

(1992) 07 OHC CK 0024

In the Orissa High Court

Case No : Civil Revision No. 521 of 1991

Keshab Chandra Nayak

APPELLANT

Vs

Laxmidhar Nayak and Others

RESPONDENT

Date of Decision : 17-07-1992

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 9

Contract Act, 1872 — Section 25

Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972 — Section 4(4), 51

Specific Relief Act, 1963 — Section 31

Transfer of Property Act, 1882 — Section 53(2)

Citation : AIR 1993 Ori 1 : (1992) 74 CLT 539

Hon'ble Judges : B.L. Hansaria, C.J.; P.C. Misra, J.; L. Rath, J

Bench : Full Bench

Advocate : B.H. Mohanty, for the Appellant; R.N. Sutar, for the Respondent

Judgement

Hansaria, C.J.—This reference to the Full Bench has been made by a learned single Judge to decide whether the view expressed principally in *Kailash Chandra Sahu v. Mahani Charan Mohanty* 62 (1988) CLT 261, by a learned single Judge of this Court which was approved by a Division Bench of this Court in *Ramachandra v. Suresh Chandra* 1988 (I) OLR 185, that consolidation authorities have no jurisdiction to decide a question relating to benami nature of transaction is correct or not.

2. To answer the reference, it would be apposite at the very outset to know what is meant by a "benami" transaction, as it would appear from what is being stated later that, in fact, there is no clash in the view taken in the aforesaid decisions and the one which the learned Judge making the reference had taken in Civil Revision No. 351 of 1983 (*Hruda-nanda Panda v. Dhirendra Behura*, disposed of on 30-4-1985), which view, the learned Judge felt is correct despite what was held in the aforesaid two decisions. The discussion to follow would show that both the views are correct and can stand together, if note is taken about what is

really meant by "benami" transaction.

3. The word "benami" really denotes two classes of transactions which differ from each other in their legal character and instance. The following passage from paragraph 14 of *Thakur Bhim Singh (Dead) by Lrs and Another Vs. Thakur Kan Singh*, , brings out the distinction between the two classes of transactions at page 732:--

"Two kinds of benami transactions are generally recognised in India. Where a person buys a property with his own money but in the name of another person without any intention to benefit such other person, the transaction is called benami. In that case, the transferee holds the property for the benefit of the person who has contributed the purchase money, and he is the real owner. The second case which is loosely termed as a benami transaction is a case where a person who is the owner of the property executes a conveyance in favour of another without the intention of transferring the title to the property thereunder. In this case, the transferor continues to be the real owner. The difference between the two kinds of benami transactions referred to above lies in the fact that whereas in the former case there is an operative transfer from the transferor to the transferee though the transferee holds the property for the benefit of the person who has contributed the purchase money, in the latter case, there is no operative transfer at all and the title rests with the transferor notwithstanding the execution of the conveyance."

4. The second type of transaction was characterised as sham transaction in *Meenakshi Mills, Madurai Vs. The Commissioner of Income Tax, Madras*, , which further stated in its paragraph 30 that the first type of transaction signifies one which is real in the sense that the sale of a property in the name of, say, X as the purchaser is genuine, but the real purchaser is B, X being his benamidar. It was then observed in this paragraph that the fundamental difference between the two classes of transactions is that whereas in the former there is an operative transfer, in the latter, there is none such; the transferor continuing to retain the title notwithstanding the execution of the transfer deed. So, in what follows, we shall call the first type of transaction as "benami" and the second as "sham".

5. Now, let us see whether the consolidation authorities have jurisdiction to deal with the case of a transaction being "benami", as distinguished from "sham". To answer this, it would be apposite to understand the true character of these two types of transactions. The benami transaction is one which evidences an operative and valid transfer resulting in the passing of title in the transferee, whereas in the sham transaction, there is no valid transfer of interest, though ostensibly the deed incorporating the transaction seeks to clothe the transferee with the title in the property. Sham transaction takes place, *inter alia*, when there is no consideration for the transfer. In such a case, if the transferor wants to assail the validity of the transaction, he shall have to seek cancellation of the document because so long as the document stands, the transferee would remain clothed with the title to the property. In case of benami transaction, however, what

happens is that the document has legal effect being perfectly valid document in the sense that if it be a sale deed, the same having been executed on the passing of consideration, but the question involved is who is the person who is the true owner of the of the property -- whether it is the transferee named in the deed of somebody else, the transferee being a benami. In such a case, the aggrieved person does not demand, indeed would not demand, cancellation of the sale deed because, if the deed would be cancelled, he as well would not be clothed with any right, title or interest over the property which had been the subject-matter of the sale deed. This would be directly against his interest inasmuch as he wants to derive right, title and interest over the property on the strength of the concerned sale deed itself, but wants a declaration that it is he who had derived title and not the person named as transferee in the document. On the other hand, in the case of a sham transaction (loosely called as benami transaction), the aggrieved person may, in some cases, require cancellation of the deed where the transaction is of voidable nature. This would become clear from what is being stated later about the nature of sham transaction.

