

(1990) 03 DEL CK 0041

In the Delhi High Court

Case No : I.A. No"s. 3120 to 3122 of 1989 in Suit No. 907 of 1976

P.N.B. Finance Ltd.

APPELLANT

Vs

Shital Prasad Jain and others

RESPONDENT

Date of Decision : 19-03-1990

Acts Referred:

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; K.K. Saini, Mrs. Shamla Pappu and Pinaki Misra, for the Respondent

Judgement

R.L. Gupta, J.—These three IAs have been moved on identical grounds on behalf of defendants Nos. 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 is that defendant No. 1 diverted the loan amounts to defendants Nos. 2, 3 and 5 and acquired assets in their names. In other words, the plaintiff, so it is alleged, has set 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 "first 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 Nos. 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 Nos. 2 to 5 and another. Defendant No. 2 is the son of defendant No. 1. Defendants Nos. 3 to 5, the three companies, have been floated by defendants Nos. 1 and 2 and are controlled by them. The majority of the shares of these companies are held by defendants Nos. 1 and 2, their family members, close relations and friends. It is further the case of the plaintiff that 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. It was denied as incorrect that the plaintiff company had set up a case of benami against defendants Nos. 2, 3 and 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 the defendants before arguing on the above applications. On October 16, 1989, learned counsel for the defendants insisted that, vide order dated November 16, 1979, in is No. 2897 of 1976 issue No. 4 regarding cause of action qua defendants Nos. 2 to 5 was treated as a preliminary issue and, Therefore, before commencing 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 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 November 16, 1979, 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 Nos. 2 to 5. There was an appeal against that order and by a very elaborate and detailed judgment reported in P.N.B. Finance Ltd. v. Shital Prasad Jain [1983] 54 Comp Case 66; the Division Bench held as follows (at page 76 of 54 Comp Cas) :

"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 Nos. 3 and 5 has been apparently invested in the purchase of the 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 Nos. 1 and 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 the bona fide nature of the dealings and transactions in question at the trial. Hence, we consider it to be a fit case to grant and do grant ad interim relief to the plaintiff by restraining defendants Nos. 3 and 5 from in any manner alienating, transferring, disposing of or encumbering the properties in question, viz., 10, Panchsheel Marg, New Delhi, and flats Nos. 101 and 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 Nos. 1 and 2 towards the companies, defendants Nos. 3 to 5, it was held that, at that 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 in the purchase of the property in question, then different consequences may follow.

5. It may then be mentioned that defendants Nos. 2, 3 and 5 had moved is No. 4050 of 1979 under Order 1, rule 10(2) and Order 7, rule 11, Civil Procedure Code, in which they had alleged that, as per the averments in the plaint, the plaintiff had failed to establish any cause of action against defendants Nos. 2, 3 and 5. This is was based upon the decision of the learned single judge dated November 16, 1979 in is No. 2897 of 1976. But, after the judgment of the Division Bench came, Mr. Y. P. Narula, advocate, on behalf of defendants Nos. 2, 3 and 5, sought leave to withdraw that application on September 8, 1981, and, Therefore, that application was dismissed as withdrawn on that date. Therefore, it was well within the knowledge of defendants Nos. 2, 3 and 5 that they had withdrawn their application alleging no cause of action against them on the basis of the averments in 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 October 16, 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 Nos. 2, 3 and 5 after a lapse of such a number of years and after having withdrawn their earlier application 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 the 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, the 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 the defendant No. 1 had been the financial adviser of the plaintiff from February 1, 1972, to June 11, 1975. At the request of defendant No. 1 made on November 7, 1974, the plaintiff advanced him a loan of Rs. 5,00,000 on December 23, 1974, payable with

