

(1989) 03 BOM CK 0018

In the Bombay High Court

Case No : Second Appeals No's. 135 and 136 of 1989

Satyabhamabai Balaji Kitey (Decd. by Legal Representative,
Kamlakar Laxmanrao Pawar) APPELLANT

Vs

Pandurang Marotrao Pawar RESPONDENT

Date of Decision : 31-03-1989

Acts Referred:

Benami Transactions (Prohibition) Act, 1988 — Section 4
Civil Procedure Code, 1908 (CPC) — Section 66

Citation : (1989) MhLj 1068

Hon'ble Judges : A.A. Desai, J

Bench : Single Bench

Judgement

A.A. Desai, J.—These appeals raise a question as to what is the extent and nature of the right, interest and title of an ostensible owner vis-a-vis a real owner of benami property?

2. Facts involved in these appeals, to some extent, are interlinked. They are heard together and are being disposed of by this common judgment.

3. One Satyabhamabai, widow of Balaji Kitey, the original plaintiff, claimed to be the owner of the suit house. She is stated to have purchased the suit house, vide sale deed, exhibit C-1, dated January 7, 1936, by making payment of a consideration of Rs. 1,600. She had three brothers; (i) Yeshwantrao, (ii) Laxmanrao and (iii) Marotrao. The defendant, Pandurang, is a son of Marotrao. According to her, she intended to execute a will bequeathing the suit house to the sons of her brothers. She instructed the defendant, Pandurang, to prepare a will. She alleged that the defendant presented exhibit 35 dated June 21, 1966, representing it as a will drafted according to her instructions and wishes. She, being an illiterate and old lady, without understanding the contents, put her thumb impression.

4. The defendant thereafter some time in 1977 tried to oust Kamlakar, son of her brother, Laxmanrao, from the suit premises. On enquiry, she learnt that the

defendant obtained her thumb impression on June 21, 1966, on a deed of relinquishment surrendering her right in the suit house in favour of the defendant. She, subsequently on May 23, 1977, executed a will bequeathing the suit house in favour of Kamlakar, three other sons of Laxmanrao and the defendant. On April 29, 1978, Satyabhamabai filed a suit against the defendant, Pandurang, alleging that the thumb impression on exhibit 35 dated June 21, 1966, was obtained by fraud and misrepresentation. She, therefore, sought cancellation of the deed dated June 21, 1966, and consequential declaration that it is not binding and claimed possession of the property.

5. The defendant, Pandurang, asserted that he is an adopted son of Yeshwantrao who died some time in 1962. He denied the ownership of the suit house and also the payment of sale consideration by Satyabhamabai. He also denied the misrepresentation or fraud as alleged.

6. The trial court, after taking into consideration the material on record, held that the plaintiff failed to prove her title to the suit house and also alleged misrepresentation or fraud played by the defendant in execution of the deed dated June 21, 1966. It is also held that, even otherwise, the plaintiff got knowledge of the relinquishment deed in 1967 during the mutation proceedings of the suit house in favour of the defendant. Hence, the suit filed on April 29, 1978, for cancellation of the deed dated June 21, 1966, is barred by limitation in view of article 59 of the Limitation Act. The trial court, therefore, by the judgment and decree dated August 10, 1982, dismissed the suit.

7. The plaintiff, Satyabhamabai, therefore, preferred an appeal registered as Reg. Civil Appeal No. 106 of 1983. However, she died on May 7, 1984, during the pendency. Kamlakar Pawar came to be substituted in her place as an executor of a will dated May 23, 1977.

8. The original defendant, Pandurang, in the meanwhile, on February 28, 1983, filed a suit for recovery of possession of the suit house against Kamlakar. According to him, he is the owner of the suit house. He, some time in 1973, permitted Kamlakar to occupy the premises being a relation. Kamlakar was thus a licensee. He revoked the licence by notice dated October 25, 1982.

