

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

% **Date of decision: 6th August, 2018.**

+ **RSA 111/2018**

OM PRAKASH PANDEY **Appellant**
Through: Mr. S.K. Mishra, Mr. T.D. Shukla and
Mr. G.S. Tiwari, Advs.

Versus

RAM PRAKASH PANDEY **Respondent**
Through: None.

CORAM:
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

CM No.31365/2018 (for exemption)

1. Allowed, subject to just exceptions.
2. The application is disposed of.

RSA 111/2018

3. This Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) impugns the judgment and decree (dated 3rd May, 2018 in RCA No.11/2016 (New RCADJ No.61819/2016) of the Court of Additional District Judge-12 (Central)) of dismissal of first appeal under Section 96 of the CPC preferred by the appellant/plaintiff against the judgment and decree (dated 5th September, 2012 in Suit No.1616/2006 (Unique ID No.02401C0885912006) of the Court of Civil Judge-01 (North)) of dismissal of suit filed by the appellant/plaintiff for (i) declaration of his exclusive ownership of property No.44/1 in Lal Dora 1908-9 Village Mochi Bagh, Nanak Pura, New Delhi; (ii) recovery of possession thereof from the

respondent/defendant; and, (iii) permanent injunction restraining the respondent/defendant from dealing with the property.

4. The counsel for the appellant/plaintiff has been heard and the copies of the Suit Court record filed along with the Memorandum of Appeal perused. No other suit record has been referred to in the arguments.

5. The appellant/plaintiff instituted the suit from which this appeal arises, pleading (i) that the appellant/plaintiff purchased the property aforesaid and paid the entire purchase consideration thereof; (ii) however, the documents of the said property were obtained in the joint names of the appellant/plaintiff and his brother respondent/defendant because the two were residing together; (iii) that though the appellant/plaintiff paid a total sale consideration of Rs.1,50,000/- for purchase of the aforesaid property but in the documents viz. Agreement to Sell, Power of Attorney, Affidavit, Receipt, Will etc. executed by the erstwhile owner of the said property in favour of the appellant/plaintiff and the respondent/defendant showed the purchase consideration as Rs.95,000/- only; (iv) that the appellant/plaintiff also spent another Rs.25,000/- as capital, on setting up business in the said property; (v) that the respondent/defendant neither spent any money in purchase of the property nor any money for setting up of the business in the said property; (vi) that the appellant/plaintiff is the sole/absolute proprietor of the business being carried on from the said property but the respondent/defendant being the brother, used to help the appellant/plaintiff in the said business and the appellant/plaintiff used to pay the respondent/defendant as per the work done by him; (vii) that the person from whom the appellant/plaintiff had purchased the property, instituted a suit for

declaration, recovery of possession, damages etc. against the appellant/plaintiff and the respondent/defendant, with respect to the said property, and which suit was finally dismissed; the appellant/plaintiff only contested the said suit; (viii) that the appellant/plaintiff and the respondent/defendant entered into an agreement dated 17th January, 1998 whereunder the respondent/defendant had no right, title or interest in the property or the business being carried on therein, though it was provided that if the respondent/defendant works/helps in the business being carried on, he could, claim 50% share in the profit; (ix) that the respondent/defendant however when so asked by the appellant/plaintiff to hand over the control of the business and the shop, refused to do so. Hence the suit.

6. The respondent/defendant contested the suit, *inter alia* pleading (a) that the respondent/defendant was the sole owner of the property aforesaid and was in exclusive possession thereof and it was the appellant/plaintiff who was seeking to disturb the possession of the respondent/defendant; (b) that the entire funds for purchase of the property were contributed by the respondent/defendant but the appellant/plaintiff, at the time of the erstwhile owner of the property executing documents with respect thereto, got the documents executed in his own name also but to which the respondent/defendant did not raise any objection on account of the appellant/plaintiff being the elder brother of the respondent/defendant; (c) that the appellant/plaintiff had forged the agreement dated 17th January, 1998; (d) that it was the respondent/defendant who contested the suit filed by the erstwhile owner of the property; (e) that there was no settlement at any time between the parties, whereunder the respondent/defendant may have confirmed the exclusive title of the appellant/plaintiff to the property.

7. On the pleadings aforesaid, the following issues were framed in the suit:

“1. Whether the plaintiff is entitled for the relief of declaration, as prayed for? OPP

2. Whether the plaintiff is entitled for declaration of possession, as prayed for? OPP

3. Whether the plaintiff is entitled to the relief of permanent injunction, as prayed for? OPP

4. Relief.”

8. The Suit Court dismissed the suit, finding/observing/reasoning (i) that the Power of Attorney, Agreement to Sell, Affidavit, Receipt executed by the erstwhile owner of the property were in the names of the appellant/plaintiff as well as the respondent/defendant; however, the water and electricity meter in the property and the licence obtained from the Municipal Corporation of Delhi for carrying on business in the property, was in the name of the appellant/plaintiff; (ii) that from the Agreement to Sell and Power of Attorney etc. executed by the erstwhile owner of the property in the joint names of the parties, it was clear that they had agreed to acquire rights jointly in the property; (iii) that neither party had challenged the said documents; (iv) that it was immaterial as to from whose pocket the consideration moved, so long as duly registered documents were in the names of both the parties; (v) that the witness examined by the appellant/plaintiff to prove the document whereby the respondent/defendant was claimed to have admitted exclusive ownership of the appellant/plaintiff, did not support the statements in his affidavit by way of examination-in-chief