6. The two different views taken by the learned Judges about which reference has been made owes its origin to the different understanding of what was stated in *Gorakh Nath Dube Vs. Hari Narain Singh and Others*, . Before examining what was laid down in *Gorakhnath's* case, it may be stated that though that case dealt with this appeal of the matter in the context of what found place in Section 5(2) of the U.P. Consolidation of Holdings Act, it is agreed at all hands that the law laid down in that case would be applicable to the case at hand also which is concerned with the provisions finding place in the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972, inasmuch as Section 4(4) of this Act is in pari materia with Section 5(2) of the U.P. Act. Section 51 of the Orissa Act, which is the only other relevant provision, does not alter this position.

7. Let us now say what was held in *Gorakhnath's* case. In that case, the jurisdiction of the consolidation authorities in a case of the present nature was spelt out in paragraph 5. Prior to noting what was stated in that paragraph, it may only be stated that the broad fact of that case was that the appellant had filed a suit for cancellation of a deed to the extent of his half share on the ground that the sale of that share by his uncle was invalid, inoperative and void. As by the time of the pendency of the second appeal before the High Court, the village in which the plots in dispute are situated was notified to come under consolidation operation, a point was taken that the suit of the appellant had abated, because the Civil Court had ceased to have jurisdiction over the matter, as it lay within the jurisdiction of consolidation authorities because of what was provided in Section 5(2) of the concerned Act. So, the question was whether the relief which the plaintiff claimed in the suit was within the jurisdiction of the consolidation authorities to grant.

8. The apex Court expressed its view in the matter in the following language in

paragraph 3 after stating that the Allahabad High Court decision noted in that paragraph held that questions relating to validity of sale deeds, gift deeds and wills could be gone into in proceedings before the consolidation authorities at page 2453 :--

".....We think that a distinction can be made between cases where a document is wholly or partially invalid so that it can be disregarded by any Court or authority and one where it has to be actually set aside before it can cease to have legal effect. An alienation made in excess of power to transfer would be, to the extent of the excess power invalid. An adjudication on the effect of such a purported alienation would be necessarily implied in the decision of a dispute involving conflicting claims to rights or interests in land which are the subject-matter of consolidation proceedings. The existence and quantum of rights claimed or denied will have to be declared by the consolidation authorities which would be deemed to be invested with jurisdiction, by the necessary implication of their statutory powers to adjudicate upon such rights and interests in land, to declare such documents effective or ineffective, but, where there is a document the legal effect of which can only be taken away by setting it aside or its cancellation, it could be urged that the consolidation authorities have no power to cancel the deed, and therefore, it must be held to be binding on them so long as it is not cancelled by a Court having the power to cancel it. In the case before us, the plaintiff's claim is that the sale of his half share by his uncle was invalid, inoperative, and void, such a claim could be adjudicated upon by consolidation Courts."

(Emphasis supplied)

9. As to the decision of the Allahabad High Court noted in paragraph 5 of Gorakhnath, we may say that the Supreme Court had approved that part of the decision only where it was stated that it is the substance of the claim and not its form which is decisive. The view expressed in that case relating to the competence of the consolidation authorities to decide whether a sale deed has been obtained by fraud, undue influence or misrepresentation was not approved. In this connection, the observation made in paragraph 7 of Ramachandra's case, whose ratio we shall presently note, may be seen. We may also state here that in paragraph 7 of Ramachandra's case, there are two printing mistakes -- the first is that the word "on" in the fourth sentence should be "no"; and the second relates to the word "distribution" as appearing in the third line from the bottom of that paragraph, which should be "distinction".

