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IN THE HIGH COURT OF DELHI

Judgment reserved on : September 18, 2008

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Judgment delivered on : October 20, 2008

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RFA No.784/2003

SATISH KUMAR

..... Appellant

Through: Ms. Sonali Malhotra, Advocate

versus

PREM KUMAR & ORS.

..... Respondents

Through: Ms. Sonia Arora, Advocate

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE J.R. MIDHA

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether judgment should be reported in Digest?

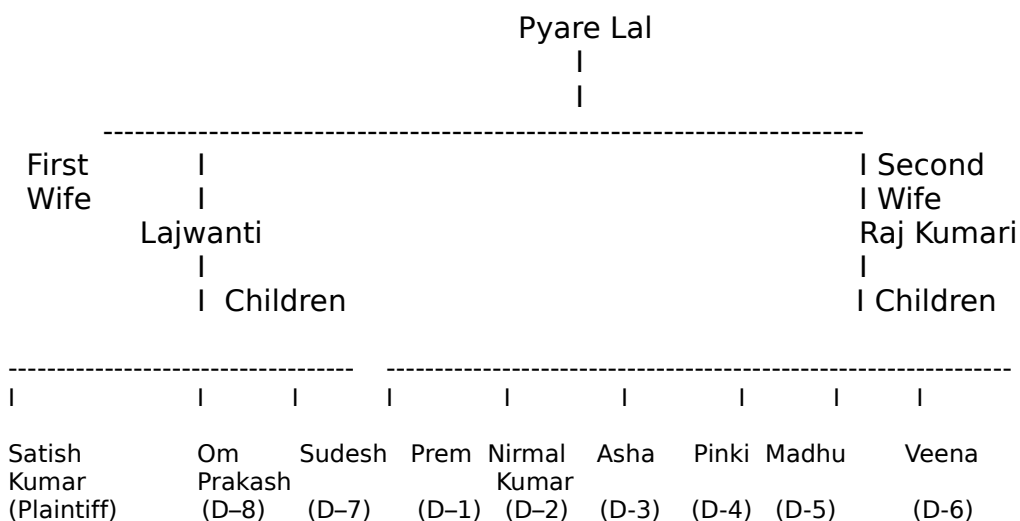
: PRADEEP NANDRAJOG, J.

1. The original suit bearing Suit No.1/2003 was filed by the Appellant, Satish Kumar, against the Respondents for the partition of his alleged 1/9th share in the property bearing

Municipal No.9/748, Subash Road, Gandhi Nagar, Delhi
(hereinafter referred to as the "Suit Property").

2. I shall be referring to the parties by their nomenclature in the suit.

3. The tenor of the dispute between the parties can be understood properly by the following pedigree:-



4. Case set up by the plaintiff was that Late Sh. Pyare Lal (hereinafter referred to as the “deceased”) was the owner of the properties bearing Municipal Nos.K-45 and K-46, Lajpat Nagar, New Delhi and two other properties situated at Rudrapur Maniari Bazaar, Uttar Pradesh and Gurgaon respectively. That the properties situated at Lajpat Nagar were allotted by the Rehabilitation Department in the name of the deceased in lieu of the properties left behind by him in Pakistan. That the deceased had purchased the suit property in name of his second wife, Late Smt. Raj Kumari and the sale

consideration thereof was paid by him from out of the sale proceeds of the afore-mentioned properties. That Late Smt. Raj Kumari had no right, title or interest in the suit property as she was a mere benamidar of the deceased inasmuch as the deceased was the real owner of the suit property as he had paid the entire consideration in respect of the suit property. That the deceased had died intestate and therefore being the natural born son of the deceased, the plaintiff is entitled to 1/9th share in the suit property as per the provisions of the Hindu Succession Act, 1956.

