
(2013) 07 RAJ CK 0092

In the Rajasthan High Court

Case No : Civil Second Appeal No. 198 of 1994

Bhagwat Lal and Prahlad Kumar

APPELLANT

Vs

Shiv Charan Lal and Shyam

RESPONDENT

Date of Decision : 17-07-2013

Acts Referred:

Citation : (2014) 1 CDR 112

Hon'ble Judges : Mohammad Rafiq, J

Bench : Single Bench

Advocate : J.P. Goyal, with Mr. Aditya Sharma, for the Appellant; Rajneesh Gupta, Counsel, for the Respondent

Final Decision : Dismissed

Judgement

Mohammad Rafiq, J.—This is plaintiff's second appeal directed against judgment and decree dated 08.02.1994 of the learned Additional District & Sessions Judge, Hindauncity, in Civil Regular Appeal No. 13/1992, whereby judgment and decree dated 07.02.1986 of the learned Munsiff & Judicial Magistrate, Hindauncity, in Civil Suit No. 26/1974 was set-aside, who had decreed the suit of the plaintiffs for possession and permanent injunction against the defendants in respect of a piece of land described as "chabootra" measuring 57" x 42" situated at Hindauncity, boundaries of which were described in the plaint. It was averred in the plaint that the disputed land was purchased by the plaintiffs from Shyam Sunder vide sale-deed dated 13.11.1962. They were put in possession of the same and since then they have been occupying the same. The parties are closely related to each other. The defendants, who are father and son, taking advantage of the close relationship with the plaintiffs, trespassed over the said land of "chabootra". Even when the plaintiffs forbade them to do so, the defendants on 27.05.1974 have erected over the land of "chabootra", structure of "pattore" and "dhalia" measuring 7" x 16" on the northern side adjacent to their house, and have installed a water tank on the southern side. Despite persistent request by the plaintiffs, the defendants were bent to further encroach the land by

putting construction. They have denied entry of the plaintiffs to the aforesaid "chabootra". They have stored stone slabs and other construction material on the disputed land. It was therefore prayed that possession of aforesaid "chabootra" be restored to the plaintiffs by evicting the defendants and they be restrained by issue of perpetual injunction from interfering with the possession of the plaintiffs and from encroaching upon the disputed land. The suit was contested by the defendants who filed written statement asserting that though the "chabootra" in dispute was purchased by defendant No. 1 from Shyam Sunder by registered sale-deed dated 01.11.1962 against sale consideration of Rs. 850/- but owing to certain special reasons, the defendants got the sale-deed executed in favour of the plaintiffs, who were their very close relatives. It was purchased by the defendant No. 1 at the insistence of his wife by investing his lifetime savings of Rs. 850/-. However, the disputed land was in possession of the defendants since the date of purchase and has throughout remained in their possession. The plaintiffs were never in possession of the disputed "chabootra". The disputed plot was purchased by the defendants because it was adjacent to their house. The construction material stored there at belonged to the defendants. It was pleaded that the alleged construction (pattore) was situated on the dispute land since 1964 i.e. even prior to date of purchase, which was always used for keeping the cattle by the defendants. The defendants cannot be said to be encroacher on their own land. The water connection was taken by the defendants from the water works department in 1974 and water tap is existing there.

2. In the additional pleas, it was pleaded that financial condition of the defendants was not very good. The defendant No. 1 had no residential house, therefore, they constructed a small house adjacent to the disputed "chabootra" by borrowing money. His debtors were threatening to get his house attached for the purpose of recovery of borrowed money. In the meantime, the disputed "chabootra", which was adjacent to his house, became available for sale and the defendants wanted to purchase the same but they did not want that it should be known to the debtors. Owing to these circumstances, the defendants instead of purchasing the "chabootra" in their name, got the sale-deed of the same registered in the name of plaintiffs. The plaintiff No. 1 was their close relatives being real brother of wife of defendant No. 1. The house of the defendants was mortgaged with the debtors. Entire expenses of the sale-deed were incurred by the defendants. The plaintiffs are therefore only "benamidar" of the defendant and they are not in possession of the disputed "chabootra" or any part thereof.

3. Learned trial court on the basis of pleadings of the parties, framed following issues,

1. Whether the plaintiffs purchased and got possession of the disputed "chabootra" on 13.11.1962 and have been in possession since then?

2. Whether the defendants installed pattore on or about 27.05.1974, and have encroached upon the disputed "chabootra" in or about February, 1975 by

erecting a wall towards its east-west side and started storing fodder and installed a tap and also started timber depot?

3. Whether the defendant No. 1 is benami purchaser of the disputed "chabootra" and is in possession in the capacity of owner?

