

(2010) 08 DEL CK 0294

In the Delhi High Court

Case No : Regular Second Appeal No. 85 of 1995 and CM No's. 1739 and 3673 of 1999

Shri Poonya Ram through LR's.

APPELLANT

Vs

Shri Durga Prasad (substituted by Shri Jagdish Prasad Awasthi)

RESPONDENT

Date of Decision : 17-08-2010

Acts Referred:

Benami Transactions (Prohibition) Act, 1988 — Section 2

Civil Procedure Code, 1908 (CPC) — Section 100

Evidence Act, 1872 — Section 92

Citation : (2010) 08 DEL CK 0294

Hon'ble Judges : Indermeet Kaur, J

Bench : Single Bench

Advocate : K.R. Gupta and Kiran Dharam, for the Appellant; Reeta Chaudhary, for Sunil Kr. Jain, for the Respondent

Final Decision : Dismissed

Judgement

Indermeet Kaur, J.—Poonya Ram the plaintiff has filed a suit for eviction against the Durga Prasad. The suit property was a pucca room shown in red colour in the map annexed along with the plaint situated in Mohalla Bagar Ka Bas, near Police Lines, Alwar. plaintiff claimed possession of the suit property.

2. Case of the plaintiff was that on 14.7.1991 he had purchased a pucca house consisting three rooms, a verandah, two kitchens with vacant land in front having neem trees and a banyan tree. Durga Prasad, the defendant was his cousin. He approached the plaintiff on 15.10.1972 and requested him to permit him user of one of the three rooms for storing fodder for a few days. Without doubting the intention of the defendant, the plaintiff permitted him to do so. Defendant had convinced the plaintiff that he shall shortly i.e. within 2-3 months vacate the room. In fact he had also got electrical fittings fitted in the room to which the plaintiff objected. Despite request the defendant did not vacate the suit property. Present suit was accordingly filed.

3. In the written statement, the claim of the plaintiff was disputed. It was stated that the building was auctioned by the Building Disposal Committee, Alwar on 19.2.1970. The defendant Durga Prasad was a competitor for the purchase of this property with Kailash Dass Rathore and Gopal Dass. Kailash Dass had made it clear to the defendant that he would not allow the defendant to purchase the said property. plaintiff took the defendant in confidence and asked him to make a benami bid on his behalf. The defendant and the plaintiff being cousins, the plaintiff agreed to abide by this request of the defendant. The defendant is the owner of the said property although the bid had been made by the plaintiff benami for and on behalf of the defendant and a sum of Rs. 11,000/- which was paid in lieu of the purchase of this property had been paid by the defendant himself. The sale deed had been got registered by the plaintiff in his name benami; the original sale deed was always with the defendant. plaintiff is occupying two rooms and he is illegally claiming ownership of the entire suit property on the basis of this registered sale deed. plaintiff has no ownership right in the suit property, it belongs to the defendant; present suit is not maintainable.

4. This is a second appeal impugning the judgment dated 5.12.1987 passed by the first Appellate Court, Alwar endorsing the finding of the Civil Judge, Alwar dated 6.9.1983 whereby the suit of the plaintiff had been dismissed. Both the Courts below had given a concurrent finding in favour of the defendant and against the plaintiff; it was held that the defendant had purchased this property benami in the name of the plaintiff; the true owner was the defendant and as such the plaintiff was not entitled to the relief sought for by him.

5. The substantial questions of law was formulated before the Rajasthan High Court on 19.12.1988 reads as follows:

a. Whether in view of Section 2 of the Benami Transactions (Prohibition of right to recover the Property) ordinance and Act of 1988 the defendant can set up the defence with regard to property in dispute that same is held Benami by the plaintiff?

b. Whether the finding of Courts below on issue No. 3 is unsubstantial and deserves to be reserved in view of promulgation of Ordinance 1988 and Act of 1988?

c. Whether the finding of two Courts below that the transaction in dispute is benami transaction is vitiated for ignoring and over looking the admitted facts as stated in Para (r)?

6. At this stage, it would be relevant to extract issue No. 3 framed by the Trial Judge as also para (r) both of which inter alia read as follows:

3. Whether the disputed house was purchased by the plaintiff is benami for defendant and the real owner and occupier of the house is defendant.

