

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

+ **RFA No. 207/2012**

%

7th May, 2012

JM KOHLI

..... Appellant

Through : Ms. Geeta Luthra, Sr. Advocate with
Mr. Harish Malik, Advocate.

versus

MADAN MOHAN SAHNI & ANR

..... Respondents

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? **Yes.**

VALMIKI J. MEHTA, J. (ORAL)

C.M. No. 8372/2012 (Exemption)

Application allowed, subject to all just exceptions.

C.M. stands disposed of.

C.M. No. 8337/2012 (U/O 22 Rule 4 CPC)

Since respondent No.2 is stated to have died after the filing of the appeal in the Registry, the application is allowed, and the legal heir of respondent No.2 as stated in para 4 of this application, is brought on record.

C.M. stands disposed of.

C.M. No. 8336/2012 (Delay in re-filing) and C.M. No. 8335/2012 (Delay in filing)

Though, in my opinion, *prima facie*, there does not appear to be a good ground for condonation of huge delay of 202 days in re-filing the appeal, since however, I have heard the appeal on merits, I am allowing the application for delay in filing and re-filing the appeal subject to just exceptions.

C.M. stands disposed of.

RFA No. 207/2012

1. The challenge by means of this Regular First Appeal (RFA) filed under Section 96 of the Code of Civil Procedure, 1908 (CPC) is to the impugned judgment of the trial Court dated 2.4.2011 dismissing the suit and/or rejecting the plaint by holding that the same is barred by Benami Transactions (Prohibition) Act, 1988 and also by limitation.

2. The disputes in the present case center around the ownership of a flat No. C-1/F, DDA Flats, Munirika, Delhi. The appellant/plaintiff-Sh. J.M. Kohli claims to be the owner of the suit property. The suit property however from the very beginning stands in the name of defendant No.1/respondent No.1/Madan Mohan Sahni, inasmuch as, the flat was allotted to him by the Delhi Development Authority (DDA) and the entire documentation qua the title of the property also stands in the name of respondent No.1. The title

documents in name of respondent No.1/defendant No.1 exist from 1981 till date.

3. The facts of the case are that the appellant/plaintiff filed the subject suit for declaration, possession and mandatory injunction against respondent No.1/defendant No.1-Sh. Madan Mohan Sahni (brother-in-law), defendant No.2-Smt. Vimla Kanta (ex-wife) and defendant No.3-Smt. Renu (daughter of the plaintiff). The basic cause of action pleaded in the plaint is that it is the appellant/plaintiff who is the owner of the property because the sale consideration of the suit property was paid entirely by him.

4. Respondent No.1 filed two applications for dismissal of the suit and/or for rejection of the plaint claiming that the suit was barred by Section 4 of the Benami Transactions (Prohibition) Act, 1988 (hereinafter referred to as the 'Benami Act'), and also that the suit was barred by time, inasmuch as, the appellant/plaintiff way back in the year 1984 had filed a suit No. 157/1984 seeking to declare himself as the actual owner of the suit flat, respondent no.1 being only the benamidar, and which suit was withdrawn on 17.9.1987. The present suit had been filed after 23 years on 22.5.2010.

5. Trial Court has dealt with both the aspects of the suit being barred by the Benami Act and also by limitation by making the following observations:-

“4.1 (Findings) – The first application is taken. The rival contentions are assessed in the light of statutory

provisions of law and precedent. It is an admitted fact in the first suit no. 157/84, plaintiff (J.M.Kohli) filed the suit against Smt. Vimla Kanta (defendant no. 2 herein) and against Sh. M.M. Sahani (defendant no. 1 herein), he was permitted on 17.09.1987 to withdraw the first suit and to file fresh suit, therefore, there was no finality to the suit or issues involved, therefore, principle of res-judicata embodied under section 11 of CPC will not be applicable. To that extent defendant no. 1 application carries no merit. Let us take the other features of the application.

4.2 The defendant no. 1/Madan Mohan Sahani is brother of defendant no. 2 Smt. Vimla Kanta (plaintiff's ex-wife). Section 3 of the Act, 1988 bars benami transaction. Section 3 of the Act does not apply, when the property is purchased in the name of wife or unmarried daughter. Section 4 of the Act, 1988 makes prohibition of right to recover property held in Benami, although section 4 is not applicable to the persons described in clause 3 of section 4 of the Act, 1988, like the properties held in the name of a coparceners in a Hindu Undivided Family or a trustee or other person standing in a fiduciary capacity.

