

(2013) 08 BOM CK 0050

In the Bombay High Court

Case No : Appeal From Order No. 283 of 2013 with Civil Application No. 341 of 2013

Hanif Gulamali Somji and Others

APPELLANT

Vs

Purnima Agro Projects Pvt. Ltd. and Others

RESPONDENT

Date of Decision : 28-08-2013

Acts Referred:

Benami Transactions (Prohibition) Act, 1988 — Section 2(a), 3(1), 3(3), 4, 4(1)
Companies Act, 1956 — Section 256, 260, 283, 284, 397

Citation : (2013) 6 ALLMR 522 : (2014) 3 BC 103 : (2014) 3 BomCR 145 :
(2013) 6 MhLj 185

Hon'ble Judges : Roshan Dalvi, J

Bench : Single Bench

Advocate : Amit Borkar, for the Appellant; Uday Warunjikar A/w. Mr. V.B. Tapkir, for the Respondent

Judgement

Roshan Dalvi, J.

Rule. Made returnable forthwith.

1. The appellants/plaintiffs challenged a sale deed dated 10th February, 2012 executed by defendant No. 3 company on the basis of a power of attorney dated 5th March, 2010 executed in favour of defendant No. 1 company by the defendant No. 2 as a Director of defendant No. 3. The defendant No. 2 is also a Director of defendant No. 1. The appellants/plaintiffs claim to be owners of the suit property under a sale deed dated 5th July, 2007 executed in favour of the appellants/plaintiffs by the initial landowners as vendors. The defendant No. 3 company claims rights under a development agreement executed by the plaintiffs in favour of defendant No. 3 dated 25th April, 2008. The defendant No. 3 seeks to further sell the suit property to third parties. The plaintiffs applied for injunction in that behalf which has been refused under the impugned order of the learned VI Joint Civil Judge Senior Division, Nashik dated 22nd February 2013, which is challenged in this appeal. It has been the grievance of the plaintiffs that

the defendant No. 2 who was made additional Director in defendant No. 3 company removed plaintiff No. 1 as the Director of defendant No. 3 without following the legal process in that behalf and has executed the power of attorney as also the sale deed on behalf of defendant No. 3 in favour of defendant No. 1 in which company also he is a Director. The plaintiffs' case of ownership is sought to be made out under the sale deed dated 5th July, 2007. The plaintiffs claim to have paid consideration of Rs. 75 lakhs to the vendors under the sale deed.

2. It is argued on behalf of defendants/respondents that the consideration was not paid by the plaintiffs. In order to see this aspect the parties have produced their bank statements. The plaintiffs claim to have paid consideration under clause 11 of the sale deed dated 5th July, 2007. Rs. 75 lakhs are shown to be paid by nine separate cheques/demand drafts on 3rd May, 2007, 4th July, 2007 and 1st August, 2009. The first three demand drafts of Rs. 3 lakhs each are accepted to have been paid by another company Zerostart Trading Pvt. Ltd. incorporated by plaintiff No. 2 and his wife on 17th June, 2006 and in which they were Directors. In that company defendant No. 2 was inducted as additional Director on 10th August, 2006. However his election was not confirmed in the next AGM of that company.

3. The other three cheques dated 4th July, 2007 shown to have been paid from the individual account of plaintiff No. 2 to the vendors. The plaintiffs have shown one debit entry of Rs. 22,01,124/- from the individual account of plaintiff No. 2 by way of a transfer by pay order on 4th July, 2007. This amount represents the total of the three payments shown to be made on 4th July, 2007 to the vendors.

4. However the defendants have shown that on 4th July, 2007 itself Rs. 25 lakhs came to be paid by Zerostart Trading Pvt. Ltd. in favour of plaintiff No. 2. There is an entry of Rs. 25 lakhs shown by way of transfer debited to the account of Zerostart Trading Pvt. Ltd. on 4th July, 2007. No such credit is shown in the account of plaintiff No. 2 on 4th July, 2007. The pay orders have been issued by the banker of plaintiff No. 2, the Ratnakar Bank Ltd., debiting the account of plaintiff No. 2.

