

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on : October 22, 2008

% Judgment delivered on : November 24, 2008

+ **RFA 422/2004**

SHRI MOHINDER SINGH Appellant
Through: Mr.V.M.Issar, Adv.

versus

SHRI KARTAR SINGH & ORS. Respondents
Through: Mr.Zafar Sadique, Adv.

Coram:

* **Hon'ble Mr.Justice Pradeep Nandrajog**
Hon'ble Mr.Justice Siddharth Mridul

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.758/2001 was filed by the appellant, Mohinder Singh, against the respondents for the partition of his alleged 1/4th share in the property bearing Municipal No.WZ-2, Mohalla Krishan Nagar, Sahibpura, Tilak Nagar, New Delhi (hereinafter referred to as the "Suit Property") and also for rendition of accounts of rent received and realized by the respondents from the tenants of the shops in the suit property.
2. The case set up by the appellant in the plaint was that Late Smt.Attar Kaur (hereinafter referred to as the "deceased") who

was the owner of the suit property died intestate on 13.08.84 leaving behind her husband, respondent No.1, and three sons, appellant and respondents No.2 and 3 as her legal heirs. That since the deceased died intestate, the appellant being son of the deceased, is entitled to 1/4th share in the suit property as per the provisions of the Hindu Succession Act, 1956.

3. The respondents No.1 and 3 contested the suit by filing separate written statements. Respondent No.2 chose not to contest the suit and thus was proceeded ex-parte by the learned Trial Court.
4. The defence predicated by the respondents Nos.1 and 3 in their respective written statements was two-fold. That the deceased had not died intestate as alleged by the appellant but had executed a Will dated 26.12.83 bequeathing the suit property in favour of respondent No.1. That the deceased was a benami owner of the suit property inasmuch as respondent No.1 had paid the entire sale consideration for purchasing the plot and had also raised constructions over the same from time to time from out of his own funds.
5. On the basis of the pleadings of the parties, following issues were settled by the learned Trial Court:-

“1. Whether the suit is not maintainable in view of the preliminary objection No.1? OPD.

2. Whether the plaintiff is not entitled to seek partition as alleged in preliminary objection No.2? OPD.
3. Whether the defendant No.1 purchased the disputed plot in the name of the deceased Smt.Attar Kaur, Benami? OPD.
4. Whether the deceased Smt.Attar Kaur left behind any valid Will as alleged in written statement? OPD.
5. Whether the defendants can take up the plea that the plot in question was purchased in the name of deceased, Attar Kaur, benami? OPD
6. Whether the construction was carried out by the defendants themselves in their respective portion in their possession, if so, to what effect? OPD.
7. Whether the plaintiff is entitled to partition of the suit property, if so, how much share? OPP.
8. Relief.”

6. Insofar as evidence led by the appellant is concerned, besides examining himself as PW-1, he examined one Mr.Rameshwar Dayal as PW-2 to prove the site plan, Ex.PW2/1 of the suit property. In his testimony, the appellant deposed that the deceased was a housewife till her death and had no source of income of her own but stated that his mother sold her gold ornaments to purchase the land.
7. On behalf of the contesting respondents, affidavit of one Mr.Tirath Singh was filed by way of examination in chief to establish the genuineness of the Will dated 26.12.83 Ex.DW1/1. However, the said witness was not produced for cross-examination. One Mr.Charan Singh was examined as DW-1 to prove the execution of the Will dated 26.12.83 Ex.DW1/1

purportedly executed by the deceased in favour of respondent No.1. The Respondent No.1 stepped into the witness box as DW-2 and deposed that he had purchased the suit property for a sale consideration of Rs.480/- in the name of the deceased because he was under an impression that the government servants cannot purchase a property in their own name and that the constructions were raised by him from time to time from his earnings and money contributed by respondents Nos.2 and 3 and the compensation received by him on death of his son. One Ms.Manjeet Kaur, Zonal Inspector, MCD, Rajouri Garden was produced as DW-3 to prove the ratable value of the suit property. (Certain documents were produced by the said witness which are vital for adjudication of present appeal and shall be discussed in detail in later part of this judgment.) One Mr.A.Rehman was examined as DW-4 to prove the registered sale deed Ex.DW4/A of the suit property recording deceased as the lawful owner of the suit property.