4. Whether the plaintiffs have not paid sufficient court fee and the court does not have pecuniary jurisdiction to hear the plaint?

5. Relief?

4. Issue No. 4 pertaining to the court fee and pecuniary jurisdiction of the court was decided as preliminary issue. The learned trial court, vide order dated 24.01.1986, decided that issue in favour of the plaintiff, however, requiring them to pay certain court fees, which they did. Issue No. 3 was however decided against the defendants holding that they failed to prove that the disputed "chabootra" was purchased by way of benami transaction and the defendants were its actual buyer. Issue No. 1 regarding continuous possession of the defendants and issue No. 2 regarding trespass said to have been made by the defendants was also decided against the defendants. Consequently, the suit was decreed.

5. The learned first appellate court, however, by its judgment and decree dated 08.02.1994, decided these three issues against the plaintiffs and consequently dismissed the suit by reversing the judgment and decree of the trial court.

6. Shri J.P. Goyal, learned senior counsel appearing for the plaintiffs-appellants, argued that findings recorded by the learned first appellate court are perverse and erroneous. The learned first appellate court committed a serious error of law in holding that the relationship of the plaintiffs and the defendants stood on fiduciary capacity, therefore, the provisions of Section 4(3)(b) of the Benami Transaction (Prohibition) Act, 1988, applies to the present case. Aforesaid provision does not apply to the present case. Relationship of brother-in-law between the plaintiff No. 1 and defendant No. 1 does not stand on the fiduciary capacity, therefore, Section 4(3)(b) of the Act of 1988 does not come into picture. It cannot be held that the property purchased by the plaintiffs was held by him in the capacity of benami for the defendant-respondents.

7. Shri J.P. Goyal, learned senior counsel further argued that in common practice properties may be held benami by husband in the name of wife or vice-versa and by father in the name of son or vice-versa but relationship of brother-in-law cannot be treated on the same pedestal. Section 4(3) of the Act of 1988 therefore could not have been applied to the facts of the present case.

8. Shri J.P. Goyal, learned senior counsel further argued that Exhibit-3, sale-deed, has been executed by vendor Shyam Sunder in favour of present plaintiff-appellants. Therefore the plea of the defendants that it was purchased in a fiduciary capacity in the name of his brother-in-law does not inspire confidence. This is because the sale-deed was not registered only in the name of the plaintiff

No. 1, brother-in-law of defendant No. 1, but also in favour of the plaintiff No. 2, son of the plaintiff No. 1, which is quite uncommon in the case of benami transactions. Learned senior counsel for the appellants further argued that sale-deed and other documents were produced by the plaintiffs. The learned trial court rightly held on that basis that if the transaction would have been benami, there was no reason why the plaintiffs would be in possession of the original title documents. The very fact that he produced these documents before the trial court, goes to prove that he had actually purchased the disputed property by passing of the sale consideration. Learned trial court rightly held that had the property been purchased benami, a collateral document would have been certainly prepared between the parties. The defendants would have got a written document executed containing admission by the plaintiff about the transaction being benami. Besides that, the documents, namely, sale-deed (Exhibit-3), site-plan (Exhibit-4) and receipt of sale consideration (Exhibit-6) were all produced by the plaintiffs. When even the receipt was produced by the plaintiffs and in the receipt also there was no such stipulation as claimed by the defendants that the transaction was benami. No satisfactory explanation was given by the defendants as to how and why these documents were found in possession of the plaintiff. Learned senior counsel for the appellants therefore argued that defendant Shiv Charan himself was a witness to the sale-deed. The appellate court was wholly unjustified in reversing the finding by accepting statement of PW-5 wife of defendant No. 1, who stated that the plaintiff on a false pretext took these documents from her, and held that this is not uncommon in close relations. The learned appellate court reversed the findings without there being any basis at all by taking erroneous view of the matter.

9. Shri J.P. Goyal, learned senior counsel for appellants, argued that stand of the defendant before the trial court that he did not save persons with whom he had pledged his house to know about the transaction, therefore he did not want to purchase the disputed "chabootra" in his own name, lest his debtors would chase him for recovery, is hardly a convincing explanation. Learned counsel, relying on the judgment of the Supreme Court in Mithilesh Kumar and Another Vs. Prem Behari Khare, argued that as per aforesaid judgment, provisions contained in the Act of 1988 would even apply to earlier transactions. The Act has barred any benami transactions.