5. Defendant No.1, Prem Kumar and defendant No.6, Smt. Veena contested the suit filed by the plaintiff. Defence set up by them was that Late Late Smt. Raj Kumari had purchased the suit property from one Smt. Dwarka Devi on 26.10.1964 vide registered sale deed dated 27.10.1964 for a consideration of Rs.5,000/-. That the suit property was the self-acquired property of Late Smt. Raj Kumari as she had paid the entire sale consideration in respect thereof from her istridhan. That the stand of the plaintiff that the deceased was the real owner of the suit property and that Late Late Smt. Raj Kumari was a benamidar of the deceased stands belied from the fact that the properties at Lajpat Nagar which is alleged to be the main source of sale consideration of the suit property were sold by

the deceased in the years 1976 and 1981 respectively which was much after the acquisition of the suit property by Late Smt. Raj Kumari in the year 1964. That the sale proceeds of the properties at Lajpat Nagar were spent by the deceased on the marriage of his daughters. That since the plaintiff is not the legal heir of Late Smt. Raj Kumari, he is not entitled to any share in the suit property which was the exclusive property of Late Late Smt. Raj Kumari. That Late Smt. Raj Kumari executed a Will dated 31.03.1986 wherein she had bequeathed the suit property in the favour of defendant No.1.

6. On the basis of the pleadings of the parties, following issues were settled by the learned Trial Court:-

“1. Whether the plaintiff is entitled to partition of the suit property as prayed? OPP

2. Whether the plaintiff has got no locus standi to file the plaint? OPD

3. Whether the suit of the plaintiff is not maintainable in view of P.O. No.6? OPD

4. Whether the suit has not been properly valued for the purposes of court fees and jurisdiction? OPD

5. Whether the suit of the plaintiff has not been properly valued for the purpose of pecuniary jurisdiction? OPD

6. Whether the suit property was purchased by Late Late Smt. Raj Kumari from the compensation received from Rehabilitation Department in lieu of properties

left in Pakistan? OPP

7. Relief”

7. Vide order dated 07.12.2001 the learned Trial Court decided the issues nos. 4 and 5, which were treated as preliminary issues in the favour of the plaintiff. Said order, not being challenged has attained finality.

8. Insofar as evidence led by the plaintiff is concerned, besides examining himself as PW-1, the plaintiff examined one Smt. Kailash Rani, maternal aunt of the defendants nos. 1 to 6 and one Smt. Krishna Rani, wife of the plaintiff as PW-2 and PW-3 respectively.

9. On behalf of the contesting defendants, defendant no.1 himself stepped into the witness box as DW-1 to prove the ownership of Late Smt. Raj Kumari in the suit property and examined one Mr. Raj Kumar a stated witness to the will as DW-2 to prove the execution of the Will dated 31.03.1986 purportedly executed by Late Smt. Raj Kumari in favour of the defendant no.1.

10. As regards documentary evidence, the contesting defendants proved the certified copy of the registered sale deed dated 27.10.1964 executed by Smt. Dwarka Devi in favour of Late Smt. Raj Kumari and the original Will dated 31.03.1986 executed by Late Smt. Raj Kumari as Exhibits

DW1/1 and DW2/1 respectively.

11. Vide impugned judgment and decree dated 31.07.2003 the learned Trial Court has dismissed the suit filed by the plaintiff on the ground that the plaintiff has not been able to establish that the deceased was the real owner of the suit property and that Late Smt. Raj Kumari was an ostensible/benami owner thereof. It has been held that Late Smt. Raj Kumari was the owner of the property.

12. The learned Trial Judge has thus dismissed the suit since as per Section 15 of the Hindu Succession Act 1954 the plaintiff was not an heir of the deceased as plaintiff was the step son and the deceased was survived by children born to her.

13. Being aggrieved by the judgment and decree dated 31.07.2003 passed by the learned Trial Court the plaintiff has filed the present appeal under Section 96 of the Code of Civil Procedure.