8. Vide impugned judgment and decree dated 01.05.04, the learned Trial Court dismissed the suit filed by the appellant. The learned Trial Court has held that the respondents have not been able to prove that the Will dated 26.12.83, Ex.DW1/1, allegedly executed by the deceased bequeathing the suit property in favour of respondent No.1 is the last legal and valid testament executed by the deceased. However, the other defence raised by the respondents that respondent No.1 is the

real owner of the suit property and that the deceased was a mere benamidar of respondent No.1 has found favour with the learned Trial Court thus resulting in dismissal of the suit filed by the appellant.

9. Since there is no cross-appeal or cross-objections by the respondents, the finding of the learned Trial Court that the respondents have not been able to prove that the Will dated 26.12.83 Ex.DW1/1 allegedly executed by the deceased bequeathing the suit property in favour of respondent No.1 is the last legal and valid executed by the deceased has attained finality. Thus the only question which needs adjudication in the present appeal is whether the learned Trial Court has rightly come to the conclusion that respondent No.1 is the real owner of the suit property and the deceased was a mere benamidar of respondent No.1.
11. In a suit claiming a property as benami, there must be cogent and sufficient evidence to conclude that the apparent owner is not the real owner. In order to ascertain whether a particular sale is benami and the apparent purchaser is not the real owner, the burden lies on the person asserting the same to prove so. Such burden has to be strictly discharged through legal evidence of definite character. Such evidence should either directly prove the fact of benami or establish circumstances unerringly and reasonably raising an inference

of that fact. It is the intention of the parties, which is to be discovered. Very often such intention is shrouded in a thick veil. It is not possible to pierce the veil easily. But such difficulties would not relieve the person, asserting the transaction to be benami, of any part of the onus that rests on him. The difficulty would not justify the acceptance of mere conjecture or surmise as a substitute for proof. The mere circumstance that the ostensible owner has not proved that he had himself paid the price or had sufficient funds to be able to do so, would also not be enough by itself to sustain the claim of the alleged benamidar owner. The proof has to be weighed against a document prepared and executed showing the person expressly as purchaser or transferee. This follows the initial presumption in favour of the apparent state of affairs being the real state of affairs. However, the question is largely one of facts. For determining this question, no absolute formula can be evolved nor can a formula so evolved be uniformly applied in all situations. But in such circumstances, it is the probabilities and inferences, which are to be gathered in order to discover the relevant indicia. It is not sufficient to show circumstances, which might create suspicion. The Court cannot decide on the basis of suspicion. It has to act on legal grounds established by evidence. In order to determine whether a transaction was or is a benami one, the following guidelines may be followed, namely: (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. 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. In regard to these legal propositions relating to proof of benami transactions, reference may be made to decisions of the Hon'ble Supreme Court reported as **M.Nagendriah v M.Ramachandraiah** (1969) 1 UJ 697 (SC), **Jaydayal Poddar v Mst. Bibi Hazra** AIR 1974 SC 171, **Krishnanand v State of Madhya Pradesh** AIR 1977 SC 796 and **Valliammal (D) by LR's v Subramaniam & Ors** AIR 2004 SC 4187.

12. In coming to the said conclusion that the deceased was a mere benami owner of the suit property, the learned Trial Court has opined that depositions of the appellant to the effect that the deceased was a housewife till her death and had no source of income of her own itself establish that respondent No.1 was the

real owner of the suit property and that the deceased was a mere benami owner thereof.