interest at 16% per annum. In consideration of his 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 January 29, 1975. 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 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 Nos. 2 to 5. Defendant No. 2 is the son of defendant No. 1. Defendants Nos. 3 to 5 were alleged to be companies floated by defendants Nos. 1 and 2 and were controlled by them. The majority of the shares of these companies were held by defendants Nos. 1 and 2, their other family members and close friends. Thus, they were alleged to be the family concerns of defendants Nos. 1 and 2. Defendant No. 3 purchased the property bearing No. 10, Panchsheel Marg, New Delhi, for about Rs. 10 lakhs, and defendants Nos. 4 and 5 purchased the flats bearing Nos. 101 and 102 comprised in New Delhi House, 27, Barakhamba Road, New Delhi, for about Rs. 3 lakhs each. It is further alleged that those properties were being held by defendants Nos. 3 to 5 on behalf of defendant No. 1 as the latter did not apply the loan directly for purchase of immovable properties 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 Nos. 3 to 5 were sought to be made liable for repayment of the 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 shareholder and director of the company, defendant No. 3. He denied that he held the majority of the 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. But he admitted that he was the director and shareholder of defendant No. 5. He also denied diversion of any amount by defendant No. 1 to him. Defendants Nos. 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 Nos. 1 and 2. Defendant No. 2, however, was admitted to be a shareholder and director of defendant No. 3. Defendant No. 3 also denied diversion of any amount by defendant No. 1 in its favor 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 shareholder 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 Nos. 2, 3 and 5, it has been argued that the allegations made in the plaint amount to saying that defendants Nos. 2, 3 and 5 held the properties benami on behalf of 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 defendants Nos. 2 to 5 liable because defendant No. 1 fraudulently transferred the amount of loans raised by him from the plaintiff company in favor of defendants Nos. 2 to 5 with a view to defraud the plaintiff company. The reliance on behalf of the defendants is upon section 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 Nos. 2 to 5 is not entitled to claim the various properties alleged to have been purchased by defendants Nos. 2 to 5 from the funds of defendant No. 1. Such a suit, according to the contention, will be clearly barred by section 4 of the first Act. On the other hand, learned counsel for the plaintiff contended that even if, for the sake of argument, it was admitted that the purchase of property by defendants Nos. 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, section 6 of the Act will cover the case of the plaintiff. Section 6, he argues, provides an exception to the general rule propounded in section 4. It says that nothing in this Act shall affect the provisions of section 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 section 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 section 53 of the second Act applies only to an immovable property and not to a movable property. Therefore, the plaintiff could not take any help from the provisions of section 53 of the second Act. On behalf of the plaintiff, two judgments have been cited to show that the provisions of section 53 of the second Act are applicable in case of movable property also. These are *Rajmal v. Moti* AIR 1956 Bhopal 22 and *Ah Foon v. Hoe Lai Pal* AIR 1932 Rangoon 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, AIR 1914 137 (Privy Council) has been cited to show that the provisions of section 53 of the second Act do not apply in the case of movable property.

12. In the case of *Ah Foon* AIR 1932 Rangoon 13, 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 Rs. 40,000 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 Nos. 3 and 4 had jointly purchased all the timbers lying in the godown of defendant No. 1 prior to the date of attachment. Objections to that effect were filed on behalf of defendants Nos. 2 to 4 which compelled the plaintiff to institute a suit for a declaration that, at the time of attachment, the property in the timbers remained in defendant No. 1 and that the sale of defendant No. 1 to defendants Nos. 2 to 4 was voidable as been a transaction made with intent to defeat and delay the creditors of defendant No. 1. The High Court held (headnote) :

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

13. It further held that,

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

14. Similarly, in the case of *Rajmal* AIR 1956 Bhopal 22, the High Court held (headnote) :

"Under section 53 of the Transfer of Property 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."

15. The property alleged to be transferred in that case was a she-buffalo. Even in

the case of AIR 1914 137 (Privy Council) , it was held that though section 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 movable property also on the ground of equity, justice and good conscience. In that case, the assignment made by debtor was of money. Therefore, in view of these authorities, I am of the view that when it is alleged that the diversions of funds (movable property) by defendant No. 1 in favor of the other defendants was fraudulent and illegal, section 6 of the first Act protects such a claim from the applicability of section 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 cover of the first Act. The intention of the first Act is to vest ownership rights in benamidars as against the real owners. It is not the intention of the first Act to protect such persons from 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 Kumar and Another Vs. Prem Behari Khare, , 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 apprehended rights by Mithilesh Kumari in favor of others by filing a suit for declaration and permanent injunction. His suit was decreed up to the High Court. The contention raised on behalf of Prem Behari Khare in appeal by Mithilesh 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 a 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 the pendency of the appeal which is deemed to be a continuation of the suit. The same principle of law was laid down in the case of VELAYUDHAN RAMAKRISHNAN AND OTHERS Vs. RAJEEV AND OTHERS., and Urmila Bala Dasi Vs. Probodh Chandra Ghosh and Another, . 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 u/s 6 of the first Act. The question of applicability of section 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 any of the three cases cited above.

16. 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 section 6 of the Act which saves actions covered by section 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 immovable properties were purchased fraudulently by other defendants, then certainly the 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. The IAs are, Therefore, dismissed.

17. Before parting with this case, I may also mention that the issues in this case were framed on December 20, 1979. Thereafter, the case was listed for recording the evidence of the parties for the first time from November 11, 14, 18, 1988, but the evidence could not be recorded because, in the meantime, another I.A. No. 8034 of 1988 was moved on behalf of defendant No. 1 for framing of additional issues. That application was allowed on conditional costs of Rs. 1,500, vide order dated November 15, 1988, by C. L. Chaudhry J. Thereafter, the dates of trial in this case were fixed from April 24, 1989, to April 28, 1989. The order dated April 24, 1989, by C. L. Chaudhry J. shows that 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 for evidence to April 27, 1989. On that date, the evidence could not be recorded because the hon"ble judge did not hold court after lunch. The case was then adjourned for evidence from October 16, 20, 1989. On November 16, 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.

18. This case was originally filed in the year 1976 and, taking into consideration all these circumstances, I am of the view that, being a very old case, it requires to be expeditiously dealt with. The matter may, Therefore, be listed before the Deputy Registrar for fixing fresh dates of trial in this case in October, 1990.

19. 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 still 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 March 30, 1990.