14. The law relating to onus of proof of a property being benami and discharge of said onus was first expounded by the Federal Court in the decision reported as **Gangadara Ayyar & Ors v Subramania Ayyar & Ors** AIR 1949 FC 88 in following terms:-

“It was contended by the learned Counsel for

the appellants that the decision of the Court below against the appellants regarding these properties had been reached because of a wrong approach to this matter in law and that the rule of onus of proof as regards benami transactions had not been fully appreciated. It is settled law that the onus of establishing that a transaction is benami is on the plaintiff and it must be strictly made out. The decision of the Court cannot rest on mere suspicion, but must rest on legal grounds and legal testimony. In the absence of evidence, the apparent title must prevail. It is also well established that in a case where it is asserted that an assignment in the name of one person is in reality for the benefit of another, the real test is the source whence the consideration came and that when it is not possible to obtain evidence which conclusively establishes or rebuts the allegation, the case must be dealt with on reasonable probabilities and legal inferences arising from proved or admitted facts. The Courts below proceeded to decide the case after fully appreciating the above rule and in our judgment their decision does not suffer from the defect pointed out by the learned Counsel for the appellants.” (Emphasis Supplied)

15. In the decision reported as **M.Nagendriah v M. Ramachandrai & Anr** 1969 (1) UJ 697 (SC) the Hon'ble Supreme Court explained the law relating to proof of benami transactions in following terms:-

“.....Now if that is so, then the onus of proving that these purchase were benami was on the appellant and it was for him to show by convincing evidence that the source of money for these acquisitions was traceable to the joint funds from this business. Admittedly this has not been shown by any affirmative evidence, Shri Gupta, however, laid stress on

the contention that the respondent had also not been shown to possess sufficient funds with which properties in question could be acquired. On this reasoning the counsel tried to induce us to infer that the properties must be held to be joint of the appellant and Ramachandraiah. This, in our opinion, is not a correct approach. Ostensible owner must be held to be a true owner in the absence of cogent evidence establishing that he is a mere benamidar, or is holding property for another person who claims to be the beneficial or real owner. The onus also does not change merely because the beneficial owner and the ostensible owner are brothers or they may be owning some other property jointly. The mere circumstance that the ostensible owner has not proved that he had himself paid the price or that he had sufficient funds to be able to do so, would also not be enough by itself to sustain the claim of the alleged beneficial owner. The initial onus is always on the party seeking to dislodge the ostensible title. We are not unmindful of the fact that in this country benami transactions are not uncommon and they are certainly not forwarded upon. We are equally conscious of the fact that the appellant and respondent Ramachandraiah are real brothers and not utter strangers. But at the same time it cannot be ignored, as just observed, that the initial onus must as a matter of law be on the party asserting benami nature of title.....” (Emphasis Supplied)

16. The observations of the Hon'ble Supreme Court in **M.Nagendriah**'s case (supra) to the effect that the onus of proof of benami transactions cannot be discharged merely on account of some deficiency in the evidence led by the alleged benami owner leads to an irresistible conclusion that the onus

of proof of benami transaction is very heavy on the person alleging the same and can be discharged only by leading positive evidence.

17. In the decision reported as **Jaydayal Poddar & Anr v Mst. Bibi Hazra & Ors** AIR 1974 SC 171 the Hon'ble Supreme Court enumerated six circumstances which must be looked into by the courts in determining whether a particular transaction is benami or not. At this juncture, it would be apposite to refer to following observations made by the Hon'ble Court in the said decision:-

“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. The reason is that a deed is a solemn document prepared and executed after considerable deliberation and the person expressly shown as the purchaser or transferee in the deed, starts with the initial presumption in his favour that the apparent state of affairs is the real state of affairs. Though the question, whether a

particular sale is Benami or not, is largely one of fact, and for determining this question, no absolute formulae or acid tests, uniformly applicable in all situations, can be laid down; yet in weighing the probabilities and for gathering the relevant indicia, the courts are usually guided by these circumstances : (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.” (Emphasis Supplied)

18. After noting leading judicial authorities on the point, the Hon'ble Supreme Court in the decision reported as **Valliammal (D) by Lrs. v Subramaniam & Ors** AIR 2004 SC 4187 summarized the law relating to proof of benami transactions as under:-

“There is a presumption in law that the person who purchases the property is the owner of the same. This presumption can be displaced by successfully pleading and proving that the document was taken benami in name of another person for some reason, and the person whose name appears in the document is not the real owner, but only a benami.