13. It is a rule of prudence that the courts should read testimonies of the witnesses in a conjunctive manner and not disjunctively. It is impermissible to pick up stray statements made by a witness, delinking them from the testimony as a whole. While appreciating the oral evidence, the courts should also keep in mind that generally witnesses are laymen having no knowledge of the legal niceties.
14. In the instant case, the learned Trial Court has read in isolation the deposition of the appellant to the effect that the deceased was a housewife till her death and had no source of income of her own. It has been overlooked by the learned Trial Court that in his testimony the appellant has also categorically deposed to the effect that the suit property was not purchased by respondent No.1 from his income and that it was purchased from the sale proceeds of the gold of the deceased. A conjunctive and harmonious reading of the said two statements leads to the conclusion that the appellant had deposed to the effect that the suit property was purchased for consideration flowing from his mother being paid out of the sale proceeds of the gold of the deceased.
15. In the instant case, except for the bald deposition of respondent No.1 that he had paid the entire sale consideration for purchase

of the suit property and had raised constructions over the same from his earnings and amounts contributed by respondents Nos.2 and 3 and amount of compensation received by him on death of his son, there is no evidence, documentary or otherwise, led by the respondents to establish that respondent No.1 had paid the sale consideration for purchase of the suit property or had raised construction thereon.

16. In such circumstances, when the Respondents have not led any positive evidence to show that the Respondent No.1 had paid the sale consideration for the purchase of the suit property it has to be held that the Respondents have not been able to dislodge the initial presumption that the deceased who is the recorded owner of the suit property, is the real owner thereof.
17. The matter can also be looked at from another angle. Mere payment of consideration by a third person will not make transactions in all cases benami. Reference may be made to the decision of the Madras High Court reported as **Chittaluri Sitamma & Anr v Saphar Sitapatirao** AIR 1938 Mad 8 wherein it was has been held as under:-

“.....the mere suspicion that the purchases might not have wholly been made with the Lady's money will certainly not suffice to establish that the purchases were benami, nor even the suspicion that moneys belonging to Jagannadha Rao whether in Smaller measure or larger measure, must have also contributed to these purchases. Even in cases where there is positive evidence that money had been contributed by the husband and not by the wife, that circumstance is not conclusive in favour of

the benami character of the transaction though it is an important character.”

18. The afore-noted decision of the Madras High Court in **Chittaluri's** case (supra) was noted with approval by the Hon'ble Supreme Court in the decision reported as **Binapani Paul v Pratima Ghosh** AIR 2008 SC 543. In the said case there was a dispute with respect of the ownership of a property which stood in the name of a lady. Disputes arose between children of the said lady after the death of the lady. The son had opposed mutation in daughters' names on the ground that their father was the benami owner. The trial court rejected the said contention, but the High Court upheld the objection of the son. However the Hon'ble Supreme Court, in appeal, held the view of the trial court as the correct one. It was observed that the deceased lady had been treated as the owner of the property during the lifetime of her husband and that she had even paid a part of the consideration for the said property. The Supreme Court also noted that there could be various reasons for a person to buy a property in the name of someone else and in all cases such transactions would not be in the nature of a Benami transaction. The Court further noticed that for a particular transaction to be called benami, credence has to be given to the surrounding circumstances and the intention of the parties at the time of the transaction and their subsequent conduct. The Hon'ble Supreme Court in the decision reported as **Thakur**

Bhim Singh v. Thakur Kan Singh AIR 1980 SC 727 dealt with the question of the intention behind a benami transaction and held that the intention could be gauged on the basis of:

- (a) Surrounding circumstances,
- (b) Relationship of the parties,
- (c) Motives governing their action in bringing about the transaction, and
- (d) Their subsequent conduct.

19. At this juncture, it is most relevant to note three documents produced by Ms. Manjeet Kaur, Zonal Inspector, MCD, Rajouri Garden, DW-3 before the learned Trial Court which throws light upon the conduct of respondent No.1 and sons of the deceased with regard to the status of ownership of the deceased in the suit property.
20. The first document is an application dated 30.12.85, Ex.DW3/A submitted by respondent No.1 to the MCD after the death of the deceased wherein it has been stated that the deceased was the owner of the suit property and had executed a Will dated 17.12.81, Ex.DW1/B, bequeathing the suit property in favour of her three sons and therefore the suit property be mutated in the name of the three sons of the deceased.

