
(1995) 02 BOM CK 0072
In the Bombay High Court
Case No : Writ Petition No. 821 of 1990

Nirmala and Others

APPELLANT

Vs

Miss Parpati R. Malkani and Others

RESPONDENT

Date of Decision : 09-02-1995

Acts Referred:

Evidence Act, 1872 — Section 91, 92

Citation : (1995) 02 BOM CK 0072

Hon'ble Judges : M.L. Dudhat, J

Bench : Single Bench

Advocate : G.K. Masand, for the Appellant; V.K. Punwani, for the Respondent

Final Decision : Dismissed

Judgement

M.L. Dudhat, J.—Petitioners in this writ petition are the legal representatives Of original plaintiff-Avinash Kumar Mukherji, who had filed R.A. Declaratory Suit No.5689 of 1978 against the present respondents for a declaration that the original plaintiff was the tenant of the suit premises and also for consequential relief"s by way of injunction. Respondent No. 1 in this case is a land lady, and respondent No.2 is the Company in whose favour respondent No. 1 entered into leave and licence agreement on April 10, 1970. After filing the suit and when Avinash Kumar Mukherji original plaintiff, was undergoing his cross-examination, the original plaintiff expired leaving behind him the present Petitioners. It is the case of the present petitioners that the original agreement entered Into between respondent No. 1 and respondent No.2 was in fact for the benefit of the plaintiff and it was only from the point of view of security of rent the said agreement was entered Into by respondent No. 1 with respondent No.2, the Company, wherein the plaintiff was in service. Original plaintiff further contended that in view of the subsequent amendment to the Bombay Rents, Hotel Lodging House. Rates Control Act, 1947 (hereinafter referred to as the Bombay Rents, Act) in the year 1973, the original plaintiff became a tenant of the suit premises and. therefore, he and subsequently the present petitioners, who are the legal representatives of

original plaintiff, have got right to a declaration in their favour to the effect that they are the tenants of the suit premises. Respondent No. 1, the land lady, resisted the aforesaid suit and contended that the leave and licence agreement dated April 10, 1970 was entered into between respondent No. 1 and respondent No.2; the Company, in order to accommodate their employee viz. Avinash Kumar Mukherji and she never entered into an agreement with the said Avinash Kumar Mukherji in the personal capacity. It was also contended by her that under the said agreement there was no privity of contract between respondent No. 1, the landlady and the original plaintiff, Avinash Kumar Mukherji. Therefore, respondent No. 1 prayed for dismissal of the suit. In this suit respondent No.2, the Company, though filed some affidavit at some stage claiming (herein the tenancy of the suit flat, did not resist the suit by filing the written statement or by leading evidence or by filing subsequent appeal. The Trial Court after allowing both the parties to lead the evidence and argue their respective cases, decreed the suit by its judgment and decree dated October 28, 1985. Against the said judgment and decree passed by the Trial Court, respondent No. 1 preferred appeal before the Court of Small Causes, Bombay being Appeal No 50 of 1986. The lower Appellate Court by its decision dated November 22, 1989 allowed the appeal preferred by the respondent by setting aside the decision of the Trial Court. It is against this decision of the lower Appellate Court the present writ petition is preferred February 9, 1995

2. The facts as disclosed in this case and admitted by both the sides are as under:

It is an admitted position that original plaintiff was an employee to respondent No.2, the Company. As an employee he was occupying flat belonging to one of the Directors of respondent No.2, the Company. The said Director wanted to sell the said flat and, therefore, the present flat, which is the subject matter of the dispute, was taken on leave and licence basis by an agreement dated April 10, 1970. A copy of the said agreement of leave and licence is produced by the present petitioner clearly shows that the suit flat was taken by respondent No.2 as a licence of respondent No. 1, the land lady. The perusal of the said agreement clearly shows that the various obligations emanated out of the said agreement are vis-a-vis respondent No.2, to respondent No. 1 and the original plaintiff is nowhere in the picture. The agreement perpetuates that the licensee respondent No.2, the Company, had taken the suit flat for its occupation by the Company's officer and respondent No.2, the Company, has undertaken various obligations as such. Therefore, on fair reading of the said agreement it becomes clear that respondent No.2 had taken the said flat from respondent No. 1 for occupation of its officer. Further, it is also not disputed that at the relevant time and till the termination of the licence, original plaintiff was in the employment of respondent No.2. In view of this agreement, according to me, respondent No. 1, the land lady, has clearly established that she gave the said flat to respondent No.2, the Company, on leave and licence basis, and the original plaintiff was occupying the said flat as an employee of respondent No.2, the Company, and not in his