(r). That the two courts below have committed serious error of law in not considering very important and admitted basic facts while considering the

question whether the sale in dispute was Benami or not. These admitted and undisputed facts are:

- (i) that the property in dispute was purchased by plaintiff in public auction;
- (ii) that the public auction took place on 18.2.70 as well as 19.2.70. On 18.2.70 the plaintiff was bidder whereas the defendant Durga Prasad even had not participated;
- (iii) in the sale deed Ex.1 it is clearly recited that the purchase money was paid by plaintiff;
- (iv) that the challans after payment of 1/4th price and 3/4th price were in possession of plaintiff;
- (v) that the challans for payment of non-judicial stamp for the purpose of sale deed was in possession of plaintiff;
- (vi) that the part of the property is in possession of plaintiff;
- (vii) that after purchase and the plaintiff coming into possession has installed water and electricity connection which is also in the name of plaintiff;
- (viii) that the plaintiff has purchased the strip of land measuring about 18".6" x 78" from UIT on the Northern side of the in front of disputed property in the year 1976.
- (ix) after the purchase of the property the possession was handed over by the authorities concerned to the plaintiff.

Since the aforesaid admitted facts have been either ignored and over looked and not properly considered by the two courts below, the finding by two courts below on issue No. 2 and 3 or for point for determination of point No. 1 by appellate court was vitiated.

7. On 16.1.1995 the Supreme Court on a transfer petition preferred by the plaintiff had transferred this petition which was pending in the Rajasthan High Court to the Delhi High Court for disposal. This Court is accordingly seized of the jurisdiction in this case.

8. Counsel for the appellant has urged that where a document of title has been misconstrued, misread which is the foundation of the rights of the parties, it raises a pure question of law. The Courts below had ignored the fact that the registered sale deed of the suit property was admittedly in the name of the plaintiff, all other documentary evidence also clearly depict that it was the plaintiff who had paid the bid amount at the auction, i.e. the earnest money of Rs. 2750/- and thereafter the balance three quarter amount of Rs. 8250/- totalling a sum of Rs. 11,000/- as the consideration of this property. Attention has been drawn to the challan dated 20.2.1970 recording that a sum of Rs. 2750/- has been paid by Poonya Ram at an auction for the aforementioned suit property located at the Police Chowki Gate, Alwar. It is pointed out by Learned

Counsel for the appellant that this document had been produced by the plaintiff although denied by the defendant. Attention has also been drawn to another challan showing payment of Rs. 8250/- issued by the Government of Rajasthan. It is submitted that this was the balance three quarter payment which had been made by the plaintiff. This document had also been produced by the plaintiff although not admitted by the defendant. Further a sum of Rs. 402/- was also deposited by the plaintiff with the Stamp Collector for the purchase of the stamp paper for recording the sale deed of the said property. This document was also in the possession of the plaintiff and produced by him in the Court although not admitted by the defendant. Admittedly the sale deed dated 14.7.1971 Ex.P-1 has been executed in the name of the plaintiff Poonya Ram where Yad Ram Meena, an advocate, son of the defendant was an attesting witness. The certified copy of the sale deed was produced by the plaintiff. Learned Counsel for the appellant has placed reliance upon a judgment of the Supreme Court reported in Jaydayal Poddar (Deceased) through L.Rs. and Another Vs. Mst. Bibi Hazra and Others, to support his submission that where the plea of benami is set up by the defendant it has to be strictly discharged by adducing legal evidence of a definite character. This evidence must unerringly and reasonably raise the inferences of fact so pleaded. The defendant had failed to discharge this onus. Counsel for the appellant has also placed reliance upon Hira Lal and another Vs. Gajjan and others, to support his submission that a substantial question of law arises in all cases where the first Appellate Court had discarded the evidence as inadmissible, in such a case it is a substantial error and defect in the procedure which in turn amounts to a substantial question of law. For the same proposition reliance has also been placed upon Kulwant Kaur and Others Vs. Gurdial Singh Mann (dead) by Lrs. and Others etc., as also a judgment reported in Krishna Mohan Kul @ Nani Charan Kul and Another Vs. Pratima Maity and Others, It is submitted that a perverse finding raises a substantial question of law worth adjudication; in the instant case by ignoring the document of title of the plaintiff and relying upon a plea of benami set up by the defendant which did not stand proved, the Courts below have committed a perversity and as such it is well within the jurisdiction of the second appellate Court to interfere in such a perverse finding. Reliance has been placed upon Arulvelu and Another Vs. State represented by the Public Prosecutor and Another, wherein the definition of "perverse" has been detailed. It is stated that whatever is not right, it has turned the wrong way; it is distorted from right, deviating from what is right, proper, correct etc. is perverse as has been held in the aforementioned judgment. By applying this ratio, it is clear that the findings of the two Courts below are perverse.