Heavy burden lies on the person who pleads that recorded owner is a benami-holder."
(Emphasis Supplied)

19. Having laid down the afore-noted legal position in respect of proof of benami transactions, the Hon'ble Supreme Court proceeded to note the six circumstances enumerated in **Jaydayal Poddar'** s case (supra) and concluded that the source from where the purchase money came and the motive as to why the property was purchased benami are the most important tests for determining whether the sale standing in the name of one person, is in reality for the benefit of another person. The Hon'ble Court emphasized that a party invoking the plea of benami in order to prove the real ownership of the property which is the subject-matter of lis is required to show that there were valid reasons for purchase of the property in name of the benamidar and that the purported real owner had paid the sale consideration for the purchase of the property.

20. In the backdrop of afore-noted legal position, we shall appreciate the evidence led by the plaintiff on the aspects of source of the consideration paid when the suit property was purchased and the motive of the deceased for allegedly giving benami colour to the purchase of the suit property.

21. The case pleaded by the plaintiff in respect of the source of sale consideration of the suit property, in his pleadings, particularly in the replication, is that, the deceased was the owner of the two properties at Lajpat Nagar, Delhi as also of two properties situated at Rudrapur and Gurgaon respectively and that the sale consideration for the suit property was paid by the deceased from out of the sale proceeds of the said properties, particularly of the two properties situated at Lajpat Nagar, Delhi.

22. Thus, in order to show the source of the sale consideration of the suit property, it was first incumbent upon the plaintiff to establish the ownership of the deceased in the afore-mentioned properties. It is pertinent to note that in his examination-in-chief the plaintiff did not depose a word about the ownership of the deceased qua the property situated at Gurgaon. In the cross-examination, the plaintiff first pleaded ignorance about the details of the property situated at Rudrapur, Uttar Pradesh and later on deposed that the deceased was not owning any property other than the two properties situated at Lajpat Nagar, Delhi. He also deposed that the property at Gurgaon was owned not by the deceased but by the brother of the deceased.

23. The only conclusion which can be derived from the

afore-noted testimony of the plaintiff is that the plaintiff has miserably failed to prove the ownership of the deceased in the properties situated at Gurgaon and Rudrapur respectively and this in turn belies the claim of the plaintiff that the sale consideration of the suit property was paid by the deceased from out of the sale proceeds of said properties.

24. Insofar as evidence pertaining to sale proceeds of the properties situated at Lajpat Nagar is concerned, it is relevant to note that a definite stand was taken by the contesting defendants that the said properties were sold by the deceased in the years 1976 and 1981 respectively which was much after the acquisition of the suit property by Late Smt. Raj Kumari in the year 1964. It is most relevant to note that despite there being a categorical stand of the contesting defendants regarding the date of sale of said properties, the plaintiff has not spoken a word about the same in his examination-in-chief. The depositions of the plaintiff in cross-examination on the said aspect are most ipsi-dixit. In cross-examination, the plaintiff first pleaded ignorance about the date of the sale of the said properties while later on deposed that the said properties might have been sold by the deceased in the years 1976 and 1981 respectively. This admission of the plaintiff that the deceased might have sold the properties in

the years 1976 and 1981 respectively completely demolishes plaintiff's case that the main source of the sale consideration of the suit properties was the sale proceeds of the said properties.

25. What perhaps is the last nail in the coffin is the testimony of Smt. Kailash Rani, PW-2 who despite being plaintiff's witness has deposed contrary to the case set up by the plaintiff by stating that Late Smt. Raj Kumari had purchased the suit property by raising loans. In fact PW-2 has demolished the case set up by the plaintiff.

26. Lastly, we note that the plaintiff has neither averred nor has led any evidence on the aspect of motive of the deceased for allegedly giving benami colour to the purchase of the suit property.

27. In view of the fact that the plaintiff has failed to prove that the deceased had provided the money for the purchase of the suit property and has given no reasons why he had purchased the suit property benami in the name of his wife, we have no hesitation in holding that the learned Trial Court had rightly come to the conclusion that the plaintiff has not been able to establish that Late Late Smt. Raj Kumari in whose name sale deed Ex.DW1/1 stood was not the real owner of the suit property but only a benamidar of the deceased.

28. In the result, we affirm the judgment and decree passed by the learned Trial Court and dismiss this appeal with costs.

29. TCR be returned.

PRADEEP NANDRAJOG, J.

J.R.MIDHA, J.

October 20, 2008
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