and took a contrary stand in cross-examination; (vi) that even otherwise, the document by which the appellant/plaintiff claimed the respondent/defendant to have given up his share, was unregistered and could not affect immoveable property; and, (vii) moreover, the fact remained that the respondent/defendant was admittedly in possession of the said property. Accordingly, it was held that though the appellant/plaintiff is not entitled to declaration of sole/exclusive ownership of the property and proprietorship of the business being carried on therein, the ownership as well as the business were proved to be jointly owned by the appellant/plaintiff and the respondent/defendant. The respondent/defendant was thus restrained from letting, subletting or parting with possession of the property till partition thereof; since the parties had been held to be joint owner, the appellant/plaintiff could not be granted the relief of possession and it was for the Executing Court to chart out a way of division of the property or its proceeds.

9. Both, the appellant/plaintiff and the respondent/defendant, appealed against the judgment and decree aforesaid of the Suit Court. The First Appellate Court has dismissed both the appeals, finding no infirmity with the judgment of the Suit Court and in addition reasoning, (a) that Sections 91 & 92 of the Indian Evidence Act, 1872 did not allow the parties to lead any evidence contrary to the written documents; (b) that the onus was on the appellant/plaintiff, to prove the presence of the respondent/defendant in the property as an employee and which onus the appellant/plaintiff had failed to discharge; (c) that the appellant/plaintiff, in his evidence had deposed that the agreement between the parties was of running the shop, turn by turn; (d) that if the respondent/defendant had no share in the property, it was not

understandable as to why would the appellant/plaintiff agree so; (e) that not only the appellant/plaintiff had failed to prove the agreement dated 17th January, 1998 but also failed to prove that the same was acted upon; (f) that the respondent/defendant also, though had claimed exclusive ownership, had failed to prove the same; (g) that once it was found by the Suit Court that the parties were joint owners, the Suit Court was correct in issuing injunction restraining the respondent/defendant from dealing with the joint property; (h) that neither the appellant/plaintiff nor the respondent/defendant could claim exclusive ownership. Accordingly, the appeals were dismissed.

10. The counsel for the appellant/plaintiff has raised two arguments. The first argument is that the Suit Court as well as the First Appellate Court have dealt with the suit, though for declaration and possession, like a suit for partition. The second contention is that the appellant/plaintiff had paid the sale consideration and which was proved from the bank draft for payment of purchase consideration of the property having been prepared from the bank account of the appellant/plaintiff.

11. As far as the first of the aforesaid contentions is concerned, once the appellant/plaintiff had instituted a suit for declaration of exclusive ownership and the Suit Court as well as the First Appellate Court on the basis of evidence adduced had found the appellant/plaintiff to be not an exclusive owner but joint owner along with the respondent/defendant, I am unable to see, as to what can possibly be the objection of the appellant/plaintiff to the same.

12. I have enquired from the counsel for the appellant/plaintiff, whether the appellant/plaintiff wants the suit to be dismissed *in toto*, which would

result in the appellant/plaintiff not having 50% share also and being not entitled to injunction.

13. Obviously, the same is not acceptable to the counsel for the appellant/plaintiff.

14. However, observation in the judgment of the Suit Court, that the division of the property was to take place in execution is indeed not found to fit in the rest of the judgment. Without a decree for partition being passed, and which was not the relief in the suit, the division of the property cannot possibly be effected in execution and the parties will have to initiate separate proceedings therefor. Else, once the Suit Court and the First Appellate Court had found the parties to be having joint ownership, the words used in the operative part of the judgment would be of no avail and the finding in that regard will not bind both the parties.

15. There is no thus merit in the first contention.

16. The main emphasis of the counsel for the appellant/plaintiff also is on the second contention. However, on my enquiring, whether not such a plea of the appellant/plaintiff is barred by the Benami Transactions (Prohibition) Act, 1988 since renamed Prohibition of Benami Property Transactions Act, 1988, the counsel for the appellant/plaintiff has no answer. Section 2(a) of the Benami Act, as originally enacted and Section 2(9) of the Act as amended with effect from 2016, *inter alia* provide that where a property is transferred to or is held by one person and the consideration for such property has been provided or paid by another person, the transaction is a benami transaction and which is prohibited by the Benami Act. The plea of the appellant/plaintiff, of the appellant/plaintiff being the exclusive owner

for the reason of the entire purchase consideration having flowed from him and the respondent/defendant being the benami owner of the 50% share in the property as reflected in the documents executed with respect to the said property, after the coming into force of Benami Act, not sustainable.

17. The counsel for the appellant/plaintiff at this stage states that no percentage of share of appellant/plaintiff and respondent/defendant are mentioned in the Agreement to Sell executed by the erstwhile owner in the joint names of the parties.

18. In such a situation, the assumption under Section 45 of the Transfer of Property Act, 1882 is, of the parties having equal share. Moreover, the same was not in issue.

19. Thus, no substantial question of law or even substantial question of fact arises in this appeal, for it to be entertained.

20. Dismissed.

No costs.

AUGUST 06, 2018

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RAJIV SAHAI ENDLAW, J.