9. According to Kamlakar, Satyabhamabai was the owner of the suit house and she inducted him into the premises. The trial court upheld the contention of Pandurang and passed a decree in his favour on March 27, 1985. Kamlakar, therefore, presented an appeal registered as Reg. Civil Appeal No. 263 of 1985 against the judgment and decree dated March 27, 1985.

10. The learned Additional District Judge heard both these appeals (R. C. A. No. 106 of 1983 and R. C. A. No. 263 of 1985) and by two separate judgments dated February 28, 1989, dismissed them. Kamlakar, therefore, presented Second Appeal No. 135 of 1989 against the judgment and decree in the suit seeking cancellation of the relinquishment deed and Second Appeal No. 136 of 1989 against the judgment and decree ordering him to deliver vacant possession of

the suit premises. Both these appeals are heard together. Mr. V. R. Manohar, learned counsel appeared for the appellant, Kamlakar, whereas Messrs. Kashikar and Bhattad, learned counsel, represented the respondent, Pandurang, in both the appeals.

11. Mr. Manohar, in Second Appeal No. 135 of 1989, tried to urge that the courts below in the suit filed by Satyabhamabai ought to have held that the document styled as a relinquishment deed was obtained by fraud and misrepresentation. Admittedly, Satyabhamabai was an old and illiterate lady. Her intention to bequeath the property under the will in favour of all the sons of her brother, according to learned counsel, was adverse to the interest of the defendant, Pandurang. It was, therefore, quite natural for him to play a fraud and misrepresent. Perused with the assistance of learned counsel, the judgments of both the courts below. It could not be pointed out that the courts below committed any patent or material illegality in recording the finding. The courts below, after close scrutiny of the evidence on record, rightly reached the conclusion that Satyabhamabai failed to prove any fraud or misrepresentation in the execution of exhibit 35. The finding as recorded is just and proper. This concurrent finding does not warrant any interference in this second appeal.

12. The courts below, even otherwise, held that Satyabhamabai failed to prove that she got the knowledge of the relinquishment deed in the year 1977. They have unanimously held that in the year 1967 during the mutation proceedings of the suit house in favour of Pandurang, she got knowledge of the relinquishment deed. Learned counsel could not seriously dispute the findings as recorded by the courts below. Her suit for cancellation of an instrument filed on April 29, 1978, is admittedly beyond three years from the date of knowledge as prescribed under article 59. In view of this, Second Appeal No. 135 of 1989 is liable to be dismissed.

13. Mr. Manohar, in Second Appeal No. 136 of 1989, relying on the observation made by the courts below in an earlier suit for cancellation of the relinquishment deed, submitted that the purchase of the suit house in the name of Satyabhamabai was benami. The learned trial judge, taking into consideration the evidence of Satyabhamabai, has observed that "this admission clearly shows that Yeshwantrao was the real vendee but he purchased it in the name of the plaintiff to avoid creditors." He, therefore, drew the inference that the plaintiff, Satyabhamabai, was a benami purchaser and that it was Yeshwantrao, who was the real owner of the house.

14. Mr. Manohar, therefore, made the submission that this finding operates as res judicata in the suit proceeding subsequently initiated by Pandurang against Kamlakar for possession. These findings are binding on the parties. According to Mr. Manohar, section 4 of the Benami Transactions (Prohibition) Act, 1988, declares a prohibition against the right to recover the property held benami. These provisions came into force on May 19, 1988. However, they are retroactive in operation in view of the decision of the Supreme Court in the case of Mithilesh

Kumar and Another Vs. Prem Behari Khare, . Hence, the suit for recovery of possession instituted against Kamlakar, the appellant, by Pandurang who claimed title to the suit house through Yashwantrao, the real owner, in respect of the property held benami by Satyabhamabai is not maintainable. The suit is, therefore, liable to be dismissed.