5. The further three cheques issued on 1st August, 2007 to the vendors are also shown debited to the account of plaintiff No. 2 totalling to Rs. 45 lakhs. The defendants have shown the debit entry of Rs. 45 lakhs from the account of Zerostart Trading Pvt. Ltd., by way of transfer in favour of defendant No. 3 company on 26th July, 2007. However the individual bank account of plaintiff No. 2 shows Rs. 45 lakhs being credited to his account on 27th July, 2007 which has been later debited into the account by way of the three cheques issued in favour of the vendors debited on 2nd August, 2007.

6. The bank statements of the Plaintiffs show consideration paid by the Plaintiff. The sale deed is made in favour of Plaintiffs. The Plaintiffs claim title. The Plaintiffs are seen to be the owners of the property. The Defendants have claimed that the Plaintiffs cannot be taken to be the owners and cannot have

rights of ownership. This would go against the Plaintiff's title reflected in the sale deed dated 5th July, 2007. It would have to be seen whether the defence of the Defendants that the Plaintiffs are not the real owners militates against the Benami Transactions (Prohibition) Act, 1988 (The Act) u/s 3(1) of which benami transactions are prohibited and U/s. 3(3) of which punishment for entering into such transaction is prescribed. U/s. 4 of the Act even the right to recover the property held benami is prohibited. This would be the right to recover the property in a suit or a defence raised in respect of the property held benami in the WS. The relevant part of the Section 4 runs thus:

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.

7. Mr. Borkar on behalf of the Defendants relied upon the legislation to claim that Plaintiffs cannot claim rights in the suit property as they hold the property benami from Defendant No. 3. The Plaintiffs have claimed rights under the sale dated 5th July, 2007 and have further shown the payment of consideration of Rs. 75 lacs upon the court's query. The Plaintiffs have not claimed that they held the property benami. The Defendants have claimed that the property does not rightly belong to the Plaintiffs but was purchased out of the funds of the Defendant No. 3 on 5th July, 2007. The Plaintiffs were entitled to deal with the property which they have done under the development agreement in favour of Defendant No. 3. Defendant No. 3 would have rights as specified in the development agreement.

8. Mr. Borkar claimed that the Plaintiffs cannot claim title in respect of the property as such claim would be barred U/s. 4 of the Benami Transactions Act. The Plaintiffs' title is clear under the sale deed dated 5th July, 2007. The fact that the money paid under the sale deed was of Defendant No. 3 is recited in the development agreement dated 25th April, 2008. Defendant No. 3 would, therefore, be the real owner who would not be entitled to enforce any right in respect of the suit property held benami by the Plaintiffs in whose name the suit property is held. It is not possible to accept that the Plaintiffs cannot sue in respect of the property which stand in their names. Similarly, Defendant No. 3 cannot raise the defence against the Plaintiffs in whose name the suit property is held in the suit by the Plaintiffs claiming to be the real owners of such property. Consequently the reliance placed by Mr. Borkar upon the Benami Transactions Act for the suit filed by the Plaintiffs as the owners showed in the document is seen to be misconceived.

9. u/s 2(a) of the Benami Transactions Act, a Benami Transaction is defined as a transaction in which a property is transferred to one person for a consideration paid or provided by another person. In this case the suit property is claimed by the Defendants to have been transferred to the Plaintiff for the consideration paid by Defendant No. 3. Hence the suit transaction would be a benami transaction which is prohibited U/s. 3(1) of Benami Transaction Act and consequently the right to recover the property by Defendant No. 3 held benami by Plaintiffs is prohibited U/s. 4 of the Act. Had Defendant No. 3 filed the suit to claim a property the suit would have been barred U/s. 4(1) of the said Act.