10. We may now see as to whether the view expressed in Kailash Chandra's case, which was followed in Ramachandra's case, can be said to be erroneous in the light of what was held in Gorakhnath's case which was duly noted in the aforesaid two decisions. As to these two cases, we would say that they really did not deal with benami transaction, as strictly understood. This would be apparent from the fact that in Kailash Chandra's case the sale deed in question was stated to be sham, as noted in paragraph 3 of the judgment which was, however, also

described as benami in paragraph 4. Similarly, in Ramachandra's case, the question was whether the vendor of the petitioners named one Hemalata had any title in the property to convey. So, that was also not a case of benami transaction, pure and simple. As benami transactions are of two types -- one appropriately called benami and another loosely understood as benami -- the test laid down in Ramchandra's case in paragraph 9 to decide whether the consolidation authorities or the Civil Court would have jurisdiction -- the same being "the necessity of an actual cancellation of the deed to half its effectivity" was correctly stated. As already noted, in benami transaction (pure and simple) cancellation of the deed is not necessary, indeed not asked for; so even as per the test laid down in Ramchandra's case the consolidation authorities shall have jurisdiction to deal with those types of transactions. As to whether in a sham transaction, cancellation of the deed would be necessary or not is a matter with which we shall deal later.

11. We would, however, like to make one observation that the statement made in paragraph 5 of Kailash Chandra's case to the effect "(w)hether a particular document is a benami transaction or not essentially involves the determination regarding the genuineness of the document" would be correct only in connection with a sham transaction (with which the Court was concerned) and not with the type of benami transaction, because that type of transaction is real and genuine, as stated in paragraph 13 of Meenakshi's case.

12. We have the further comments to make about these two decisions. The first is regarding the Division Bench in Ramchandra's case not agreeing with the view taken by the learned single Judge in the decision referred in paragraph 13, which was really in Civil Revision No. 351 of 1983 disposed of on 30-4-85, and not in the one reported in 57(1984) CLT 417 (as stated). This is, however, based on a little misunderstanding of that judgment inasmuch as what was stated in paragraph 8 of that judgment really applies to a benami transaction, strictly understood, and not a sham transaction with which Ramchandra's Bench was concerned. This would be apparent from the fact that the learned single Judge deciding the Civil Revision stated that "(a) benami transaction is not an outcome of a fraud. The vendor in a sale deed alleged to have been executed benami is otherwise competent in law to sell the property, and the sale deed does not become ineffective on the face of it. It is not one of the categories of documents dealt with in the decision in Gorakh Nath Dube Vs. Hari Narain Singh and Others, . We would read these observations as relating to benami transaction, strictly understood, in which case cancellation of the sale deed being not required, the consolidation authorities would have jurisdiction. Our second comment is that none of the decisions referred in paragraph 12 of Ramchandra's case in support of the conclusion reached by the Bench related to benami transaction.

13. Before concluding, it would be necessary to refer to three decisions of this Court, to which our attention has been invited and which have dealt with the

case of benami transaction. The first of these decisions is that of a Division bench in Bhagirathi Kar and Another Vs. Jagannath Roul and Others, . That decision seems to be a case of a sham transaction, because the case of the aggrieved person before the consolidation authorities was that "the sales were benami and, therefore, did not convey any title to the vendees." (See paragraph 2 of the judgment). The reference of the matter to the Civil Court was upheld by this Court. No reason has, however, been given for the decision. So, what has been held in that case does not propound any law.

14. The next decision is that of a learned single Judge in Hrudananda Panda and Another Vs. Dhirendra Behura, As to this decision, it may be first stated that this decision had not taken note of Gorakhnath's case, and it is because of this that the learned single Judge in Kailash Chandra's case did not feel it necessary, despite his taking, according to him, a contrary view, to refer the matter to a Division Bench. Even so, we may note what was the reason given in Hrudananda's case to hold that the consolidation authorities have jurisdiction to go into the question of benami. The reasons find place in paragraph 8, which reads as below :---

"Powers given to the consolidation authorities, in my opinion, are sufficiently wide to decide the question of right or interest in any land situate within the consolidation area. There is nothing to suggest that the consolidation authorities are not competent to go into the question of benami while deciding the right or interest of one party or the other. The decision on the question of benami is in effect and substance in respect of the declaration of the rights or interests of the parties in the land. All claim of ownership of land should be put forward before the consolidation authorities so that they may determine who is the true owner of the land. If a party fails to do so, he will be debarred from establishing his claim of benami in a Civil Court. Directing a party to the consolidation proceeding to establish in Civil Court his claim of benami would materially affect carrying out a proper consolidation scheme under the Act. If it is held that the consolidation authorities have no power to decide the question of behami and they must await the decision of the Civil Court, then it would virtually hold up the consolidation proceeding."

