(1990) 03 DEL CK 0060

In the Delhi High Court

Case No : I.A.S. 3121, 3120 and 3122 of 1989 in 907 of 1976

M/s. P.N. B. Finance Ltd. APPELLANT

Vs

Shital Prasad Jain and others RESPONDENT

Date of Decision : 19-03-1990

Acts Referred:

Benami Transactions (Prohibition) Act, 1988 — Section 4, 6
Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10(2), Order 7 Rule 11
Transfer of Property Act, 1882 — Section 53

Citation : AIR 1991 Delhi 13 : (1990) 2 BC 228 : (1990) 69 CompCas 196 : (1990) 41 DLT 452 : (1990) 1 ILR Delhi 325 : (1990) 185 ITR 298

Hon'ble Judges : R.L. Gupta, J

Bench : Single Bench

Advocate : D.K. Aggarwal and K.K. Jain, for the Appellant; R.K. Saini, Mrs. Shamla Pappu and Pinaki Misra, for the Respondent

Judgement

This Judgment has been overruled by : Olympus Superstructures Pvt. Ltd. Vs. Meena Vijay Khetan and Others, AIR 1999 SC 2102 : (1999) 2 ARBLR 695 : (1999) 3 JT 514 : (1999) 3 SCALE 587 : (1999) 5 SCC 651 : (1999) 3 SCR 490 : (1999) 2 UJ 997 : (1999) AIRSCW 1831 : (1999) 5 Supreme 338

1. These three IAs have been moved on identical grounds on behalf of the defendants 2, 3 and 5. Therefore, this order will dispose of all these IAs.

2. It is alleged in these IAs that the present suit is directed against defendant No.1 who is alleged to have taken some loan from the plaintiff. The substance of the allegations in the plaint are that defendant No.1 diverted the loan amounts to defendants 2, 3 and 5 and acquired assets in their names. In other words the. plaintiff so its is alleged has get up the case of benami against the defendants it is then alleged that without prejudice to the rights and contentions of the defendants herein and also without admitting in any manner, any of the allegations made in the plaint, the defendants submit that in view of the Benami Transactions (Prohibition) Act, 1988 (hereinafter called the Act), the plaintiff is

not entitled to maintain any suit on the basis of the plea of benami. Therefore the suit of the plaintiff should be dismissed against defendants 2, 3 and 5. The replies in these IAs on behalf of the plaintiff are identical. It was denied that the present suit was directed against defendant No.1 only. In fact it is filed against all the defendants. The case is that defendant No.1 in order to defraud the plaintiff company did not apply the loan amount directly for purchasing immovable property in his name for which purpose the loan was asked for and sanctioned to him by the plaintiff company it is then contended that defendant No. 1 after having obtained the loan diverted the same to defendants 2 to 5 and another. Defendant No. 2 is the son of defendant No. 1. Defendants 3 to 5, the three companies, have been floated by defendants 1 & 2 and are controlled by them. Majority of the shares of these companies are held by defendants 1 and 2, their family members, close relations and friends. It is further the case of the plaintiff that the defendant No.1 has resorted to the subterfuge of diverting the funds to other defendants to perpetuate a fraud. It is further stated in the reply that in the present case the main question is about the lifting of the corporate veil in order to see the reality behind. It was denied as incorrect that the plaintiff company had set up a case of benami against defendants 2, 3 & 5. The applications were misconceived and should, Therefore, be dismissed.

3. I have heard arguments advanced by learned counsel for the parties. First of all I must point out another fact which was sought to be highlighted by learned counsel for defendants before arguing on the above applications. On 16-10-89 learned counsel for the defendants insisted that vide order dated 16-11-79 in is 2897/ 76, Issue No. 4 regarding cause of action qua defendants 2 to 5 was treated as a preliminary issue and, Therefore, the recording of evidence in this case, for which purpose it was fixed for that date, arguments should be heard on that preliminary issue. Learned counsel for the plaintiff opposed the request of learned counsel for the defendants by saying that already by an order of the Division Bench of this Court in appeal against the order of a learned single Judge, the question had remained open and, Therefore, this issue should not be treated as a preliminary issue. But to avoid all controversy and also because of the fact that the matter was listed for the first time before me on that date, arguments on Issue No. 4 were heard. However on going through the file I find that the request made on behalf of the defendants was really unreasonable. The learned single Judge vide order dated 16-11-79 had held that there was no privity of contract between the plaintiff and these defendants, and there was, thus, no question of attaching the assets of defendants 2 to 5. There was an appeal against that order and by a very elaborate and detailed judgment in the matter of Shri Shital Prasad Jain v. P.N.B. Finance Limited*(* or PNB Finance Ltd. V. Shital Pd. Jain-Ed.) the Division Bench held as follows:-