9. These submissions have been countered by the Learned Counsel for the respondent. Written submission has been placed on record. It is pointed out that concurrent findings of the fact after a correct appreciation of the oral and documentary evidence before the said fact finding Courts cannot be interfered with. Arguments propounded by the Learned Counsel for the appellant are all fact based. It is pointed out that the Benami Transaction (Prohibition) Act 1988

was promulgated in the year 1988; it does not apply to the instant situation as the proceedings in the instant case are of the year 1970 which is prior in time to the said Act which does not have a retrospective application. For this proposition Learned Counsel for the respondent has placed reliance upon a judgment reported in *R. Rajagopal Reddy and Others (deceased by legal representatives) Vs. Padmini Chandrasekharan (deceased by legal representatives)*, wherein it had been held by Supreme Court that this Act had no retrospective operation, it would only apply prospectively. At this stage, Learned Counsel for the appellant also submits that he is not pressing this submission as admittedly the said Act would not apply to the facts of the said case.

10. In view of the aforementioned admission of the Learned Counsel for the appellant as also the law on the applicability of the Benami Transaction (Prohibition) Act 1988 as laid down by the Supreme Court in the case of *R. Rajagopal Reddy (supra)* it is clear that the provisions of the said Act will not apply to the instant case. This Act had been promulgated much after the disputed transaction in the instant case. The substantial questions of law No. (a) and (b) formulated on 19.12.1988 thus do not have to be answered.

11. This Court only has to answer the substantial question No. (c) as formulated on 19.12.1988 and para (r) in the memo of appeal which has been reproduced hereinabove.

12. Section 100 of the Code expressly bars a second appeal unless a question of law is involved and the said question of law involved is substantial. This was pursuant to the amendment in 1976; object being that all questions of facts involved in a case must rest where they lie after having been decided by the Court of first Appeal without any further appeal. There will no longer be any scope whatsoever for the admission of a second appeal by the High Court on such questions of fact merely on the fact that the findings recorded are supposed to be manifestly unjust or merely because of the certain procedural defects; unless they raise a "substantial question of law", no second appeal can be entertained. In *Krishna Mohan Kul (supra)*, the Supreme Court in the context of the scope of the power of the High Court to interfere with concurrent findings of fact had inter alia held as follows:

9. Though, as rightly contended by Learned Counsel for the appellants, the scope for interference with concurrent findings of fact while exercising jurisdiction u/s 100 CPC is very limited, where the trial Court and/or the first Appellate Court misdirected themselves in appreciating the question of law and placed the onus on the wrong party, certainly there is a scope for interference u/s 100 CPC after formulating a substantial question of law.

10. As was noted in *Yadarao Dajiba Shrawane v. Nanilal Harakchand Shah* if the judgments of the trial Court and the first Appellate Court are based on misinterpretation of the documentary evidence or on consideration of inadmissible evidence or on ignoring material evidence or on a finding of fact has

ignored admissions or concession made by witnesses or parties, the High Court can interfere in appeal.

11. In *Neelakantan v. Mallika Begum* it was held that findings of fact recorded must be set aside where the findings has no basis in any legal evidence on record or is based on a misreading of evidence or suffers from any legal infirmity which materially prejudices the case of one of the parties.

13. It is in this backdrop of the law as enunciated hereinabove that the contentions of the respective parties have to be appreciated.

14. The plaintiff Poonya Ram had filed a suit for possession of one room; suit property comprised of three rooms; contention of the plaintiff was that one room had been given to the defendant for use i.e. to keep his fodder for a temporary period but thereafter in spite of requests the defendant did not hand over the possession of the said room. The suit property which was the subject matter of the auction purchase comprised of three rooms of which as per the plaintiff two rooms were in his possession; only one room had been handed over to the defendant. It is also an admitted case that the sale deed Ex.P-1 of the property dated 14.7.1971 is in the name of the plaintiff. It is also admitted that the challans Ex.P-6 and Ex.P-4 evidencing payment of the earnest money and the balance purchase money had been produced by the plaintiff. The challan of Rs. 402/- Ex.P-5 evidencing the deposit of stamp duty for purchase of stamp paper for the sale deed was also proved in the evidence of the plaintiff. It is also not in dispute that the original document of title i.e. the sale deed Ex.P-1 had been produced by the defendant; it was in his custody; plaintiff had produced a certified copy of the same.

15. The defendant had set up a plea of benami; his case being that the plaintiff had paid the purchase money on his behalf; the money had been given by the defendant to the plaintiff who was acting for and on behalf of the defendant. This being a benami transaction, the Courts below had held that the plaintiff is not entitled to the possession of the suit property.

16. There are two concurrent findings of fact by the courts below. They had held that the defense of benami set up by the defendant stood established.

