

(2007) 10 PAT CK 0034

In the Patna High Court

Case No : Appeal from Original Order No. 36 of 2007

Pawan Kumar Gadodia and Others

APPELLANT

Vs

Radha Devi and Others

RESPONDENT

Date of Decision : 03-10-2007

Acts Referred:

Benami Transactions (Prohibition) Act, 1988 — Section 3(a), 4

Citation : (2007) 4 PLJR 624

Hon'ble Judges : S.N. Hussain, J

Bench : Single Bench

Advocate : Shashi Shekhar Dwivedi, for the Appellant; Siddheshwari Pd. Singh, Sanjay Kumar, Ram Kishan Prasad and Ashok Kumar, for the Respondent

Final Decision : Allowed

Judgement

S.N. Hussain, J.—This miscellaneous appeal has been filed on behalf of the plaintiffs against order dated 18.1.2007, by which the learned Subordinate Judge, 8th Court, East Champaran at Motihari rejected the application filed by the plaintiffs for grant of injunction against the defendants (respondents) for restraining them from transferring the suit properties and from raising any construction over the same and from changing its nature till the disposal of the suit bearing Title Suit No. 471 of 2004. The aforesaid title suit was filed by the plaintiff-appellants for declaration that the three deeds of gift dated 24.11.1998 and 6.11.2004 executed with respect to the suit property measuring about 2 kathas by defendant no. 3 in favour of defendant no. 1 were void and illegal and also for confirmation of the plaintiffs' joint possession over the suit property with the defendants and also for restraining them from transferring and making construction over the suit lands.

2. Learned counsel for the plaintiff-appellants submitted that all the parties to the suit belong to the same family and their common ancestor was Bhuramal Gadodia, who left behind only one son Satya Narayan Gadodia (defendant no. 3), who has two sons, namely, Pawan Kumar Gadodia (plaintiff no. 1) and Man

Mohan Kumar Gadodia (defendant no. 2). Plaintiffs No. 2 and 3 are the sons of Pawan Kumar Gadodia (plaintiff no. 1), whereas, defendant no. 1 is the wife of defendant no. 2 Man Mohan Kumar Gadodia. He further claimed that the ancestral profession of the family was business, in which Bhuramal Gadodia inducted his son defendant no. 3, who after the death of Bhuramal Gadodia became the Karta of the joint Mitakshra family, of which plaintiff no. 1 and defendant no. 2 were the members. He also averred that by registered deed dated 9.7.1965 the said Joint family alongwith the joint family of one Ram Pukar Singh purchased about 4 kathas of land in Muhalla Ahirpatti Motihari Town in the name of plaintiff no. 1 (son of defendant no. 3) and Raghvendra Kumar Singh (son of Ram Pukar Singh), in which the two joint families had half share (about 2 kathas) each.

3. Learned counsel for the appellants further submitted that defendant no. 3 alongwith plaintiff no. 1 and defendant no 2 filed P.S. No. 194 of 1989 against the said Ram Pukar Singh and his sons for partition of their moiety share in the said property and for other reliefs, but the said suit was dismissed by the learned Subordinate Judge, 3rd Court, Motihari, by judgment and decree dated 5.12.1993 holding that the suit lands were already partitioned between them and hence there was neither any unity of title or of possession nor there was any cause of action in the partition suit. He also averred that in the land falling in their share and possession, the joint family of defendant no. 3 had constructed a double storeyed house towards the south, in which all the members of the joint family including the plaintiffs and the defendants reside. He also submitted that subsequently on 10.1.1969 defendant no. 3 as Karta of the joint family purchased 10 dhurs of land from Ram Pukar Singh in the name of defendant no. 2, which also came in pos session of the joint family as all the said purchases were made out of the nucleus of the joint family fund created by the joint family business.

4. Learned counsel for the appellants further contended that subsequently with a view to usurp the entire joint family property, defendant no. 1 and defendant no. 2 brought defendant no. 3 in then-collusion and tried to take 10 dhurs of land in exclusive possession of defendant no. 2 and also tried to get the entire share of the joint family property of sale-deed dated 9.7.1965 measuring about 2 kathas from defendant no. 3 and for that purpose they got the aforesaid three deeds of gift dated 24.11.1998 and 6.11.2004 executed by defendant no. 3 in favour of defendant no. 1 with respect to the aforesaid about 2 kathas of the joint family, although there was no occasion for the same nor defendant no. 3 could legally execute the deed of gift in favour of the wife of one of his sons, treating it to be his personal property.