10. The Plaintiffs have sued for enforcing their rights as owners in respect of suit property. The Plaintiffs are the owners on record. If the suit property is held benami by the Plaintiffs and the consideration is actually paid by Defendant No. 3, such a defence cannot be raised by Defendant No. 3 against the Plaintiffs in whose name the suit property is held U/s. 4(2) of the Act. The Plaintiffs suit would not be dismissed. The Plaintiffs claim cannot be rejected. In view of prohibition of benami transactions the Plaintiffs as the owners shown on record must be taken to be the owners and the Court would not be entitled or enjoined to consider the claim of Defendant No. 3 as the party who is stated to have provided the consideration which was actually paid by the Plaintiffs to original land owners.

11. In the case of Duvuru Jaya Mohana Reddy and another Vs. Alluru Nagi Reddy and others, , a suit came to be dismissed by the High Court upon seeing that the Plaintiff had not paid the consideration in respect of the suit transaction. Pending the suit the Benami Transactions Act came into force. In view of the prohibition U/s. 4(2) of the Act it was held by the Supreme Court that the suit could not have been dismissed by the High Court on the view that the transaction was a benami transaction and the judgment of the High Court was set aside and the decree of the lower Court was restored.

12. In the judgment in the case of Ratanlal Bansilal and others Vs. Kishorilal Goenka and others, , the Full Bench of the Calcutta High Court considered the plea of benamidar. It was contended that that the benamidar executed a deed of release under which he conveyed his right, title and interest in the suit property. It was held that that argument ran counter to the fact that he was benamidar of the partnership firm of another party. It was observed that when a party claims that it is he real owner, and the ostensible owner is the benamidar, the benamidar could not convey the property by the deed of release. Prior to the act coming into force he would not have any right, title and interest in the property which he got conveyed. Hence the deed of release was a mere declaration and mere declaration on his part that he as benamidar having no right and interest in the property could not operate as conveyance. Hence it was held that such deed executed by benamidar was of no consequence. However, after the coming into force of the Act the party in whose name the property stands would alone have the right since benami transactions are prohibited. Consequently the party who

may have paid consideration but who is not shown as the purchaser upon such consideration cannot claim any right against the party in whose name property is purchased and held.

13. Mr. Borkar relied upon the judgment in the case of R. Rajagopal Reddy and Others (deceased by legal representatives) Vs. Padmini Chandrasekharan (deceased by legal representatives), to contend that the suit would not be maintainable under the Benami Transactions Act. The contention is wholly contrary to the Act and the mischief it seeks to prevent.

14. Paragraph 10(2) at page 639 of the judgment shows that the purport and meaning of Section 4(2) of the Act thus:

It means that once a property is found to have been held benami the real owner is deprived of such defence against the person in whose name the property is held or any other person.

15. In paragraph 10(3) it is further explained thus:

It is the benamidar in whose name the property stands, and law only enabled the real owner to recover the property from him which right has now been ceased by the Act. In one sense there was a right to recover or resist in the real owner against the benamidar. Ubi jus ibi remedium. Where the remedy is barred, the right is rendered unenforceable.

16. In the case of Heirs of Vrajlal J. Ganatra Vs. Heirs of Parshottam S. Shah, it has been observed that the question whether a particular sale is benami or not is question of fact which would depend upon the intention of the parties who paid the purchase money. It is held that the burden of proof is on the person who asserts the benami transaction. It is also observed that if it shown or proved that the purchase money came from a person other than the recorded owner (ostensible owner), there would be a presumption, though rebuttal in some cases, that the purchase was for the benefit of the person who supplied the purchase money.