17. The relevant extract of the proposition of law as laid down by the Supreme Court in the case of *Jaydayal Poddar* (supra) and the guidelines required to be proved in a defence of benami had been detailed. The said guidelines are as follows:

It is well settled that the burden of proving that a particular sale is benami and the apparent purchaser is not the real owner, always rests on the person asserting it to be so. This burden has to be strictly discharged by adducing legal evidence of a definite character which would either directly prove the fact of Benami or establish circumstances unerringly and reasonably raising an inference of that fact. The essence of a benami is the intention of the party or parties

concerned; and not unoften such intention is shrouded in a thick veil which cannot be easily pierced through. But such difficulties do not relieve the person asserting the transaction to be benami of any part of the serious onus that rests on him; nor justify the acceptance of mere conjectures or surmises, as a substitute for proof.

(1) the source from which the purchase money came; (2) the nature and possession of the property, after the purchase; (3) motive, if any, for giving the transaction a benami colour; (4) the position of the parties and the relationship, if any, between the claimant and the alleged benamidar; (5) the custody of the title-deeds after the sale and (6) the conduct of the parties concerned in dealing with the property after the sale.

The above indicia are not exhaustive and their efficacy varies according to the facts of each case. Nevertheless No. 1, viz. the source whence the purchase money came, is by far the most important test for determining whether the sale standing in the name of one person, is in reality for the benefit of another.

18. The Trial Court and the first Appellate Court had both in depth and detail discussed the evidence in the light of the aforementioned propositions of law.

19. Admittedly the title deeds of the suit property i.e. the sale deed Ex.P-1 dated 14.7.1971 was in the custody of the defendant. Court had returned the finding that the defendant was a government servant, his son was an advocate having an earning of about Rs. 2000/- per month whereas the plaintiff was having a meager financial capacity and did not have the source of money to purchase this land for Rs. 11000/-. plaintiff did not have the means or the resources to have paid the purchase money from his own account; a fact finding conclusion had been drawn that this money had been paid by the plaintiff for and on behalf of the defendant. Motive of the defendant to give the transaction a benami colour was for the reason that his co-competitor Kailash Dass wanted to out bid him; that is why he had requested the plaintiff to bid on his behalf. Kailash Dass had come into witness box as PW-9. He had testified to the said effect. Parties as aforementioned are closely related defending being the nephew of the plaintiff who was his "chacha". DW-1 had deposed that he had given the bid money; he had brought it from his wife Smt. Chokti Devi and given it to the plaintiff to deposit the same in the Collectorate on his behalf. The auctioneer DW-4, an independent witness, has also deposed that this bid although done by Poonya Ram was on behalf of Durga Prasad. DW-8 the son of DW-1 had deposed that balance three quarter amount had been taken by him from his father and deposited in the State Bank of India, Alwar, although receipt had been issued two days later in the name of Poonya Ram.

20. Further contention of the defendant was that the possession of the suit land in fact has already handed over by the plaintiff to the defendant. The Court had also examined the site plan and the coloured portion i.e. the yellow portion which was in the possession of the defendant and the green portion which was in the

possession of the plaintiff and concluded that in view of the documentary evidence as also oral testimony it was established that the 2/3rd of the property from the very beginning was in the physical possession of the defendant. plaintiff in his cross-examination had in fact admitted that he is in possession of only 1/3rd of the property. The document of title i.e. the sale deed Ex.P-1 had been produced by the defendant. This was a vital document; if plaintiff was the legal owner, how did the title document pass to the defendant. Submission of the plaintiff that Yad Ram Meena DW-8 being an advocate was entitled to receive the sale document had been rejected.

21. An indepth and detailed scrutiny of the evidence both oral and documentary had been conducted by the two fact finding courts below to draw a conclusion that this transaction was in fact benami. The parameters and guidelines laid by the Supreme Court had been addressed. The courts below had in fact with special reference to each of the six conditions laid down by Supreme Court concurrently drawn a conclusion that the defence of benami as set up by the defendant is established. The first Appellate Court also discussed the provisions of Section 92 of the Indian Evidence Act; in a case where a defence of benami is set up and the nature of the real transaction has to be determined as to whether it is a real purchase or benami, there is no restriction to take oral evidence.

22. These are concurrent findings of fact which had been endorsed by both the Courts below. The submission of the Learned Counsel for the appellant that this is a case of perversity and the Courts below had based their conclusion on no evidence or in the alternative by ignoring material evidence or further by endorsing findings which are contrary to the documents on record is not made out. The findings cannot in any manner be held to be preserve. There is no merit in the appeal. Appeal as also the pending applications are dismissed.