"We are, Therefore, of the view that the counter-affidavits filed by the defendants, being vague and evasive, an inference may be well-warranted that the relevant information, if furnished, would not have supported their case. It is also noticed that the entire share capital of defendants 3 & 5 has been apparently invested in the purchase of aforesaid properties and it is nobody''s case that they have any other business activity. Prima facie, Therefore, it would appear that these companies were formed by defendants 1 & 2 etc. for purchase of the properties in question and the allegation of diversion of funds made by the plaintiff cannot be brushed aside lightly at this stage. It is, of course, a different matter that the defendants may satisfy the Court about bona fide nature of the dealings and transactions in question at trial. Hence, we consider it to be a fit case to grant and do grant ad interim relief to the plaintiff by restraining defendants 3 & 5 from in any manner alienating, transferring, dispersing of or encumbering the proportion in question viz. 10 panchsheel Marg, New Delhi and flat Nos. 101 & 102 in ''New Delhi House'' at 27, Barakhamba Road, New Delhi, till the disposal of the suit."

4. The above observations, Therefore, clearly point out that in view of the allegations of diversion of funds made by the plaintiff against defendants 1 & 2 towards the companies, defendants 3 to 5, it was held that at the stage the allegations made by the plaintiff company could not be brushed aside. But if later on these defendants satisfied the Court that they had bona fide dealings of the purchase of the property in question, then different consequences may follow.

5. It may then be mentioned that the defendants 2, 3 and 5 had moved is 4050/ 79 under Order 1, R. 10(2) and 0. 7, R. 11, Civil P.C. in which they had alleged that as per the averments in the plaint, the plaintiff had to establish any cause of action against defendants 2, 3 and 5. This is was based upon the decision of the learned single Judge dated 16-11-79 in is 2897/76. But after the judgment of the Division Bench came Mr. Y.P. Narula, Advocate, on behalf of defendants 2, 3 and 5 and sought leave to withdraw that application on 8-9-81 and, Therefore, that application was dismissed as withdrawn on that date. Therefore, it was well within the knowledge of defendants 2, 3 and 5 that they had withdrawn their application alleging no cause of action against them on the basis of the averments of the plaint and that must have been the reason that for all these years from 1981 till the case was listed before me for the first time on 16th October, 1989, no attempt was ever made on their behalf to renew their assertion for treating Issue No. 4 as a preliminary issue. Therefore, I must bring it on record that the posture adopted on behalf of defendants 2, 3 and 5 after lapse of such a number of years and after having withdrawn their earlier application and for the same purpose, and then insisting that Issue No. 4 should be treated as a preliminary issue and arguments on this issue must be heard, was not reasonable I, Therefore, need not return any finding on this so-called preliminary issue which has to be tried along with other issues in the light of the observations made by the Division Bench.

6. Now coming to the disposal of the IAs.

7. First of all it may be noted that in the plaint, plaintiff has nowhere alleged that the defendants or either of them are benami owners of any property. The main stress of the allegations in the plaint is that defendant No.1 had been the