21. The second document is a Will dated 17.12.81, Ex.DW3/B purportedly executed by the deceased submitted by respondent No.1 along with the application dated 30.12.85 which contains a recital that the deceased is the 'absolute' owner of the suit property.
22. The third document is an indemnity bond, Ex.DW3/C, executed by the sons of the deceased i.e. the appellant, respondents Nos.2 and 3 after the death of their mother which also contains a recital that the deceased was the owner of the suit property during her lifetime.
23. The afore-noted three documents show that the appellant and respondent Nos.2 and 3 had treated the deceased as the lawful owner of the suit property.
24. Thus, in such circumstances, even if it is assumed that respondent No.1 had paid sale consideration for the purchase of the suit property, the same would be of no effect because the fact of the recording of name of the deceased as the owner of the suit property coupled with the other fact that respondent No.1 had treated the deceased as the owner of the suit property during her lifetime probabalizes that the respondent No.1 had intended to create a beneficial interest and not a benami interest in favour of the deceased in the suit property. In **Binapani Paul's** case (supra), a major factor which led the Hon'ble Supreme Court to come to the conclusion that the

transaction in question was not a benami transaction was the fact that the lady who was alleged as benami owner was treated as the owner of the disputed property during her lifetime.

25. Before concluding, we would also like to note another material circumstance. The Respondent No.1 had submitted a Will dated 17.12.81, Ex.DW1/B, purportedly executed by the deceased bequeathing the suit property in favour of her three sons along with his application dated 31.12.85, Ex.DW1/B, to the MCD for mutation of the suit property. The said two documents were submitted by respondent No.1 after the death of the deceased. However, defence predicated by the Respondent No.1 before the learned Trial Court was based upon the Will dated 26.12.83, Ex.DW1/1, allegedly executed by the deceased bequeathing the suit property in favour of respondent No.1. There is one material difference between the recitals in the two Wills. The Will dated 26.12.83, Ex.DW1/1, contains a recital that the deceased had purchased the suit property from the savings/earnings of respondent No.1. However, the said recital is conspicuously absent in the Will dated 17.12.81 which on the contrary contains a recital that the deceased is the absolute owner of the suit property. This material difference between the recitals of the Will dated 17.12.81, Ex.DW3/B, which itself was submitted by respondent No.1 to the MCD after the death of the deceased and the

Will dated 26.12.83, Ex.DW1/1, alleged to be the last legal and valid testament executed by the deceased by the Respondent No.1 and found not a genuine document by the learned Trial Court strongly probablizes that the defence set up by the respondents that respondent No.1 was the real owner of the suit property and that the deceased was a mere benamidar of respondent No.1 is a concocted story set up by the respondents to defeat the claim of the appellant.

26. The upshot of the entire discussion is that the respondents who had set up the defence of benami have failed to prove that respondent No.1 is the real owner of the suit property and the deceased who is the recorded owner of the suit property was a mere benamidar of the respondent No.1.
27. In view of the above discussion, we allow the appeal filed by the appellant and set aside the impugned judgment and decree dated 01.05.04 passed by the learned Trial Court.
28. The necessary consequence of the setting aside of the impugned judgment and decree dated 01.05.04 passed by the learned Trial Court is that the suit filed by the appellant before the learned Trial Court stands decreed. The appellant is granted a decree declaring that he has 1/4th share in the suit property. A decree for rendition of accounts of rents received and realized by the respondents from the tenants of the shops in the suit property is also passed in favour of the appellant.

28. The suit is revived before the learned Trial Judge who shall proceed to appoint a local commissioner with a mandate to suggest a mode of partition of the property by metes and bounds as also to hold an inquiry and submit a report pertaining to the rents realized by the respondents.
29. No costs.
30. LCR be returned.

PRADEEP NANDRAJOG, J.

SIDDHARTH MRIDUL, J.

November 24, 2008
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