5. It was further alleged by the plaintiffs that on the basis of the said deeds of gift, defendants no. 1 and 2 started making preparation for construction of pucca building over the suit properties and collected building materials for the same as they wanted to raise pucca structure over the suit properties merely with a view

to oust the plaintiffs from the same and to vanguard their joint right, interest and possession over the suit properties causing irreparable loss to them, which cannot be compensated in terms of money, although being a member of the joint family and also being the vendee as per original deed of transfer, balance of convenience was also in favour of the plaintiffs.

6. On the other hand, learned counsel for the defendant-respondents vehemently opposed the contentions of learned counsel for the appellants and submitted that they had filed their written statement in the suit and also their show cause against the injunction petition filed by the plaintiffs in the court below. He also submitted that there was no joint family income or nucleus and defendant no. 3 purchased the suit properties alongwith another person by registered deed dated 9.7.1965 out of his own personal income and he only gave the name of his son (plaintiff no. 1) as the vendee, although plaintiff no. 1 had no income of his own nor was there any jointness. He, thus, averred that the property having been purchased by defendant no. 3 out of his own personal income, it was his individual property and he was quite justified in transferring the same by registered deeds of gift dated 24.11.1998 and 6.11.2004 in favour of defendant no. 1.

7. Learned counsel for the respondents also stated that in the aforesaid facts and circumstances the plaintiffs had no prima facie case and the balance of convenience is also in favour of the plaintiffs, who had acquired the lands in question by registered deeds. He further submitted that the plaintiffs were not going to suffer any irreparable loss as only two rooms are going to be constructed by the respondents and if the plaintiffs succeed they will gain from the construction and will not lose in any manner whatsoever. He also stated that the respondents had no knowledge of the order of this Court dated 12.4.2007, by which the respondents were restrained from making any further construction over the suit land and the respondents were informed only on 28.4.2007 about the said order and after that they had stopped making constructions and appeared in the miscellaneous appeal on 3.5.2007 and filed their counter affidavit on 5.7.2007. Hence, they had not violated any order of this Court.

8. Considering the respective claims of the parties and the materials on record, it is not in dispute that the registered sale-deed dated 9.7.1965 was executed by the admitted owner in the name of plaintiff no. 1 Pawan Kumar Gadodia and Raghvendra Kumar Singh, in which both of them had half share (about 2 kathas) each. It is quite apparent that if defendant no. 3 was claiming the said suit properties, he could claim the same only as a joint family acquisition or a Benami transaction. From the averments of the parties and the materials on record, it is quite apparent that the defendant-respondents have not claimed the said purchase to be Benami transaction nor they had been able to prove the requirements of the Benami transaction. Furthermore, the provision of Section 4 of the Benami Transactions (Prohibition) Act, 1988 specifically provides that 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.

9. Although the deed in question dated 9.7.1965 is much prior to coming into force of the said Act on 9th May, 1988, but the suit was filed thereafter in the year 2004 and hence the provision of the said Act would be applicable to the instant case and the defendants are prohibited by law to raise question of Benami transaction in the instant suit. The parties did not raise the said question on any earlier occasion. However, only if the parties are accepting the said acquisition as the acquisition of joint family, then the exception provided in sub-section (3)(a) of Section 4 of the Benami Transactions (Prohibition) Act, 1988, would be attracted.

10. So far existence of joint family is concerned, it is not in dispute that plaintiff no. 1 and defendant no. 2 are the sons of defendant no. 3 and hence the legal presumption would be that they constitute a joint Hindu family unless it is contrary proved by the defendants. Here in the instant case, no material has been produced by the defendant-respondents to show that the joint family did not exist, except an unregistered and Sada paper claimed to be family arrangement dated 19.8.1960, which was signed by two persons, namely, Bhura Mai Gadodia and Indra Chand Gadodia, who were brothers, whereas, there was no signature of defendant no. 3 or of any of their other brothers although they admittedly had several other brothers. Furthermore, the said paper is only with respect to some house at Rajasthan and no mention of the joint family business and properties in Bihar has been made therein. In the said circumstances, the said document has got no value nor can it be termed as a deed of partition and has got no bearing upon the instant case and moreover it did not even prove that defendant no. 3 was separate from his father Bhura Mai Gadodia or from his sons plaintiff no. 1 and defendant no. 2.