Financial Adviser of the plaintiff from 1-2-72 to 11-6-75. At the request of defendant No.1 made on 7-11-74, the plaintiff advanced him a loan of Rupees 5,00,000/- on 23-12-74 payable with interest at 16% per annum. In consideration of having obtained the loan, defendant No.1 executed a promissory note. Again at the request of defendant No. 1, the plaintiff gave another loan of Rs. 10,00,000/- to him on 29-1-75. Defendant No.1 had represented that he would utilise these loans for purchase of Immovable property in Delhi. It was one of the terms that the loan would be secured by deposit of the title deeds of the property as soon as it was purchased and registered in the name of defendant No. 1. Another condition .was that the loan would be repaid in 12 monthly installments commencing from April, 1975. No amount either towards principal or interest was paid. Instead defendant No.1 diverted the amount of both the loans to defendants 2 to 5. Defendant No. 2 is the son of defendant No. 1. Defendants 3 to 5 were alleged to be the companies floated by defendants I & 2 and were controlled by them. Majority of the shares of these companies were held by defendants I and 2, their other family members and close friends. Thus, they were alleged to be the family concerns of defendants 1 and 2. Defendant No. 3 purchased property bearing No. 10, Panchsheel Marg, New Delhi, for about Rs. 10 lacs, defendants 4 & 5 purchased flats bearing No. 101 and 102 comprised in New Delhi House, 27, Barakhamba Road, New Delhi for about Rs. 3 lacs each, It is further alleged that those properties were being held by defendants 3 to 5 on behalf of defendant -No. I as the latter did not apply the loan -directly for purchase of immovable proper-tics in his own name in order to defraud the plaintiff although the loan had been given to him for the specific purpose of purchasing immovable property in Delhi. In this manner defendants 3 to 5 were sought to be made liable for re-payment of loan on the ground that they were holding such properties for the benefit of the plaintiff.

8. The main defense of defendant No. 2 is that he is a share holder and Director of the company defendant No. 3. He denied if he held majority of equity shares in it or that his other family members and close relations had such majority of equity shares. He denied having any share in the company defendant No. 4 at the time of institution of the suit. He admitted, however, that he was a Director of defendant No. 4 but since the company did not undertake any business whatsoever he resigned from its directorship. He also denied that he and defendant No.1 or their relations owned and controlled the company defendant No. 5,. He also denied diversion of any amount by defendant No. 1 to him. Defendants 3 and 5 are alleged to have acquired the various properties out of their own funds. He also denied having raised any loan from defendant No.1 and thus he was neither accountable nor liable or indebted to defendant No.1 for any money.

9. Similarly defendant No. 3 denied being controlled by defendants 1 and 2. Defendant No. 2, however, was admitted to be share holder and Director of defendant No. 3. Defendant No. 3 also denied diversion of any amount by defendant No.1 in favor of himself as also the fact that any such funds were

applied by it for purchasing any Immovable property. The property bearing No. 10, Panchsheel Marg, New Delhi was alleged to have been purchased from the funds belonging to defendant No. 3. As such defendant No. 3 was not liable to pay any amount to the plaintiff. Defendant No. 5 admitted that defendant No. 2 was a share holder and Director of defendant No. 5. The allegations of diversion of funds by defendant No.1 in its favor were also denied. As such defendant No. 5 was not liable for any amount whatsoever to the plaintiff.

10. On behalf of defendants 2, 3 and 5, it has been argued that the allegations made in the plaint amount to saying that defendants 2, 3 and 5 held the properties benami on behalf of de defendant No. 1. Therefore, such allegations squarely fall within the definition of the term ''benami transaction'' covered by the first Act and that now there was a complete bar under the Act to the right of any real owner to recover property held benami. This argument has been countered on behalf of the plaintiff by saying that the allegations as made in the plaint do not make out any case of the nature of a benami transaction. Rather the allegations indicated that the plaintiff company sought to make liable defendants 2 to 5 because defendant No. 1 fraudulently transferred the amount of loans raised by him from the plaintiff company in favor of defendants 2 to 5 with a view to defraud the plaintiff company. The reliance on behalf of the defendants is upon S. 4 of the first Act, which is as follows:-

"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 defense 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."