10. Per contra Shri Rajneesh Gupta, learned counsel for respondents, has opposed the appeal and submitted that the plaintiff has failed to prove by any evidence the source of money. DW-2 Rajaram in his statement has proved that the disputed "chabootra" was in possession of the defendants and DW-3 Gul Mohammad has also proved that building construction material (khanda) was unloaded there by him on the order of the defendant Shiv Charan. DW-4 Durgalal has also proved that the disputed "chabootra" was in possession of defendant Shiv Charan, where he was running timber depot and also had the construction material stored. Learned counsel submitted that the defendant No. 1 was very closely related to plaintiff; in that the wife of defendant No. 1 was real sister of

the plaintiff No. 1. There was thus fiduciary relationship between the parties and the first appellate court has rightly taken the view that provision of Section 4(3) of the Act of 1988 would apply. Angoori Devi is DW-5, wife of defendant No. 1, has proved that they are in possession of the land of disputed "chabootra" for last twenty years. The "chabootra" was adjacent to their house, therefore, they purchased the same. Structure of "pattore" was raised by them there two years after the purchase, which is used for keeping their cattle. The defendants then started running timber depot there. She stated that originally the sale-deed was lying with her for eight years but thereafter her brother plaintiff No. 1 Bhagwat Lal, had taken it from her because the neighbours of this land raised dispute and quarrelled with her. The sale-deed was required to prove as to who was the owner of this land. She was informed by the plaintiff that a suit would be filed against the said owner on the basis of sale-deed. At that time, her husband was not in the town, therefore, she approached her brother. The neighbour, who quarrelled with her, was Suraj Master. He was native of Paota and is now residing at Hindaun. The sale-deed was thus retained by the plaintiff No. 1, which continued to remain with him. Even when she demanded, Bhagwat Lal did not return it. Her husband came back 3-4 days thereafter. She did not immediately inform him about the quarrel and also the fact that she had handed over the sale-deed to Bhagwat Lal.

11. Learned counsel therefore submitted that the appellate court rightly reversed the judgment and decree passed by the trial court because statement of DW-5 Angoori Devi was quite convincing and at the time of dispute with her neighbour, she approached her brother and on his demand that he would file a suit against neighbour, handed over the sale-deed to him. There was nothing unusual in her conduct. Learned counsel argued that the provisions of Section 4(3)(b) can very well be applied to the present case because there was fiduciary relationship between the parties. It is contended that Angoori Devi (DW-5) has stated that it was she who had given money for purchase of the disputed land therefore if the sister has given money to her own brother, it cannot be said that there was no fiduciary relationship between the two. In any case, the suit was filed in the year 1974, much before the enforcement of the Act of 1988. Bar contained therein would not apply to past transactions.

12. This appeal was admitted on 10.04.1996 for hearing on the following substantial questions of law contained in memo of appeal:--

- i) Whether a plea of BENAMI is available to the defendant-respondents after coming into force of Sections 3 and 4 of the Benami Transaction Prohibition Act, 1988?
- ii) Whether the appellants admittedly have purchased the disputed property vide registered sale deed Ex. 3 then the defence is barred by the provisions of Section 4(1) and 4(2) of the Act, 1988?
- iii) Whether the brother-in-law of the defendant-respondents stands on a

fiduciary capacity as such the provisions of Section 3(b) and Section 4 of the Act, 1988 are applicable to the facts of the present case?

iv) Whether the judgment passed by the First Appellate Court suffers from an error of law and the mandatory provisions of Order 41 Rule 33 CPC?

13. Question No. 1 whether after coming into force of Sections 3 and 4 of the Act of 1988 the plea of Benami is available to the defendant-respondents, is no longer res-integra in view of three-Judge-Bench judgment of the Supreme Court in R. Rajagopal Reddy and Others (deceased by legal representatives) Vs. Padmini Chandrasekharan (deceased by legal representatives), While differing from earlier two-Judge-Bench judgment in Mithilesh Kumari, supra, it was held therein that the Act was prospective in nature and it has no retrospective operation excepting certain observations made in respect of some cases, it was categorically held that Section 4(1) would not apply even to such pending suits, which were already filed and entertained prior to the date when the Act came into force

14. Contention that the Act has the effect of destroying the existing right of the defendant in connection with the suit property, cannot be sustained in the face of the clear language of Section 4(1). It has to be visualized that the legislature in its wisdom has not expressly made Section 4 retrospective. Then to apply it retrospectively by necessary implication to hold that Section 4 would have retrospective effect and would even cover pending litigations filed prior to coming into force of the section, would amount to taking a view which would run counter to the legislative scheme and intent projected by various provisions of the Act. It is, however, true, as held by the Supreme Court, that on the express language of Section 4(1), any right inhering in the real owner in respect of any property held benami would get effaced once Section 4(1) operated, even if such transaction had been entered into prior to the coming into operation of Section 4(1). In view of the above, it was held that no party can thereafter set up a plea of benami.