15. Satyabhamabai, as discussed, in her suit has merely sought cancellation of the relinquishment deed dated June 21, 1966. She has, however, not sought any declaration about her title in respect of the suit house. Even the defendant has not raised a plea of benami purchase of house in the name of Satyabhamabai. There was no issue either involved or raised or framed by the court in this regard. The court was not called upon to decide the question regarding the nature of title or ownership of Satyabhamabai as reflected through exhibit C-1, i.e., original sale deed dated January 7, 1936. The trial court, has, therefore, not decided any question directly or substantially involved so far as it relates to the nature of the transaction. As such, the observation made by the learned trial judge that Yeshwantrao was the real owner and Satyabhamabai was the benamidar cannot operate as res judicata in the subsequent suit filed by Pandurang of recovery of possession.

16. Moreover, the subsequent suit filed by Pandurang against Kamlakar cannot be said to be between the same parties. In the earlier suit between Satyabhamabai and Pandurang, Kamlakar was substituted in her place as the executor of the will. However, in the subsequent suit he was impleaded, being the licensee of the respondent, Pandurang. As such, both the suits cannot be said to be between the same parties so as to attract the rule laid down in section 11 of the Code of Civil Procedure.

17. Mr. Manohar then submitted that exhibit 35, the relinquishment deed, is nothing but an act of Satyabhamabai to reassert that the transaction as evidenced through the sale deed, exhibit C-1, dated January 7, 1936, is a benami transaction. In the submission of learned counsel, Satyabhamabai being a benamidar, did not possess any right, title or interest in respect of the suit property. He, therefore, contended that exhibit 35 as executed in favour of Pandurang does not transfer or enlarge his right, title or interest in the property. In this behalf, he sought support from a ruling of the Patna High Court reported in the case of Munshi Gobind Prasad Vs. Lala Jagdeep Sahai, . The Patna High Court has observed (at page 186):

"Now it has been held repeatedly that the deed of relinquishment does not confer a title and that title to land cannot pass by admission when the statute requires a deed.... Here the parties have been trying to effect by release what could only be effected by conveyance. This document is of no effect whatsoever in transferring the title from the defendant to the plaintiff".

18. In the case before the Patna High Court, it was held that the defendant was a beneficial owner and, therefore, a legal owner. It is further held that for

transferring the interest or title, the statute requires a conveyance and such transfer could not be by mere admission. The case before the Patna High Court was not one of relinquishment or release or a surrender by the benamidar in favour of the real owner. The observation on which reliance is placed by learned counsel is of no assistance for the question raised in this appeal.

19. However, Mr. Bhattad, learned counsel, contended that Satyabhamabai, through exhibit 35, has relinquished whatever right she possessed as holder of the property in favour of Pandurang. He is recorded as an owner and holder of the property since 1966 in the municipal records. The property has, as such, ceased to be benami. In the submission of learned counsel, relinquishment by the benamidar is a normal and recognised mode of surrendering and acknowledging the right of the real owner. As a result of exhibit 35, the property ceased to be benami since then.

20. Exhibit 35 is a deed executed by Satyabhamabai in favour of Pandurang, the sole legal heir of dead Yeshwantrao. The document is in vernacular. The deed is registered and is valued at Rs. 10,000. The title of the document reads as "the deed relinquishing right of a benami purchase". It opens with the statement, "in this year of 1966 - she is writing this deed to relinquish right... This house is purchase in my name. In the sale consideration, not a single pie is of mine. Because of difficulties, your father purchased in my name. This right of benami purchase without taking anything in return is relinquished from today."

21. On going through the text of the document, it is explicit that the deed unambiguously declares the intention of the executor to surrender and relinquish her right in respect of the house purchased in her name. In *Mariyam Bivi and Others Vs. Natharsa Rowther Trust*, , it is held that an instrument whereby a benamidar sustains and declares the interest of a real owner is a release deed and not a conveyance. Similar view was earlier taken in a case reported in *The Chief Controlling Revenue Authority, Board of Revenue, Madras Vs. M. Hamid Sultan*, .

22. The question that comes up for consideration is as to what is the nature and extent of a right of a benamidar. It is well-settled that a person advancing consideration sometimes borrows the name of a third person for recording in the sale deed as a purchaser. When such purchase does not create any beneficial interest in the person who has lent his name, he holds the property as an ostensible owner. The person advancing consideration is a beneficial owner.

