

(1987) 07 CAL CK 0007
In the Calcutta High Court
Case No : Appellate Decree No. 1250 of 1970

Chittabala Kundu and Others	Vs	APPELLANT
Sailen Behari Paul and Others		RESPONDENT

Date of Decision : 15-07-1987

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Evidence Act, 1872 — Section 167
Income Tax Act, 1961 — Section 281A
Transfer of Property Act, 1882 — Section 41

Citation : 92 CWN 398

Hon'ble Judges : Ajit Kumar Nayak, J;A.M. Bhattacharjee, J

Bench : Division Bench

Advocate : Ranjit Kumar Banerjee and Bijitendra Nath Mitra, appellate Decree No. 1250 of 1970, Rahindra Nath Mitter and Anath Nath Mondal, appellate Decree No. 481 of 1972, for the Appellant;Mukul Prakesh Banerjee and Tapas Kumar Mukherjee for the Respondents Nos. 1(1) and 1(2), Appellate Decree No. 1250 of 1970, Mukul Prakesh Banerjee, Tapas Kumar Mukherjee and Sanat Kumer Seal for the Respondents Nos. 1(1) and 1(2), Appellate Decree No. 481 of 1972, for the Respondent

Final Decision : Dismissed

Judgement

A.M. Bhattacharjee, J.—Both the appeals arising out of a common judgment were heard together and are being disposed of by this common judgment. The suit giving rise to these two appeals was filed for a declaration that the suit-property standing in the name of one of the defendants was the benami property of the plaintiff and for a further declaration that the transfers of portion of the suit-property between the defendants inter se were malafide, sham and void. One would seldom hold out another to be the owner of his property, but for some oblique mundane purposes and not just to enable him to count the beads of his rosary or to chant the holy scriptures. His hands, more often than not, are unclean and he should not, therefore, have been entitled to any equity or any other forensic protection. But the courts in India, including our pre-independence

as well as post-independence apex courts, far from frowning upon them, have approved benami transactions as legal and valid. Authors of such transactions, therefore, merrily go on enjoying their benami properties except in cases Covered by Section 115 of the C:\Documents and Settings\ahj\Desktop\Rs-B1320-2012\WB870427.COQ.htm Act or by Section 41 of the Transfer of Property Act. As a result of operation of the provisions of these two Sections, such a person would not be allowed to assert his title against a person to whom he has represented his benam-der to be the real owner and who, acting on such representation, has altered his position and also against persons, who are transferees for value from the benamdar and have acted in good faith after making reasonable enquiries. It is only in 1972 (and better late than never) that the authorities concerned have shown their effective awareness of the menace of benami transactions and in order to put check thereon have inserted Section 281A in the Income Tax Act, 1961 with effect from 15.11.1972. That Section now provides that where a property is held benami, any person claiming to be the real owner of such property is restrained from enforcing his claim in a court of law unless the income, if any, from such property has been disclosed in his returns of income or such property has been disclosed in his return of net wealth or notice in the prescribed form with prescribed particulars in respect of the property has been given to the Income Tax Officer. This should go a very long way to put a stop to benami transactions, because once the author of the benami shows the property or its income as his own in his tax-returns, the veil of benami would at once stand withdrawn. But the suit giving rise to these two appeals having been filed in 1960, the provisions of Section 281A, inserted in 1972, would not be attracted and need not detain us.

2. The law relating to benami, which is well settled for about a century, may be said to demonstrate in the field of law the philosophical Vedantic doctrine that the apparent is not the real which is very often shrouded by the veil of the apparent. According to that law, even though one is recorded as the owner of a property in all the relevant records, some one also would still be allowed to overturn the apparent veil of the records and to assert to possess the real title. The authorities on the point are galore and reference may be made by way of illustration to one of them being the decision of the Supreme Court in Jaydayal Poddar (Deceased) through L.Rs. and Another Vs. Mst. Bibi Hazra and Others, . It has been pointed out by the Supreme Court in that case (supra, at 172) that though the question whether a particular property is benami or not is largely one of fact and for determining that question no absolute formulae or acid test can be laid down, yet in weighing the probabilities and for gathering the relevant indicia, the courts are usually guided by these circumstances : - (1) the source of consideration money, (2) the nature and possession of the property, (3) motive, if any, for giving the transaction a benami colour. (4) the position of the parties and the relationship, if any, between the claimant and the alleged benamdar, (5) the custody of the title deeds and (6) the conduct of the parties concerned in dealing with the property. The above indicia are not exhaustive and their efficacy varies

according to the facts and circumstances of each case, but nevertheless the source of consideration money is by far the most important test for determining whether the property standing in the name of one in reality belongs to another.