15. From the above, it appears that the aforesaid decision dealt with benami transaction, as strictly understood, because the question for decision was said to be one of "declaration of the right or interest of the parties in the land". This question would really arise in case of real benami transaction. So, the decision that the consolidation authorities had jurisdiction, which accords with our view.

16. The last decision we have to note is again that of a learned single Judge in Siba Prasad Dashson Vs. Kali Charan Dash, . The treatment of the question touching the jurisdiction of the consolidation authorities is to be found at page 567 and after noting that there was no specific prayer in the suit for setting aside the documents in question, the view taken by the Subordinate Judge that he had no jurisdiction in the matter was upheld. So, what has been held in this case is in

conformity with our view,

17. Having come to the conclusion that in case of benami transactions (as strictly understood), the consolidation authorities would be competent to deal with the same, let us see what is the position in law regarding sham transaction, which have also been loosely termed as benami transactions. Dealing with this question is felt necessary for the sake of completeness and to avoid further controversy in the matter and also because the reference requires decision about the competence of authorities/court qua benami transactions sham transaction being also one of the kinds of benami. To decide this aspect of the matter, it would be necessary to know what is the legal effect of a sham transaction. As pointed out in Meenakshi Mills case, in such a transaction, there is no operative transfer and "the transferor continues to retain the title notwithstanding the execution of the transfer deed." In Bhim Singh's case also, a similar view was expressed by stating that in such a case "there is no operative transfer at all and the title rests with the transferor notwithstanding the execution of the conveyance."

18. Now, if this be the legal effect of a sham transaction, it is apparent that conceptually it has to be regarded as a void transaction, as distinguishable from voidable. We have said so because a void transaction is one which is "non-existent from its very inception", as stated in the opening sentence of paragraph 9 of Smt. Kalawati Vs. Bisheshwar, . In State of Punjab v. Gurudev Singh AIR 1991 SC 2291, it was stated that void transactions only need a declaration of their voidness; they need not be set aside (see paragraph 5). So, if in case of a sham transaction, the title rests with the transferor notwithstanding the execution of the conveyance, or, to put it differently, if the transferor continues to retain the title notwithstanding the execution of the deed, this would be so only when the transaction in question can be said to be void, in which case alone it would be non-existent from its very inception. If such a transaction would have been voidable, it could not have been opined that the transferor would continue to retain the title, because in case of a voidable transaction, the transferor ceases to have title, but acquires the same if the transaction is declared to be bad in the eye of law. But for such a declaration, the title passes, and so, if in sham transaction title is ipso facto retained without anything further being done, it has to be held that it is because such a transaction is void.

19. This conclusion of ours receives support, if mind is applied to what was stated in the aforesaid two decisions of the apex Court as to which transactions can be said to be sham. A reading of paragraph 14 of Bhim Singh would show that the question of benami transaction under the English law related to the question as to who had contributed to purchase money. As to Indian law, it was stated that in a benami transaction of the first kind (i.e. benami, pure and simple), a person buys a property with his own money but in the name of another without any intention to benefit such other person, whereas in the second type, a person executes a conveyance in favour of another "without the intention of transferring the title to the property". If these statements are read to

mean that in benami transactions, or for that matter, sham transactions, the only question to be looked into is whether consideration had passed and, if so, who had paid the same; even then, a sham transaction in which no consideration is passed has to be regarded as void in view of what has been stated in Section 25 of the Indian Contract Act, 1972 unless the transaction be one of the three types of which mention has been made in that section. We may, however, add that it may not be understood that according to us that transaction alone would be sham in which no consideration had passed, inasmuch as what has been stated in both the aforesaid decisions relating to sham transaction is that it is one where a person executes a conveyance in favour of another without the intention of transferring the title to the property thereunder. In this connection, we may note with profit that in paragraph 30 of *Meenakshi Mills*, a sham transaction was illustrated by saying that such would be case "when A purports to sell his property to B without intending that his title should cease or pass to B". This was given as an example of sham transaction. We do not propose to pursue this matter, as in this reference we are not called upon to decide as to when a sham transaction would be void, or for that matter voidable. All that we are required to decide is who has competence to entertain a matter relating to sham transaction.