individual capacity. Further it is pertinent to note that after the said agreement was entered into, respondent No. 1 had also made an application to the Navjeevan Society, of which respondent No. 1 was a tenant-member, for licensing out the suit flat to respondent No. 2. The said Navjeevan Society, by its letter dated May 2, 1970, granted the said permission. These two documents clearly establish the fact that respondent No. 1, the land lady entered into the agreement with respondent No. 2, the Company, and the agreement nowhere refers to the original plaintiff.

3. In respect of the aforesaid admitted position Mr. Masand, the learned counsel for the present petitioners, strongly contended that the lower Appellate Court erred in not taking into consideration the evidence as led by the petitioners to show that though the suit flat was taken by respondent No. 2, the Company, for occupation of its officer, in fact, the said flat was taken only for the personal benefit of the original plaintiff and it was only because respondent No. 1 wanted security of rent from the Company, the said agreement was entered into with respondent, No. 2 instead of the original plaintiff. Firstly, according to me, after taking into consideration the said agreement and the permission letter from the Society, as referred to above, which clearly shows that the agreement was entered into by respondent No. 1, with respondent No. 2, the parties are not under law, more particularly in view of Sections 91 and 92 of the Evidence Act, to lead evidence contrary to the intention as appeared in the said leave licence agreement. Apart from the aforesaid position the learned Judge has taken into consideration all the relevant documents relied upon by the petitioners to substantiate their claim that in fact though the agreement stood in the name of respondent No. 2, respondent No. 2 took the suit flat under the said agreement for the benefit of original plaintiff. By relying on certain correspondence, Mr. Masand, the learned Counsel for the petitioners, pointed that respondent No. 1, the land lady, demanded water charges from the original plaintiff. The lower Appellate Court held that the aforesaid correspondence though refers to the original plaintiff, still as stated by respondent No. 1, respondent No. 1 referred to original plaintiff as representative of respondent No. 2, the Company, of which he was an employee. It is pertinent to note that respondent No. 1, the land lady, is a school teacher working at Delhi and was not aware of the niceties of law. The fact that though she had entered into an agreement, as far as the suit flat is concerned, with respondent No. 2, she calls upon the original plaintiff to pay water charges, only shows that respondent No. 1 was ignorant of the niceties of the law. The lower Appellate Court further made reference to one of these letters whereby she reminds the clerk in the office of respondent No. 2 to send the cheque before 10th of every month so as to avoid delay. By relying on this, the lower Appellate Court came to the conclusion that the correspondence relied upon by the petitioners was addressed by respondent No. 1 to the original plaintiff as a representative of respondent No. 2. Further, Mr. Masand, the learned Counsel for the petitioners, also relied upon the fact that the original plaintiff had paid brokerage at the time of entering into the said agreement. According to Mr.

Masand, if agreement was in favour of respondent No.2, then there was no question of the original plaintiff making, the payment of the brokerage the lower Appellate Court has held that even if the said receipt of payment of brokerage is read as whole, it only shows that the payment of brokerage was made by original plaintiff on April 11, 1970 and since the agreement was entered into between respondent No. 1 and respondent No.2, the Company wherein original plaintiff was working, and as such he might have paid the brokerage on behalf of the Company. According to me, as pointed out aforesaid, all the correspondence relied upon by the petitioners in this case was interpreted by the lower Appellate Court correctly and therefore, in a writ petition, it is not proper for this Court to interfere with the said finding. The reason being, all these documents relied upon by the present petitioners can be construed in one way or the other and as laid down by the Supreme Court in the case of Mohd. Yunus Vs. Mohd. Mustaqim and Others, , and in the case of Chandavarkar Sita Ratna Rao Vs. Ashalata S. Guram, , unless the decision of the lower Court is perverse or based on no evidence resulting in manifest injustice, the High Court should not interfere with the same under Article 227 of the Constitution of India in its writ jurisdiction. Whenever two views are, possible. In view of this, in my opinion, there is no need to interfere with the finding of fact arrived at by the lower Appellate Court.