In G. Mahalingappa vs. G.M. Savitha 2005 6 SCC 441 it was held that there is a presumption under section 3(2) of the Act 1988 that when property is purchased in the name of wife or unmarried daughter, it was for the benefit of the wife or the daughter, however, it is a rebuttable presumption by production of evidence or other material to prove that the property was purchased by the appellant in the benami of the respondent for his own benefit. However, the defendant no. 1 is neither wife nor daughter of plaintiff but brother of defendant no. 2. Therefore, in terms of section 4 of the Act 1988, plaintiff's suit or claim is barred to enforce any right in respect of suit flat, which originally registered and allotted in the name of defendant no. 1.

4.3 Now the issue of limitation is taken. Paragraph 42

of the plaint is compilation of points of time, referred in other parts of plaint that cause of action had arisen from January 1972 onward till notice was sent on 08.08.1988 and lastly on the point when conveyance deed was executed/registered in favour of defendant no. 1. Paragraph 24 of previous suit no. 157/84, also reflects the cause of action, from the point of time of 28.09.1983, vis a vis that defendant no. 2 in her written statement in Divorce Petition in the court of the then Additional District Judge claimed herself owner of the half portion of the property in Punjabi Bagh, New Delhi, whereas the ownership rights in respect of property at Punjabi Bagh and benami ownership of the flat was subsisting in the favour of plaintiff.

Article 58 of the schedule appended with the Limitation Act, 1963 prescribed period of 3 years to be computed when the right to sue first accrues, for obtaining declaration. When the suit No. 154/84 was filed for declaration in the year 1984 or when it was amended in the year 1986, the plaintiff was knowing that his right has been accrued for filing the suit for declaration as at that point of time not only half portion of the property at Punjabi Bagh claimed by his ex-wife but also the rights in suit flat were under challenge. Thus the point of time, when right to sue first accrued were either in the year 1984 when the suit was originally filed or when it was amended in the year 1986 (as copy of amended plaint has been placed on record) and the three year period is to be computed from that point of time. However, by order dated 17.09.1987 the suit was permitted to be withdrawn, however, the period of limitation will be from the point of time, when the right to suit first accrued or from the time permission was given to file the fresh suit, in either of the eventuality, the present suit filed on 24.5.2010 is beyond the prescribed period of 3 year from the point of time. In M/s Alliance Paints and Varnish vs Hari Kishan Gupta (Deceased), RFA No. 54/1997, DOD 10.02.2010, the Hon'ble High Court of Delhi held that section 3 of the Limitation Act places a statutory obligation on the courts to examine

whether the suit is filed within limitation or not, even if no such plea has been taken by the opposite party. If the suit is filed beyond limitation and is clearly time barred, it cannot be decreed in the teeth of section 3 of the Limitation Act and the court has to dismiss it, whether or not limitation has been set up as a defence. As per documents in support of plaint, it was 21.02.1975 when defendant no. 1 completed the formalities and requested DDA for possession letter for possession of flat and possession was taken around year 1978 and the plaintiff left the suit flat on 24.12.1979. Article 65 and 64 of the schedule appended to Limitation Act, 1963 prescribed period of 12 years from the date when possession of the defendant becomes adverse to the plaintiff or the date of dispossession, therefore, the suit filed in May 2010 is beyond the period of 12 year, if it is to be computed from 24.12.1979. In fact the suit for possession is alike consequential relief to the declaration, but in view of above it is also barred by time. In Hardesh Ores (P) Ltd. Vs. Hede And Company 2007 5 SCC 614 it was held that the term barred by law, in order VII rule 11 (d) of CPC, contemplates that it includes the law of limitation also.

4.4 It is settled law that while considering application under order VII rule 11 CPC, the statement of facts given in the plaint coupled with document are to be considered as true and it does not require to look into the defence taken or to be taken by the defendants, whereas defendants are yet to file their written statement but defendant no. 1 has filed the first application.” (underlining added)

6. The consequences of the Benami Transactions (Prohibition) Act, 1988 were harsh as they brought to an end the ownership rights of an actual owner against the benami owner. Before passing of the Benami Act, a *de jure* owner could also file a suit against *de facto* owner and thereby claim ownership of

the property on the ground that ostensible owner was only a benamidar. The legal provisions which helped the plaintiff in such a suit prior to passing of the Benami Act were inter-alia the provisions of Sections 81, 82 and 94 of the Indian Trusts Act, 1882 and as per which provisions a benami owner was actually a trustee for the real owner. Section 7 of the Benami Act specifically repeals the aforesaid sections of the Indian Trusts Act, 1882 and also Section 66 of the CPC which had similar substance.