20. Being satisfied that a sham transaction is one which is void, the question is whether such a transaction can be voidable also. Having noted the legal effect of a sham transaction, we would not have indeed posed this question because of the legal effect of sham transaction, which has been noted above. But when, a reference to Section 25 of the Indian Contract Act itself shows that an agreement made without consideration may not be always void. This would be so if the transaction be one of the kinds mentioned in that section. If the transaction be one of that kinds, it would not be void but voidable at the instance of the persons who had executed it on his making out a case that the ingredients of the exceptions are not satisfied. This apart, a reference to Section 53(2) of the Transfer of Property Act shows that transfer of immovable property made without consideration, which would be a case of sham transaction par excellence, shall be voidable at the option of a subsequent transferee if the transfer in question was with intent to defraud him. This shows that in certain situation, a sham transaction can also be treated as voidable at the instance of some persons and these persons may approach the appropriate authority for getting it so adjudged and for its cancellation, as permitted by Section 31 of the Specific Relief Act, 1963.

21. Let it now be seen as to who is the competent authority to take up a matter relating to sham transaction. As per the decision in *Gorakhnath*, the consolidation authorities have no power to deal with those documents "the legal effect of which can only be taken away by setting it aside or (by) its cancellation". A document incorporating a void transaction does not, however, require cancellation to take away the legal effect of the same in such a case, declaration of voidness is enough to protect the interest of the aggrieved person. So, in case of void transactions, the consolidation authorities shall have

jurisdiction to entertain and adjudicate the grievance. If, however, the transaction be voidable, in which case to take away the legal effect of the document cancellation would be necessary, it would not be within the competence of the consolidation authorities; but the matter shall have to be agitated before the Civil Court.

22. We, therefore, conclude by saying that the consolidation authorities would have jurisdiction in those cases where the dispute between the parties is relatable to a benami transaction, as strictly understood; and would also have jurisdiction over those sham transactions which are void. But, if the sham transactions be voidable, the consolidation authorities would have no power to deal with the same and it would be within the jurisdiction of the Civil Court to do so.

P.C. Misra, J.

23. I agree.

L. Rath, J.

24. (Concurring with Hansaria, C. J.) Agreeing completely with my Lord the Chief Justice, I wish to add a few lines. The authorities under the Act are vested with the powers u/s 51(1) to decide all questions relating to right, title, interest and liability in land. In Gorakhanath's case (supra), the apex Court carved out the exception to that jurisdiction by saying that where a document needs actual cancellation, the power of cancellation being not vested with the consolidation authorities, a suit for such relief shall lie in the Civil Court; but no cancellation being necessary where the document is void one, the right, title, etc. in the land covered in the deed would be determinable by the consolidation authorities. This is so since the very transaction under the void deed being non est from the beginning, as the deed is of no consequence, the right, title, etc. are not affected by it in any manner. Hence those questions are to be decided only by the consolidation authorities. A purely benami transaction does not involve determination of the question whether the concerned deed is void or voidable, but involves the question of determination of right, title, interest and liability in the land of the claimant and of the ostensible purchaser or of persons claiming through them. Such determination has nothing to do with the validity of the deed, it being never in question. The decision in Ramachandra's case (supra) dealing with benami transactions has to be read in that context, so that the question of consolidation authorities having or not having jurisdiction to deal with benami transactions would be confined only to sham transactions and not purely benami transactions which are always within the cognizance of those authorities. As has been correctly explained by the Hon'ble Chief Justice, a sham transaction may involve the determination of the question of it being void or voidable. The test to apply as to when the Civil Court or the consolidation authorities would have jurisdiction in respect of the transaction is as has been explained in Ramachandra's case (supra). It must, however, be clarified that in

that case while dealing with the procedure for determination of the deed being void or voidable, it was rather broadly stated that, as is the case with the consolidation authorities, so also with the courts, there may be occasions necessitating a primary investigation to determine the fact, though it must be held that the question has to be ordinarily resolved upon the pleadings of the parties. While this may be true of the consolidation authorities, so far as civil courts are concerned, the primary investigation must be in consistence with the procedure of Order 14, Rule 2 of the Code of Civil Procedure, according to which an issue relating to jurisdiction of the Court (and the question whether the transaction is void or voidable relates to jurisdiction of the Court) can be tried first, if the same can be resolved as a pure question of law, which would be so if no evidence is required to be taken to decide that issue. To put it differently, an issue relating to the jurisdiction of the Court also cannot be taken up as a preliminary issue, if to decide the same evidence would be required to be taken.