17. In this case upon the execution of the agreement dated 25th April, 2008 by the Plaintiffs the fact that the money came from Defendant No. 3 is seen. It does not have to be proved. However in view of the various disputes between the parties how the purchase was made for the benefit of Defendant No. 3 who supplied the money would have to be seen. Even if that is so, the fact that the purchase was made benami in the names of the Plaintiff though required for the benefit of Defendant No. 3 would enjoin the Court to disregard the benefit that Defendant No. 3 would claim. Defendant No. 3 must abide the prohibition U/s. 3(1) of the Benami Transactions Act and in fact be liable for punishment thereunder upon its case and upon showing in the document that its money was utilised for purchase of the property not in its own name but in the name of others, being the Plaintiffs.

18. Consequently Defendant No. 3 who claims to be the real owner of the

property because it claims to have provided the finance for the purchase of the property by the Plaintiffs would contend that the Plaintiff holds the property benami for Defendant No. 3 and therefore, cannot sue against Defendant No. 2. That is the whole purpose of the Act. Prior to the Act the real owner could sue for declaration that the person in whose name the property is held holds it as a benamidar and for consequential reliefs. That right has become enforceable. Similarly the real owner cannot put up a defence that the person in whose the name property is held holds it as a benamidar and hence not entitled to reliefs in respect of the property. Since the Plaintiffs are seen to be the owner of the property the Court cannot accept the claim of any other party as owners of the suit property consequent upon the Benami Transactions Act.

19. Under the said agreement the three Plaintiffs in the suit as land owners, recited to be seized and possessed of and entitled to suit land purchased under the sale deed dated 5th July, 2007 (4th July, 2007) with the money of the developer Defendant No. 3, entrusted the development of suit property to Defendant No. 3 as the developer for the same consideration being Rs. 75 lacs. Hence Defendant No. 3 is shown to have paid the Plaintiffs Rs. 75 lacs which is the consideration set out in the sale dated 5th July, 2007 under the development agreement. Defendant No. 3, as the developer, was given the sole and exclusive right to develop the suit property in accordance with law, plans and specifications and be entitled to transfer it to third parties free from all encumbrances and defects in the title of the Plaintiffs as the land owners shown thereunder. The Plaintiffs acknowledged the receipt of the consideration of Rs. 75 lacs which was paid by Defendant No. 3 on behalf of the Plaintiffs to the earlier land owners under the sale deed dated 5th July, 2007. In a hand written portion of the said agreement, on Pg. 8 thereof, it is covenanted that Defendant No. 3 as the Director would not adversely affect the title or interest of the Plaintiffs as the land owners and that possession was given to Defendant No. 3 only on license basis and that the Defendant No. 3 shall not sell the property on "as is where is basis" and shall develop the suit land. Further in a later clause the developer has been entitled to transfer the suit land on "as is where is basis" and also enter into various agreements for sale in respect of the constructed units.

20. A reading of the agreement shows that in clauses 1 and 4 of the agreement the sole and exclusive right of Defendant No. 3 as the developer to develop the property and also to transfer the same on "as is where is" basis as also to enter into agreement for sale in the units constructed thereon is specified. In between these two claims and at the end of clause 1 of the agreement a handwritten portion is inserted to state that Defendant No. 3 has been given possession only as licensee and would not be entitled to sell the property ("on as is where is basis") but shall only develop the suit land. The handwritten portion is, therefore, after as also before the aforesaid two typed written portions. The agreement is signed by Plaintiff No. 2 on behalf of himself and Plaintiff Nos. 1 and 3. It is also signed by Plaintiff No. 2 on behalf of Defendant No. 3. It is also signed by him as authorised signatory of Plaintiff No. 1 on behalf of Defendant

No. 3.

21. There has been some controversy about the interpretation of the documents with regard to handwritten portion and the typed written portions. Both parties have contended what portion would take precedence over which other portion. However, those aspects would have to be considered in the suit upon the cross examination of the parties with regard to the typing as well as writing of that document. In the Notice of Motion the right of either party in respect of the suit property is denied by the other upon denial of the title itself. The authority of Defendant No. 3 to execute the Power of Attorney dated 5th March, 2010 and sale deed dated 10th February, 2010 is challenged by the Plaintiffs in view of lack of authority of Defendant No. 3 in selling the suit property under the handwritten covenants and despite the entitlement to transfer it to any third party free from all encumbrances and the defects in title of the Plaintiffs.