4. Mr. Punwani, the learned Counsel for respondent No. 1. contended that in the facts and circumstances of the present case the suit filed by the petitioners is not maintainable in view of the provisions of the Benami Transaction (Prohibition) Act, 1988. It is contended by Mr. Punwani that admittedly in the pleadings and in the arguments it is the case of the original plaintiff that though the leave and licence agreement was granted in favour of respondent No.2. the Company of which original plaintiff was an employee, still, in fact, the said agreement was for the benefit of original plaintiff personally. According to Mr. Punwani the pleadings clearly show that the agreement dated April 10. 1970 was a Benami transaction and. therefore, u/s 4 of the said Act there is prohibition to recover the property on the basis of such agreement. Section 2(c) defines "property" as under.

2(c): "property" means property of any kind, whether movable or immovable, tangible or intangible and includes any right or interest in such property.

Since, the petitioners are claiming tenancy in their favour, tenancy right being the right in the property comes within the purview of the proper and since the said interest was created by the agreement dated April 10, 1970 in favour of respondent No. 2 for the benefit of original plaintiff, the said transaction comes within the purview of the prohibition as laid down u/s 4 of the Benami Transactions (Prohibition) Act. 1988. Section 4 reads as under:

I 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

(3) Nothing in this section shall apply -

(a) where the person in whose name the property is held is a coparcener in a Hindu undivided family and the property is held for the benefit of the coparceners in the family, or

(b) where the person in whose name the property is held is a trustee or other person standing in a fiduciary capacity, and the property is held for the benefit of another person for whom he is a trustee or towards whom he stands in such capacity.

5. As against this. Mr. Masand. the learned Counsel for the petitioners, contended that his case does not come within the purview of the Benami Transactions (Prohibition) Act. 1988. in view of the definition as given in Section 2(a) of the said Act, which reads as under:

2(a) "Benami transaction" means any transaction in which property is transferred to one person for a consideration paid or provided by another person.

6. According to my opinion, in view of the fact that the petitioners have contended that the licence created in favour of respondent No.2. the Company, was in fact for the benefit of original plaintiff and respondent No.2 was only the nominal party, to protect the licence fee, the case of the present petitioners definitely comes within the purview of Section 4 of the Benami Transaction (Prohibition) Act, 1988. Therefore, the petitioners are not entitled to get protection which he has claimed in the suit. The fact that the Benami Transactions (Prohibition) Act. 1988. though, came in force in the year 1988 has retrospective effect and is an admitted position in view, of the ratio as laid down in the case of, *Mithilesh Kumari v. Prem Behare*, 1989 Mah.LJ 210.

7. Mr. Masand. the learned Counsel for the petitioners, alternatively argued that, presuming without admitting, that Benami Transactions (Prohibition) Act, 1988, is applicable to the facts and circumstances of this case, according to him, the case of the petitioners will come within the exception as laid down in Section 4 Sub-section 3(b), as it is the case of the original plaintiff that the possession of the property was given to respondent No.2 under the agreement dated April 10, 1970 in a fiduciary capacity for the benefit of the original plaintiff. According to me, there is no substance in this contention, it is an admitted position that at the relevant time the original plaintiff was an employee of respondent No.2, the Company. Earlier to this agreement he was occupying some other premises given to him by respondent No.2, the Company. Since he was required to vacate the said premises, by an agreement dated April 10, 1970 respondent No.2. the Company entered into an agreement with respondent No. 1 which agreement

clearly perpetuates that the said premises was taken on leave and licence basis for the benefit of its officers and the rent and the charges were being paid by the Company (which is an admitted fact) till the termination of the original plaintiff. In view of this fact it becomes difficult to hold that respondent No.2 is trustee of respondent No. 1 and the suit property was taken for the personal benefit of original plaintiff.

8. In view of the aforesaid discussion, the suit is barred by Section 4 of the Benami Transactions (Prohibition) Act. 1988.

9. This Writ Petition, is therefore, dismissed and the order or decree passed by the lower Appellate Court stands confirmed. Rule is discharged with no order as to costs.