7. Section 4(3)(b) of the Benami Act, however, protected rights of a real owner where the person in whose name the property is held is a trustee or other person standing in the fiduciary capacity and the property is held for the benefit of other person, for whom the person in whose name the property is held is a trustee. Section 4(3)(b) of the Benami Act reads as under:-

“4. Prohibition of the right to recover property held benami.-

(3) Nothing in this section shall apply –

(b) where the person in whose name the property is held is a trustee or other person standing in a fiduciary capacity, and the property is held for the benefit of another person for whom he is a trustee or towards whom he stands in such capacity.”

8. In a way, therefore, there may be some ostensible conflict between the provision of Section 4(3)(b) of the Benami Act and Section 7 of the same Act

which repeals the provisions of the Indian Trusts Act, 1882, however, one has to read and interpret Section 4(3)(b) in a manner which is in accord with the legislative intention to bar claims against properties held as benami. The concept of trust was always inbuilt once a transaction was a benami transaction as the benamidar was the trustee for the real owner. But in spite of the concept of trust being inbuilt in benami transactions, the Benami Act provided that no rights could be asserted in a benami property by the actual/*de jure* owner.

Putting it differently, once Sections 81, 82 and 94 of the India Trusts Act, 1882 have been repealed, they cannot be brought in from the back door, so to say, by giving the same content contained in the repealed provisions of Sections 81, 82 and 94 of the Indian Trusts Act, 1882 to Section 4(3)(b) of the Benami Act. If we give such an interpretation, the entire Benami Act will fall and it will be as if the same has not been enacted. Therefore, Section 4(3)(b) which provides that the property which is held as a trustee or in a fiduciary capacity must be interpreted in the sense that the trustee or a person who is holding the property in a fiduciary capacity has either committed a fraud and got the property title in his name or is in furtherance of law holding property in his name however in the capacity of a trustee or in fiduciary capacity, although the real owner is somebody else. Repealed Sections 81, 82 and 94

of the Indian Trusts Act, 1882 read as under:-

“81. Where the owner of property transfers or bequeaths it and it cannot be inferred consistently with the attendant circumstances that the intend to dispose of the beneficial interest therein, the transferee or legatee must hold such property for the benefit of the owner or his legal representative.

82. Where property is transferred to one person for a consideration paid or provided by another person, and it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration.

Nothing in this section shall be deemed to affect the Code of Civil Procedure, section 317, or Act No. XI of 1859 (to improve the law relating to sales of land for arrears of revenue in the Lower Provinces under the Bengal Presidency), section 36.

94. In any case not coming within the scope of any of the proceeding sections, where there is no trust, but the person having possession of property has not the whole beneficial interest therein, he must hold the property for the benefit of the persons having such interest, or the residue thereof (as the case may be), to the extent necessary to satisfy their just demands.”

9. Two of the examples where the Supreme Court has held the property to be held as a trustee in terms of Section 4(3)(b) of the Benami Act are the judgments in the cases of *C. Gangacharan V. C. Narayanan, 2000 (1) SCC 459* and *P.V. Sankara Kurup V. Leelavathy Nambiar, 1994(6) SCC 68*.

In the case of *C. Gangacharan* (supra), the Supreme Court has held

that the property was held as a trustee as per Section 4(3)(b) of the Benami Act, and the person in whose name the property stood cannot take up a plea of the bar of Benami Act, inasmuch as, actually the owner had given moneys for the property to be purchased under his name, however, the moneys were in fraud utilized to get the property purchased in the name of defendants in that suit. In the case of ***P.V. Sankara Kurup*** (supra) also the obvious fraud which was perpetrated was that the property was to be purchased in the name of the plaintiff by his attorney holder and which the defendants did not do and instead got the property purchased directly in their name. In the case of ***P.V. Sankara Kurup*** (supra), the Supreme Court was dealing with Section 66 of CPC as it existed before its repeal by Section 7 of the Benami Act and in the facts of the case as stated above it was held that the purchaser had acted in fiduciary capacity as an agent and consequently the bar of the Benami Act would not apply. In the said judgment, the Supreme Court held that when the agent was employed to purchase the property on behalf of his principal, however does so in his own name, i.e. the agent's name then upon conveyance or transfer of the property to the agent, he stands as a trustee for the principal.

10. Therefore, in certain cases where there is obvious breach of trust in purchasing the property in the name of a person, whereas it ought to have

been purchased in the name of the principal or the real owner, Supreme Court has, to that limited extent, held that such actions are covered under Section 4(3)(b) of the Benami Act and such transactions are not hit by the Benami Act.

