

(2006) 02 MP CK 0084
In the Madhya Pradesh High Court
Case No : First Appeal No. 145 of 1993

Jagdish Prasad Agrawal and another	Vs	APPELLANT
Raj Kumar s/o Radheshyam Agrawal and another		RESPONDENT

Date of Decision : 08-02-2006

Acts Referred:

Benami Transactions (Prohibition) Act, 1988 — Section 2, 3, 4
Civil Procedure Code, 1908 (CPC) — Section 96
Contract Act, 1872 — Section 56
Specific Relief Act, 1963 — Section 22

Citation : (2006) 2 MPLJ 603

Hon'ble Judges : Sugandhi Lal Jain, J

Bench : Single Bench

Advocate : S.P. Khirwadkar, for the Appellant; D.R. Vishwakarma, for the Respondent

Final Decision : Dismissed

Judgement

S.L. Jain, J.

Invoking appellate jurisdiction of this Court u/s 96 of the Code of Civil Procedure, 1908, appellants Jagdish Prasad Agrawal and Ganga Bisen Agrawal have filed this appeal calling in question the correctness, legality, validity and propriety of the judgment and decree dated 4-2-1993, passed by find Additional District Judge, Chhindwara in Civil Suit No. 61-A/88 dismissing their suit for Specific Performance of Contract.

The brief facts of the case lying in a narrow compass and relevant to the decision of this appeal are act to be dilated hereunder :-

Appellant/plaintiffs filed a suit for Specific Performance of the Contract of sale of a house situated at Chhindwara stating that plaintiff No. 2/appellant No. 2 is the father of appellant No-1/plaintiff No. 1. They are the proprietors of a grain shop known as Nathmal Harchand Agrawal. One Gomaram Agrawal was the adopted

son of late Seth Narshinghdas Agrawal who among other properties owned a plot and a house thereon in the New Extension Area, Chhindwara. Said Gomaram entered into an agreement with the plaintiffs on 18-12-1986 agreeing to sell the said suit house in favour of plaintiff No. 1 for a consideration of Rs. 30,000/- . It was agreed that the plaintiff will pay him Rs. 10,000/- at the time of agreement and the balance amount of Rs. 20,000/- will be paid at the time of registration of the sale deed which was agreed to be executed by him on 31-12-1987. But on agreement being written and read over to him, said Gomaram insisted on payment of Rs. 11,000/- . Accordingly the figure of Rs. 10,000/- was corrected as Rs. 11,000/- in the document. This correction was countersigned by Gomaram. Thus, a sum of Rs. 11,000/- was paid to Gomaram at the time of execution of the agreement. It is alleged in the plaint that plaintiff No. 2 wanted to purchase the suit property in the name of his son-plaintiff No. 1.

The plaintiffs averred that they were always ready and willing to perform their part of the contract by paying the balance consideration of Rs. 19,000/- . The plaintiffs in furtherance of performance of their part of the contract paid a further sum of Rs. 5,000/- to said Gomaram on 20-1-1987. A sum of Rs. 4,600/- was paid through cheque drawn on the Punjab National Bank and a sum of Rs. 400/- was paid in cash towards balance consideration.

Said Gomaram all of a sudden died on 7-4-1987 Gomaram was issueless and had left no heirs.

It is alleged in the plaint that defendants No. 1 and 2 are claiming themselves to be the heirs of deceased Gomaram and also inter-meddling with the estate of the deceased and thus they are the legal representatives of deceased Gomaram. The plaintiffs served a notice dated 17-9-1987, calling upon the defendants No. 1 to 3 to execute the sale deed in furtherance of the agreement executed by deceased Gomaram, but they refused to specifically perform the contract. A correction notice was also served on defendants on 15-10-1987. The plaintiffs have also stated that they deposited in the trial Court balance consideration of Rs. 14,000/- less costs of the suit.

The suit was contested by defendants No. 1 and 2, denying the facts that any agreement to sell the suit house was executed by Gomaram. They admitted that they are the legal representatives of deceased Gomaram. It was also stated by defendants No. 1 and 2 that the transaction in question is admittedly Benami transaction which is prohibited under the provisions of Benami Transactions (Prohibition) Act, 1988 (henceforth, "the Act" for short).

The trial Court framed as many as five issues and recorded a finding that the transaction in dispute is a Benami transaction which is prohibited by the Act. However, the trial Court decreed the plaintiffs' suit for the refund of amount of Rs. 11,000/- received by Gomaram as part consideration with interest @ 6% per annum from the date of the filing of the suit till the date of realization.

As the relief of specific performance of contract was refused, the appellants have

filed this appeal.

I have heard Shri S. P. Khirwadkar, counsel for appellants and Shri D. R. Vishwakarma, counsel for respondents and perused the record of the trial Court.