3. We must at once state that both the courts below have unmistakably demonstrated their full awareness of the tests noted above: but applying these tests to the materials on record, the two courts have come to contrary conclusions. For example, while the trial court has held that the plaintiff has failed to establish that the consideration for the property was paid by him, the first Appellate Court has held that it has been sufficiently and most satisfactorily proved that the plaintiff paid the consideration and the benamdar defendant no. 1 neither paid nor had the means to pay the same. As to the motive for the benami, while the trial court has found no adequate explanation for the purchase of the property by the plaintiff in the benami of the benamdar the defendant no. 1, the Appellate Court has been inclined to hold that there is believable explanation therefor. As to the custody of the various title deeds, while the trial court has decided the question against the plaintiff, the Appellate Court has held that the plaintiff having produced one of the two title deeds and also the draft thereof corrected by the drafting lawyer, the question cannot be decided against him. And as to the question of possession by the plaintiff, while the trial court has found no convincing evidence of possession by the plaintiff the Appellate Court found the evidence as to the plaintiff's possession to be most satisfactory.

4. It is trite to say that second appeal is not meant to provide a third trial on facts and that if the two courts below differ, however profoundly, in their appreciation of evidence and determination of questions of facts, it is not for the second Appellate Court to say who is right and who has gone wrong. It would be platitudinous to say that conclusions on facts are beyond the reach of a second Appellate Court u/s 100 of Civil Procedure Code, even as it stood before the Amendment of 1976, unless those are based on "no evidence" at all or are results of no consideration of material evidence. The judgment of the first Appellate Court apply demonstrates detailed consideration of the evidence on record and the learned Counsel for the appellants have not been able to show that any materially relevant evidence has been overlooked or that any part of it is based on no evidence.

5. The first Appellate Court having found the plaintiff to be the real owner and the defendant no. 1 to be benamdar was required to and did consider the impact of Section 41 of the Transfer of Property Act in order to decide as to whether the other defendants, being the transferees, mediate or immediate, from the Benamdar, were entitled to the protection of that Section. u/s 41 of the Transfer "of Property Act, a transfer from or by a benamdar is not voidable on the ground that the benamdar transferor had no real title to transfer provided that "the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, had acted in good faith". The trial court has held that even assuming that the defendant no. 1 was the benamdar of the plaintiff and

was thus merely an ostensible owner, the plaintiff can not avoid the operation of Section 41 of the Transfer of Property Act and that" the purchasers-defendants being bonafide purchasers for value without notice of the real title in spite of reasonable enquiry on their part, were entitled to all the protections under that Section. The Appellate Court, however, on a detailed consideration of the materials on record, has come to the conclusion that those materials unmistakably show all the transfers to be sham and fraudulent and to be the entirely lacking in good faith. A finding as to a transaction being sham or fraudulent or as to the presence or absence of good faith on the part of the transferee is obviously a finding of fact unassailable in second appeal unless, as already noted, the same is based on no evidence or has been arrived at without any advertence to the material evidence on the point. We do not find that any finding of fact has been arrived at by the Appellate Court without any evidence to that effect and the first Appellate Court must have the final say as to whether the evidence was sufficient to sustain the findings.

6. It has, however, been urged on behalf of the appellants that the first Appellate Court has omitted to consider a very material piece of evidence, being the record-of-rights, Exhts. B1 series and therefore its findings are liable to be interfered with. We do not, however, take it to be the law that a judgment becomes vulnerable in second appeal merely because it has overlooked or omitted to consider even an otherwise important piece of evidence, unless it can further be shown to the satisfaction of the court that such evidence, if considered, could have (to borrow from Section 167", Evidence Act), varied the decision. The decision of the Supreme Court in *Radha Nath Seal (dead) by his legal representatives Vs. Haripada Jana and Others*, , so strongly relied on by the learned Counsel for the appellants, is never an authority for such a broad proposition that non-consideration simpliciter of material evidence would, by itself, warrant intervention in second appeal whether or not consideration of such evidence was likely to materially affect the ultimate decision. Even under the wider provisions of Section 100 of the Code of Civil Procedure, as it stood before the 1976-Amendment, the second Appellate Court would not overturn the decision of the first Appellate Court solely on the ground of non-consideration of even otherwise important evidence, unless consideration of such evidence would have had altered the decision. Now, even if the record-of-rights were there in favour of the benamdar, a mere inspection of such records is not sufficiently reasonable enquiry for the purpose of Section 41, Transfer of Property Act and a transferee who acts on such records only as evidence of title of his transferor can not be said to have acted in good faith within the meaning of Section 41 and, if any authority is necessary for this view, reference may be made to the decision of Nagpur High Court in AIR 1952 106 (Nagpur) . In our view, therefore, mere failure to refer to or even to consider this piece of evidence by the first Appellate Court would not justify our intervention in second appeal.

Having thus found no ground to interfere, we dismiss both the appeals with costs and as a result the judgment and decree of the first Appellate Court would stand

affirmed.

Ajit Kumar Nayak, J.

I agree.