11. If we see the facts of the present case, the only relationship of trust which is alleged has two salient features. The first is of the moneys having been paid by the appellant/plaintiff and therefore the property being actually of the appellant/plaintiff and the defendant No.1 being the trustee, and, the second feature is that the parties understood as per the case in the plaint that defendant No.1 will hold the property in faith/trust for the appellant/plaintiff. In order to appreciate the contents of the plaint in this regard, qua the averments with regard to trust, paras 27 to 29 of the plaint are relevant and the same read as under:-

“**27.** That all the payments of the installments of the value of the suit property was given by the plaintiff out of his self earned income and nothing was paid by the defendant no. 1 and only the name of the defendant no. 1 was in the records of the D.D.A. with respect to the said property and due to the abovesaid fiduciary relationship between the plaintiff and the defendants, the said arrangement was made, as stated above and it was understood that the plaintiff will be the owner of the suit property and the defendant no. 1 shall be a just for the name and he shall have no ownership or possessory right in the suit property.

28. That at present the defendant no. 3 is in possession

of the suit property being a daughter, in fiduciary relationship with the plaintiff and she has no right, interest in the title and in possession of the said property and in fact she is illegal occupation of the same and therefore the plaintiff is entitled for the possession of the suit property.

29. That plaintiff has deposited the above said amounts towards the suit flat in the D.D.A. on faith and trust in the name of the defendant no. 1, being in fiduciary relationship with him and it was very well understood in the family that the plaintiff is the owner of the same and defendant no. 1 is only having his name in the record of the D.D.A.”

12. In my opinion, the aforesaid averments are not the averments which can take the case out of the repealed Sections 81, 82 and 94 of the Indian Trusts Act, 1882 and bring the same within Section 4(3)(b) of the Benami Act. As already stated above, in benami transaction obviously there is an implied trust, however, such trusts are not the trusts which are within the purview of Section 4(3)(b) of the Benami Act.

13. Learned Senior counsel for the appellant sought to place reliance upon the decision of learned Single Judge of this Court in the case of ***S.M. Wahi v. Reeta Wahi, 2006 (90) DRJ 616*** in which the learned Single Judge, in the facts of the said case, found that the nominee under the agreement to sell was the trustee for the purpose of Section 4(3)(b), inasmuch as, nominee herself admitted that the property was being held pursuant to the agreement to sell in

trust for and on behalf of the plaintiff who was said to be the actual owner. I may also state that the attention of the learned Single Judge who decided the case of *S.M. Wahi* (supra) was not drawn to the two judgments of the Supreme Court in the cases of *C. Gangacharan* (supra) and *P.V. Sankara Kurup* (supra), which have been referred to by me above. The judgment, therefore, cited in the case of *S.M. Wahi* (supra) will have no application in the facts of the present case.

14. It is said that hard cases lay down bad law and therefore sympathy arising from facts cannot be allowed to negate the intention of the legislature in enacting the Benami Act . It is not only the appellant but probably thousands/lakhs of persons like the appellant who have suffered the consequences of enactment of the Benami Act, however, this Court has to act as per the laws as applicable, and considering the facts of this case I have no option but to affirm the finding of the trial Court that the suit was barred by Benami Act.

15. The trial Court, in my opinion, has further rightly held the suit to be barred by limitation. Admittedly, the appellant/plaintiff had claimed title in the suit property by way of a suit filed way back in the year 1984 on the ground that actually the defendant was the benamidar and that the appellant/plaintiff was the real owner. That suit No. 157/1984 was

withdrawn on 17.9.1987 and the present suit had been filed after 23 years. In law, the right to sue for possession of an immovable property arises within 12 years of the possession being adverse to the actual owner in terms of Article 65 of the Limitation Act, 1963. Obviously respondent No.1/defendant No. 1 was claiming ownership of the property from day one and at least since 1984 which forced the appellant/plaintiff to file the suit being No. 157/1984 seeking ownership rights in the suit property. Though learned counsel for the appellant one way or the other could not categorically state as to whether any written statement was filed by respondent No. 1 in the suit of 1984, but even assuming that if the written statement was not filed, the very fact that the appellant/plaintiff was forced to file the suit claiming ownership rights pleading that defendant No.1/respondent No.1 was only a benamidar shows that defendant No.1/respondent No.1 was claiming title adverse to the appellant/plaintiff at least from 1984. The present suit therefore filed in 2010 i.e. after 23 years is *ex facie* barred by limitation. As per Section 27 of the Limitation Act, 1963 when the period of limitation for filing of the suit qua an immovable property comes to an end, the ownership rights qua the same also get extinguished as against the person who ought to have filed the suit within 12 years.

16. In view of the above, I do not find any reason to interfere with the

impugned judgment of the trial Court dated 2.4.2011. The present appeal, being without any merit, is accordingly dismissed, leaving the parties to bear their own costs.

VALMIKI J. MEHTA, J.

MAY 07, 2012

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