Learned Counsel for the appellants vehemently submitted that the plaintiffs had always been ready and willing to perform their part of contract. In furtherance of the agreement, they paid a sum of Rs. 4,600/- by a cheque and a sum of Rs. 400/- in cash, but the trial Court wrongly recorded a finding that the sum of Rs. 5000/- was not paid. The counsel argued that Ganga Bisen, PW-5 has specifically stated that a cheque of Rs. 4,600/- was given to Gomaram and a sum of Rs. 400/- was paid in cash. PW-4, Rhaise Ahmad was also examined to prove the encashment of the cheque. The trial Court wrongly disbelieved the evidence of these witnesses.

The contention is not acceptable. The trial Court disbelieved the evidence of the plaintiffs with regard to the payment of Rs. 5,000/- on the basis of the evidence of PW-1, Navmilwar.

This witness has stated that the cheque in question was a bearer cheque and the amount can be received by any person bearing the cheque.

The trial Court on the basis of the comparison of the signatures of Gomaram recorded a finding that the signatures of Gomaram on the back of the cheque, Ex. P-2 do not tally with his signatures put on Exs. P-3 and 9.

The trial Court found that appellants did not insist for any receipt while giving the cheque or making the payment of Rs. 400/- . No signature of Gomaram was obtained on the counter of the cheque and, therefore, rightly disbelieved the claim of the plaintiffs that amount of Rs. 5,000/- was paid to Gomaram after the execution of the agreement.

Learned Counsel for the appellants also submitted that the agreement in question was executed on 18-12-1982. On this date the Act was not in force. The Act contains no specific provisions making its operation retrospective.

The contention is not acceptable. The term Benami Transaction is defined in Clause (A) of section 2 of the Act as any transaction in which property is transferred to one person for a consideration paid or provided by another person. It has been specifically pleaded in the plaint that the consideration was paid by plaintiff No. 2 Ganga Bisen while the agreement in question was executed in favour of plaintiff No. 1 Jagdish Prasad. The plaintiff No. 2 in his evidence before the trial Court also stated that the consideration was paid by him and the agreement was executed in favour of his son Jagdish. As the agreement was in favour of one person for a consideration paid or provided by another person, the transaction is certainly Benami. The Act is a piece of prohibitory legislation and it prohibits Benami transactions subject to stated exceptions and make such transactions punishable and also prohibits the right to defences against enforcing Benami transactions.

As a result of the provisions of the Act all the properties held Benami at the moment of the Act coming into force may be affected irrespective of their beginning duration and origin. This will be so even if the legislation is not retrospective but only prospective. The intention of legislature is clear that section 4 of the Act prohibits the institution of the suit or preferring of claim or action to enforce any right, the real owner in Benami transaction is having in respect of any property standing in the name of Benamidar. Therefore, after the coming into force of the Act the agreement of Benami transaction cannot be enforced by the Court. Even if the date of the agreement was prior to the commencement of the Act, the date of the execution of the sale deed will be after the commencement of the Act. An agreement to sell entered into prior to the coming into force of the Act cannot be enforced through Court after coming into force of the Act. Hence, the trial Court committed no error in refusing the specific performance of the agreement by which the property was to be transferred to Jagdish for a consideration paid or provided by another person Ganga Bisen as the Benami Transactions have been prohibited by the Act.

The counsel for the appellants also submitted that the property was purchased for the benefit of the son and the transaction cannot be said to be Benami.

The contention is not acceptable. The exceptions have been given under sub-section (2) of section 3 of the Act and apply only on the purchase of the property by any person in the name of his wife or any unmarried daughter. Sub-section (2) does not apply to a son, therefore, purchase of property in the name of son has not been exempted.

Learned Counsel for the respondent submitted that the trial Court committed error in directing the refund of earnest money and in granting interest thereon. Sub-section (2) of section 22 of the Specific Relief Act specifically provides that no relief of refund of any earnest money or deposit paid or made can be granted by the Court unless it has been specifically claimed.

The contention is not acceptable for two reasons; firstly, because at the time of agreement the Act was not in force and Benami Transactions were permissible. It was after the Contract that the Benami Transactions have become unlawful, therefore, provisions of section 56 of the Contract Act applies. According to section 56 promisor is under an obligation to make compensation to the promisee for any loss which such promisee sustained through the nonperformance of the promise. Therefore, the trial Court committed no error in calling upon the promissory to refund the consideration paid and secondly, the respondent has not challenged the decree either by cross appeal or by raising cross objections. The decree against the respondent has become final and the same may not be interfered with at the instance of the respondent.

The upshot of the above discussion is that the trial Court committed no error in refusing the Specific Performance of the Contract. The conclusion recorded by the trial Court is defensible and I do not find any reason to interfere with the

same. The appeal is sans merit and the same is dismissed. Costs as incurred.