever title Biseswar had in himself in favour of his six named grandsons.

28. It is impossible, in our view, to hold that in 1961, Biseswar had no title to the land which is claimed by the plaintiffs for partition. In 1961, at the time of execution of the deed of gift, Biseswar could set up his benami in the written Statement. More importantly, so long as the parties don't come to a Court of law and so long as they do not put their case of benami either in the plaint or in the written statement, their title or the title of the real owner was in no way affected. They could very well execute a deed of gift or a deed of sale or obtain money by other dealings with the property bought in a benami in Court sale.

29. The result of this is, that the deed of gift of 1961 was not void ab initio and it was, if at all, voidable; whether it is voidable or not, whether it can be rescinded or cancelled on adjustment of it being voidable, even at this distance of time is an issue upon which parties have not fought this battle.

30. It is very helpful to look at it from another point of view. Let us suppose that the partition suit was not defended. Let us suppose that the plaintiffs, following the normal rules, bring before the Court, on their own, the Court purchase by

Kulalakshmi as well as the deed of gift executed by Biseswar. There would be no bar to that, because Section 66 does not prevent the plaintiffs from abiding by the law and does not in any manner encourage the plaintiff to suppress a deed, because mentioning it might make his case more difficult to prove or succeed in.

31. Once the deed of gift is before the Court, and the Court finds that Biseswar had some title, although a title with some fetter, then and in that event, the Court would not be able to pass a partition decree contrary to the deed of gift without first setting it aside.

32. Were it to embark upon the query whether the 1961 deed of gift is to be set aside or not, it would not be helped in answering that query in any manner by the provisions of Section 66. Section 66 prevents certain things being pleaded in the plaint or the written statement, by those who wish to maintain a case of benami even against a Court purchaser, and obtain an adjudication of title, even in cases of Court sale, from the Court, holding that benami exists. However, if the plaintiffs who seek to avoid benami are themselves compelled to bring in their pleadings a deed which was executed by a real owner claiming the Court purchaser to be a benamdar, then it cannot, of necessity or of certainty be said, that the deed of gift must necessarily be perished. After all, in 1961 Biseswar had the real purchaser's title to give by way of gift, the recipients of the gift were his own grandsons. If Section 66 is out of the way, the Court would have to rule upon the benami as per the law of benami itself.

33. At least the above is a very arguable point of law. If the point of law is arguable, not raising it at all in the plaint makes it vitally defective. A decree as per the plaint, if registered, would today be absolutely in conflict with the deed of gift of 1961 which is also registered. The plaintiffs were thus compelled to seek a cancellation of the deed if they intended to succeed. Since they did not do so their claim for partition must fail. Although no prayers for amendment in this regard are made before us, in our opinion, any amendment at this distance of time is impossible. The suit is of 1963 and the decree is of 1973. Moreover, a partition suit is normally not barred because an earlier partition suit has failed. If the plaintiffs today feel that they can claim the cancellation of the deed of gift of 1961, they are free to act in accordance with law or as they might be advised. For our part we would simply dismiss the appeal with costs. That is hereby done.

Tapan Kumar Dutt, J.

34. I agree.