11. In the plaint, plaintiff no. 3 Satya Narayan Gadodia has been shown as son of late Bhura Mal Gadodia, but in the court below defendant no. 3 had denied the aforesaid fact and had claimed that defendant no. 3 was brother of Bhura Mal Gadodia. This claim also appears to be absolutely baseless as the deed in question dated 9.7.1965, on the basis of which defendant no. 3 is raising his claim, specifically mentioned that the purchase was being made from the money of Bhura Mal Gadodia the grandfather of the vendee, namely, plaintiff no. 1. Furthermore, in the deeds of gift executed by defendant no. 3, which is claimed by the defendants to be legal and genuine the executant (defendant no. 3) had specifically described himself as the son of Bhura Mal Gadodia. Even in the plaint of the earlier Partition Suit No. 194 of 1989 filed by defendant no. 3. he described himself as son of Bhura Mal Gadodia and in his deposition in the said suit also, he had described himself as the son of Bhura Mal Gadodia. In the said circumstances, taking a different view in the instant suit, clearly shows that defendant no. 3 had no respect for his own parentage and is trying to mislead

the courts giving different statements at different stages.

12. There is nothing to show that a defendant no. 3 had any other income of his own, except the income from business, which he has failed to prove to be his exclusive business. In the aforesaid facts and circumstances, it, prima facie, appears that the claim of the plaintiff-appellants is genuine and the claim of the defendant-respondents is not justified and the property in question had been purchased from the admitted owner on 9.7.1965 out of the joint family income in the name of plaintiff no. 1 and it belonged to the joint family of the parties.

13. Article 258 of the Mulla Hindu Law specifically provides that according to Mitakshara School of Hindu Law, by which both parties are admittedly governed, no coparcener can alienate even for value, his undivided interest without the consent of the other coparceners, unless the alienation be for legal necessity, or for payment by a father of antecedent debts. It further provides that the consent of the other coparceners is necessary, even if the alienation is made in favour of a coparcener. In this regard reference may be made to the decisions of various High Courts, (i) in the case of Shambhoo Vs. Ramdeo and Others, , (ii) in the case of Munna Lal vs. Karu Singh, reported in (1919)1 Pat. LT. 6, and (iii) in the case of Chander vs. Dampat reported in (1894)16 All. 369.

14. In the said circumstances, defendant no. 3 had no right to transfer the suit property in favour of defendant no. 1 as even according to the defendants' case, neither any consent was taken by the plaintiffs nor the alienation was for legal necessity, or for payment of antecedent debts as the alienation was merely by way of gift. In the said circumstances, a big question mark exists with respect to the legality of the impugned deeds of gift and the plaintiffs have a good prima facie case.

15. So far question of balance of convenience and irreparable loss of the plaintiff-appellants is concerned, it is specifically claimed by the plaintiffs that the entire land purchased in the name of plaintiff no. 1 is sought to be transferred by the impugned deeds of gift by defendant no. 3 to defendant no. 1 and on this basis the defendant-respondents have started making construction over the suit lands, which will amount to completely oust the appellants and to destroy and change the condition thereof rendering it unsuitable for the plaintiff-appellants and also to block the frontage of the portion in which plaintiff-appellants are residing, from the road side and also the light and air. These facts are confronted by the defendant-respondents only on the ground that if the plaintiff-appellants succeed, they will get their share in the said building. This reply is not sufficient for rejecting the specific claim of balance of convenience and irreparable loss of the plaintiff-appellants on the basis of several uncontested facts, which clearly proved that the balance of convenience is in favour of the plaintiffs specially when the original deed of sale was only in favour of plaintiff no. 1.

16. It is also apparent from the aforesaid facts that the plaintiff-appellants would suffer irreparable loss if the defendant-respondents are not restrained from

making any construction over the suit land or from changing its physical feature and nature till the disposal of the suit. It could also not be denied by the defendant-respondents that during the pendency of the injunction matter, they have continued making some construction over the suit land although in view of the pendency of the injunction matter, they should have refrained from doing such act until the matter was disposed of. This undue haste and impetuosity clearly shows that the defendant-respondents are trying to frustrate the efforts and claim of the plaintiff-appellants by this method, without having any respect for the court proceeding. However, these aspects of the matter have been completely overlooked by the learned court below. In the aforesaid facts and circumstances, this miscellaneous appeal is allowed, impugned order dated 18.1.2007 passed in Title Suit No. 471 of 2004 is set aside and the defendant-respondents are restrained from making any construction over the suit land and also from changing its physical feature and nature till the disposal of the said title suit.