23. Mr. Bhattad invited my attention to a decision of the Madras High Court reported in *Rangaswami and Another Vs. T.R.C. Krishnan and Others*, . It is held that "section 66 of the CPC does not prohibit recognition of a title of a real owner by a benamidar (auction-purchaser)". It was also held that "release-deed in favour of real owner or his heir might well be construed as a deed of transfer or conveyance sufficient to vest title in the true owner". Mr. Bhattad, therefore, made a submission that Satyabhamabai by a registered deed, exhibit 35,

asserted her brother, Yeshwantrao, as the real owner and surrendered the right to hold the property in her name as an ostensible owner in favour of Pandurang, adopted son of Yashwant. Learned counsel, therefore, made a further submission that as a result of the release deed, Pandurang becomes legally entitled to hold the property in his name and can further transact or deal with it without any hindrance or impediment.

24. Mr. Manohar made a submission that the view taken by the Madras High Court in the case of Rangaswami and Another Vs. T.R.C. Krishnan and Others, , is erroneous in view of the law laid down by the Supreme Court in the case reported in Kuppuswamy Chettiar Vs. A.S.P.A. Arumugam Chettiar and Another, . The Supreme Court on a construction of the documents held that "it was a deed of release. Such release without consideration is a gift." It is observed that the release is a form of conveyance by a person having interest in favour of a person having limited interest. Such release, it is observed, then operates as an enlargement of a limited estate. It is further observed that a deed which is not in favour of a person having any interest could not take the place of an enlargement of existing title. In substance, release can amplify the rights which are in existence. However, it cannot create new rights. The Supreme Courts was not dealing with the case of relinquishment by a person holding property as an ostensible owner in favour of a legal owner. The Supreme Court, therefore, does not disapprove the view taken by the Madras High Court in Rangaswami and Another Vs. T.R.C. Krishnan and Others, .

25. Benamidar possesses an ostensible title. He holds and represents the property for all practical purposes to the entire world "except the real owner". Section 66 of the Code of Civil Procedure, as held by the Madras High Court, does not create any legal bar for a benamidar to recognise the title of a legal owner. He can do so by an instrument which, as held by the Madras High Court in the case of Mariyam Bivi and Others Vs. Natharsa Rowther Trust, , constitutes a deed of release. It is well-settled that the purchaser of a property from an ostensible owner (benamidar) is protected from the real owner save for their want of knowledge of the real owner and the benamidar can transfer a valid title in favour of a purchaser.

26. Satyabhamabai, by a deed of release, exhibit 35, relinquished such right. She surrendered her ostensible title and her right to hold the property in her name and also the right to represent. As a result of exhibit 35, her character as an ostensible owner in respect of the property has extinguished. Since then she has no longer been a benamidar. Consequently, the suit house also ceased to be a benami property in the name of Satyabhamabai. The ostensible title, right to hold and represent the property, by deed, exhibit 35, has completely merged in the legal owner. Pandurang came to be recorded as the owner of the property in the place of Satyabhamabai as a legal heir of the real owner. Yeshwantrao. Since 1967, Pandurang is holding the property in his name as legal and real owner for all practical purposes.

27. In view of the discussion, the Act of 1988 which came into force on May 19, 1988, even though retroactive in operation, cannot create a bar against Pandurang to re-enforce his right against Kamlakar in respect of the property which ceased to be benami since 1966, as a consequence of execution of the relinquishment deed, exhibit 35. Pandurang was, therefore entitled to recover possession from Kamlakar. The courts below were justified in awarding decrees in favour of Pandurang. The judgment and decree, in view of the discussion, does not suffer from any legal infirmity. Second Appeal No. 136 of 1989, therefore, must fail.

28. In the result, Second Appeal No. 135 of 1989 and Second Appeal No. 136 of 1989 are hereby dismissed. There would be no order as to costs.