22. It appears that the parties have incorporated private limited companies and have thereafter had disputes. The first incorporated company is Zero Start Trading Pvt. Ltd. incorporated on 7th June, 2006 by Plaintiff No. 2 and his wife. Defendant No. 2 was made additional Director on 10th August, 2006. This appointment as Director made under the provision contained in Section 260 of the Indian Companies Act, 1956 would require to be confirmed in the later Annual General Meeting (AGM) as per section 256 of the Companies Act. The later AGM was held on 20th September, 2007. Defendant No. 2 was not confirmed. Consequently U/s. 283 of the Companies Act Defendant No. 2 vacated his office as such Director. The payment of Rs. 9 lacs was made by Zerostart Trading Pvt. Ltd. on 3rd May, 2007 on which date Defendant No. 2 was its additional Director. The claim of the Plaintiffs that the amount of Rs. 9 lacs was paid by the Plaintiffs albeit from another account from another company of the Plaintiff would have to be tested in the trial given that the Defendant No. 2 was appointed additional Director along with Plaintiff No. 2 and his wife and had continued as such on the date of the payments.

23. It is the case of the Plaintiffs that after the Plaintiffs entered into development agreement with Defendant No. 3, which agreement was signed by Plaintiffs on behalf of both the parties, Defendant No. 2 gave notice of removal of Plaintiff No. 2 and his wife as Director of the company on 26th February, 2010. He is stated to have been removed on 27th February, 2010 U/s. 284 of the Companies Act without complying with any of the provisions of Section 284 of the Companies Act in that behalf. The Plaintiffs claim that this removal is clearly illegal. No special notice as required by law was given to the Plaintiffs and the representation of Plaintiff No. 2 was not made or taken into account. The Plaintiffs contend that only Form 32 stated to have been filed with the Registrar of Companies (ROC) is produced to show that Plaintiff No. 2 have been removed as Director of Defendant No. 3.

24. There have been proceedings between the parties alleging oppression and mismanagement of Defendant No. 3 Company under Sections 397 & 398 of the

Companies Act before the Company Law Board (CLB).

25. Plaintiff No. 2 and Defendant No. 2 have been Directors in the two aforesaid companies at various times. There have been disputes between them. They have been appointed and removed at will and contrary to the provisions of Companies Act. There has been dispute before the CLB also which is pending. Pending the suit as also the other disputes between the parties, therefore, the Court must protect the property of the Plaintiff against the creation of third party rights.

26. The learned 6th Jt. Civil Judge, S.D., Nashik under the impugned order dated 22nd February, 2013 has rejected the Plaintiffs application for injunction restraining Defendant No. 2 on behalf of the Defendant No. 1 or their constituted Power of Attorney from creating third party rights, interest and alienating the suit property pending the suit. The learned Judge has recited purchase of the property under the sale deed dated 5th July, 2007 for consideration of Rs. 75 lacs recited to be with the money of Defendant No. 3. The learned Judge has also considered the handwritten and typewritten portions of the development agreement dated 25th April, 2008 and the effect of clauses incorporated in the agreement and rejected the plaintiffs claim in view of the agreement for development as also entitlement of transfer recited in clauses 1 and 4 of the agreement which are respectively before and after the handwritten portion disallowing the sale of the property and allowing only the development of the property as licensees to Defendant No. 3. The conclusion upon the law relating to interpretation of documents is seen not to be appropriate at the interim stage and before evidence of the parties is recorded.

27. In view of the above the impugned order of the learned Judge is required to be and is set aside. There shall be an order of injunction against Defendants in the suit restraining them from alienating, encumbering, transferring or creating any third party rights in the suit property until the disposal of the suit.

28. Rule is accordingly granted. Appeal from Order as also Civil Application are disposed off accordingly.