15. Question whether the plaintiff-appellants have purchased the disputed property by registered sale-deed (Exhibit-3) then the defence is barred by provisions of Section 4(1) and 4(2), must be clear from the ratio of three Judges Bench judgment of the Supreme Court in R. Rajagopal Reddy, supra. The Supreme Court in that case held that the legislature in its wisdom has nowhere provided that no suit, claim or action pending on the date when Section 4 came into force, shall be proceeded with and shall stand abated. On the contrary, intention of legislature is clear from the word "no such claim, suit or action shall lie", meaning thereby no such suit, claim or action, shall be permitted to be filed or entertained or admitted to any court for seeking such a relief after coming into force of Section 4(1). The real owner, cannot stake their claims regarding benami transactions after Sections 4(1) and 4(2) of the Act came into operation, whether they come as plaintiffs or as defendants.

16. Certain exceptions are however carved out in Sub-section (3) of Section 4 of

the Act, which have to be dealt with while considering the next question, which is the third question formulated in the appeal, whether the brother-in-law of the defendant-respondents stand on a fiduciary capacity as such the provisions of Section 3(b) and Section 4 of the Act of 1988, are applicable to the facts of the present case? Plaintiffs-appellants Bhagwat Lal and Prahlad, father and son respectively, filed the suit for recovery and possession as also the perpetual injunction. Defendant-respondents Shiv Charan Lal and Shyam, who are also father and son, contested their claim. Shiv Charan Lal, happens to be husband of real sister of appellant No. 1 Bhagwat Lal.

17. Now the question arises whether exceptions contained in sub-section 3 of Section 4 would be applicable and whether this matter would be covered by exceptions contained in sub-section 3 of Section 4? In order to better appreciate the controversy, it would be appropriate to reproduce the aforesaid provision:--

4. Prohibition of the right to recovery 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.

18. First two sub-sections of Section 4 inter-alia provides that 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. Conversely, 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. Sub-section (3), however, provides that nothing contained in this Section shall apply where the person in whose name the property is held is a co-parcener in a Hindu Undivided family and the property is held for the benefit of the co-parceners in

the family; and further 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.

19. What is argued on behalf of the defendant-respondent is that the property was held by the plaintiff Shiv Charan Lal in fiduciary capacity because he happens to be his wife's real brother. Question therefore arises whether one brother-in-law for another would stand in fiduciary capacity. The Supreme Court in *Sri Marcel Martins Vs. M. Printer and Others*, considered the import of the word "fiduciary relationship" vis-?-vis "fiduciary capacity", and relying on its earlier judgment in *Central Board of Secondary Education and Another Vs. Aditya Bandopadhyay and Others*, of the report, held thus:--

39. The term "fiduciary" refers to a person having a duty to act for the benefit of another, showing good faith and candour, where such other person reposes trust and special confidence in the person owing or discharging the duty. The term "fiduciary relationship" is used to describe a situation or transaction where one person (beneficiary) places complete confidence in another person (fiduciary) in regard to his affairs, business or transaction (s). The term also refers to a person who holds a thing in trust for another (beneficiary). The fiduciary is expected to act in confidence and for the benefit and advantage of the beneficiary, and use good faith and fairness in dealing with the beneficiary or the things belonging to the beneficiary. If the beneficiary has entrusted anything to the fiduciary, to hold the thing in trust or to execute certain acts in regard to or with reference to the entrusted thing, the fiduciary has to act in confidence and is expected not to disclose the thing or information to any third party.

20. After considering the previous case law on the subject, it was thus held in *Marcel Martins, supra* that the expression "fiduciary capacity" may not be capable of a precise definition. It implies a relationship that is analogous to the relationship between a trustee and the beneficiaries of the trust. The expression is in fact wider in its import for it extends to all such situations as place the parties in positions that are founded on confidence and trust on the one part and good faith on the other. In determining whether a relationship is based on trust or confidence, and whether they stand in a fiduciary capacity, the Court shall have to take into consideration the factual context in which the question arises; for it is only in the factual backdrop that the existence or otherwise of a fiduciary relationship can be deduced in a given case.

21. In the present case, the plaintiff No. 1 was indeed closely related to the defendant No. 1, if not by blood, at-least through his wife, who was plaintiff's real sister. Angoori Devi (DW-5), the sister of the plaintiff No. 1 and wife of defendant No. 1, has supported the case of the plaintiffs. She has stated that the disputed house was purchased by them through Shyam Sunder for a sale consideration of Rs. 850/-. She gave the money to Shyam Sunder. Plaintiff No. 1 Bhagwat Lal was her brother and plaintiff No. 2 Prahlad was her nephew.