11. Based on the above Section, it has been argued that even defendant No.1 who is alleged to have transferred the amount of loans in favor of defendants 2 to 5 is not entitled to claim the various properties alleged to have been purchased by defendants 2 to 5 from the funds of defendant No. 1. Such a suit, according to the contention, will be clearly barred by S. 4 of the first Act. On the other hand the learned counsel for the plaintiff has contended that even if for the sake of argument it was admitted that the purchase of property by defendants 3 to 5 was covered by a benami transaction as against defendant No. 1, the case of the plaintiff being that defendant No. 1 had fraudulently transferred the loans raised by him from the plaintiff, S. 6 of the Act will cover the case of the plaintiff. This Section, he argues, provides an exception to the general rule propounded in S. 4. It says that nothing in this Act shall affect the provisions of S. 53 of the Transfer of Property Act, 1882 (hereinafter called the second Act) or any Law

relating to a transaction for an illegal purpose. Therefore, the argument on behalf of the plaintiff is that S. 53 of the second Act will save the present suit. As against this it has been contended on behalf, of learned counsel for the defendants that S. 53 of the Second Act applies only to an Immovable property and not to a moveable property. Therefore, the plaintiff could not take any help from the provisions of S. 53of the Second Act. On behalf of the plaintiff two judgments have been cited to show that the provisions of S. 53 of the Second Act are applicable in cases of moveable property also. These are Rajmal v. Moti AIR 1956 Bho 22 and Ah Foon v. Hoe Bai Pal AIR 1932 Rang 13 Learned counsel for the plaintiff has also cited the case of AIR 1930 255 (Privy Council) in order to show that defrauded creditors are not affected by a sham transaction. On the other hand on behalf of the defendants, Chidambaram Chettiar v. Srinivasa SastrialS. 53 of the Second Act do not apply in case of moveable property.

12. In the case of Ah Foon (supra) the facts were that the plaintiff and defendant No.1 were partners at one time and the partnership was dissolved in 1927. In 1930 the plaintiff obtained a decree for over Rupees 40 thousand against defendant No.1 and in execution of the decree attached certain timbers lying in the godown of defendant No. 1. Defendant No. 2 informed the Bailiff that he and defendants 3 & 4 had jointly purchased all the timbers lying in the godown of defendant No.1 prior to the date of the attachment. Objections to that effect were filed on behalf of defendants 2 to 4 which Compelled the plaintiff to institute a suit for declaration that at the time of attachment the property in the timbers remained in defendant No.1 and that the sale by defendant No.1 to defendants 2 to 4 was voidable as being a transaction made with intent to defeat and delay the creditors of defendant No. 1. The High Court held:

"The principals underlying 13 Eliz., Ch. 5, and S. 53 T.P. Act, ought to be applied in India to transactions relating to the transfer of moveable property, upon the ground that those principles are in accordance with justice, equity and good conscience "

It further held that,

"Innocent transferee for value was protected and cases of such transfers could not be brought within the ambit of S. 53 of the Act."

Similarly in the case of Rajmal (supra) the High Court held,

"Under S. 53 of the T.P. Act, a fraudulent transaction can be set aside at the instance of the creditor whose interest had been defeated as a result of the fraudulent transaction."

13. The property alleged to be transferred in that cast was a she-buffalo. Even in the case of AIR 1914 137 (Privy Council) , it was held that though S. 53 did not apply directly as the subject matter of assignment was not Immovable property but when the assignment was partly a device to defeat the creditors then the principle underlying it will apply to moveable property also on the ground of

equity, justice and good conscience. In that case the assignment by a debtor was of money. Therefore, in view of these authorities, I am of the view that when it is alleged that the diversion of funds (moveable property) by defendant No.1 in favor of the other defendants was fraudulent and illegal, S. 6 of the first Act protects such a claim from the applicability of S. 4. Even otherwise thinking aloud. I think that when the allegations are of a fraudulent transfer by one of the defendants in favor of the others, it will indeed be too much if such transactions are held to be protected under the cover of the first Act. The intention of the first Act is to vest ownership rights in benamidara as against the real owners. It is not the intention of the first Act to protect such persons from the creditors who allege diversion of funds by such persons in a fraudulent manner in order to escape their liability to the creditor. So far as the proposition of law laid down in the cases of Mithilesh Kumar and Another Vs. Prem Behari Khare, , Velayudhan Ramakrishnan and Others Vs. Rajeev and Others, and Urmila Bala Dasi Vs. Probodh Chandra Ghosh and Another, , is concerned, there cannot be any dispute in that respect. In the case of Mithilesh Kumari (supra) the respondent Prem Behari Khare had purchased property in the name of Mithilesh Kumari who had been living with him for a number of years and had also given birth to two children from his loins. Prem Behari Khare challenged the creation of any rights by Mithilesh Kumari in favor of others by filing a suit for declaration and permanent injunction. His suit was decreed up to High Court. The contention raised on behalf of Prem Behari Khare in appeal by Mithlesh Kumari in the Supreme Court was that the first Act did not apply retrospectively to cover a past benami transaction. Repelling this contention, the Supreme Court held that the appellant being benamidar, the provisions of the first Act shall very much be applicable if an appeal against the main judgment was pending at the time of coming into force of the Act. The relief available to a person could be molded in the light of the law which came into force during um pendency of the appeal, which is deemed be a continuation of the suit. The same principle of law was laid down in the case of Velayudhan Ramakrishan (supra) and Urmila Bala Dasi (supra). However the present case has no parallel with those cases because here the allegations are that defendant No.1 after taking loans from the plaintiff for purchase of property in Delhi transferred the amount of such loans in favor of the remaining defendants and another in order to defraud the plaintiff. Such suits are clearly protected under S. 6 of the first Act. The question of applicability of S. 6 of the first Act vis-a-vis a creditor in the nature of the present plaintiff was not the subject-matter of consideration in either of three cases cited above.

14. The observations of the Division Bench hold good even today and I am of the view that the first Act has not in any manner made those observations redundant. But the importance of those observations now is with reference to the exception provided in S. 6 of the Act which saves actions covered by S. 53 of the second Act as well as transfers for an illegal purpose. If it is ultimately found that defendant No.1 fraudulently diverted the amount of the loans raised by him from the plaintiff, in favor of the other defendants and out of such diverted funds

fraudulently immovable properties were purchased by other defendants, then certainly plaintiff is entitled to follow such properties in the hands of other defendants also. On the other hand if the other defendants are able to show that such properties were acquired by them out of their own funds then the plaintiff may not be entitled to follow the properties in their hands.

15. Before parting with this case, I may also mention that the issues in this case were framed on 20th December, 1979. Thereafter the case was listed for recording the evidence of the parties for the first time from I I th, 14th to l8th November, 1988 but the evidence'' could not be recorded because in the mean.'' time another is 8034/88 was moved oh behalf of defendant No.1 for framing of additional issues. That application was allowed on conditional costs of Rs. 1500/- vide order dated November 15th, 1988 by C.L. Chaudhry, J. Thereafter the dates of trial in this case were fixed from 24th April, 1989 to 28th April, 1989. The order dated 24th April'', 1989 by C.L. Chaudhry.J. shows that the evidence could not be recorded because Mr. Vinod Sharma, counsel for the defendants was stated to be having throat trouble. The case was then adjourned to evidence to 27th April, 1989. On that date the evidence could not be recorded because the Hon''ble Judger did not hold court after lunch. The case was then adjourned for evidence from 16th to 20th October, 1989. On 16th November, 1989 the case then came up for the first time before me when it was vehemently stated that Issue No. 4 being a preliminary issue, arguments be, heard on that issue. The defendants, in the meantime, also filed the present IAs. In view of these facts evidence could not be recorded even during those days.

16. This case was originally filed in the year 1976 and taking into consideration all those circumstances, I am of the view that being a very old case it requires to expeditiously dealt with. The matter may, Therefore, be listed before the Deputy Registrar for fixing fresh dates of trial in this case in October, 1970.

17. Since already sufficient opportunities were granted to the parties to file the list of their witnesses, no indulgence can be shown to them now for the same purpose. If parties will desire to seek the assistance of the Court for summoning their witnesses, they will file process fee, diet money etc. within a week after the dates of trial are fixed. They shall also be responsible to get service effected upon their witnesses. To be listed before the Deputy Registrar on 30th March, 1990.

18. Order accordingly.