Therefore, believing them, the defendants got the sale-deed registered in their name. Reason that was given therefor, was that her husband Shiv Charan Lal was indebted to many persons and therefore he did not want this to come in open that he has purchased the disputed property from his own money. She stated that the sale-deed in favour of the plaintiff was only exhibitory and not real. The plaintiffs were never in possession of the disputed "chabootra". Land of the "chabootra" was adjacent to their house and the building construction material stored there belonged to the defendants. In cross-objection also, she stated that since the plaintiff was her brother, defendant did not deem it necessary to get any separate document written from him. In view of the facts as noticed above, therefore, it has to be held that the plaintiffs stood in a fiduciary relationship in so far as the defendant Shiv Charan Lal was concerned.

22. The next and last question is whether the judgment passed by the first appellate court suffers from any error of law and mandatory provision of Order 41 Rule 33 CPC has been correctly applied. In fact, it is the most crucial question, though strictly speaking, pertain to appreciation of evidence produced before the court. What is to be seen is whether the learned first appellate court was justified in reversing the judgment and decree passed by learned trial court. The learned trial court concluded that sale-deed (Exhibit-3) is registered in favour of the plaintiff and defendant No. 1 Shiv Charan Lal was one of the witness to it. If at all the disputed property was purchased Benami by the defendants in favour of the plaintiff, nothing prevented them to get a separate document written from the plaintiff so that this transaction could be proved to be Benami. Moreover, the sale deed (Exhibit-3), site-plan (Exhibit-4) and receipt of the sale-deed (Exhibit-6) were all produced by the plaintiff and further that the stand of the defendant that in those days they owed huge money to the people, therefore they did not want this transaction to make public by getting the sale-deed registered in their own name, did not inspire confidence. The learned trial court has held that in so far as the suit for injunction filed by the plaintiff is concerned, the plaintiff not being in actually possession, could not be maintained.

23. The learned first appellate court, however, on the basis of the evidence especially Exhibit-1, receipt issued by the Municipal Board and Exhibit-3 License issued for running saw mill held that the defendants were in possession of the property since 1973. The defendant was running a timber depot from this land and that he had taken the water connection in 1994. The learned appellate court has relied on and referred to the statement of DW-5 Angoori Devi, who has asserted that it was she who gave Rs. 850/- to the plaintiff No. 1, her brother. As regards the original title documents being found in possession of the plaintiff, the learned first appellate court has held that the plaintiff had taken away the original sale-deed from her on the pretext of filing injunction suit against adjoining plot holder, who had quarreled with Angoori Devi (DW-5). The learned first appellate court has held that in view of the provisions of Section 4(3)(b), the plaintiff stands in fiduciary relations with the defendant because he was his brother-in-law, being brother of his wife, and therefore, even if this land was

purchased by him benami in his name, the bar contained in Sections 3 and 4 would not apply to such a plea being set up by the defendant in view of the provisions contained in Section 4(3)(b). The findings recorded by the appellate court cannot be said to suffer from any such legal infirmity as may be warranted interference of this court. In the opinion of this court, the defendant has been able to prove his possession and that the disputed "chabootra" was situated adjacent to their house and that it was Angoori, sister of the plaintiff, who actually gave the money to the plaintiff to purchase the disputed land and that Angoori has explained the reason why the original title sale-deed was with the plaintiff by stating that he had taken away the original sale-deed and the receipt when the dispute arose with their neighbour. And when this neighbour quarrelled with them, he assured that he would get an injunction suit filed against him and for that purpose he told Angoori Devi that he would need the original sale-deed and receipt for filing such suit.

24. In the facts of this case, as per the settled proposition of law that the Act of 1988, being perspective in nature, even otherwise, there would be no impediment for the defendants in setting up a plea that the disputed property purchased by them, was held benami by the plaintiff on their behalf because such plea was set up by them in a suit filed in 1974, much before the Act of 1988 came into force. Moreover, the plea of the defendants is that they purchased the same in the name of the plaintiffs because they were closely related to them and owing to which reason the parties had mutual faith and confidence in each other, no dispute having arisen between them till then. Alternatively, therefore, even if the Act of 1988 is held applicable, then also Section 4(3)(b) saves the right of the defendant to set up such plea because the plaintiffs are placed in fiduciary capacity vis-?-vis the defendants. In view of the above discussion, I do not find any merit in this appeal and it is accordingly dismissed with no order as to costs.