



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 16.04.2015

CORAM:

THE HONOURABLE MR.JUSTICE P.R.SHIVAKUMAR
Second Appeal (MD) No.646 of 2014

S.Subramani

.. Appellant/Appellant/Defendant

Versus

S.Jeyalakshmi

.. Respondent/Respondent/Plaintiff

Second appeal is filed under Section 100 of CPC against the Judgment and Decree dated 12.7.2013 made in A.S.No.21 of 2011 on the file of the Principal Subordinate Judge, Karur confirming the judgment and decree dated 16.11.2010 made in O.S.No.588 of 2006 on the file of the Additional District Munsif, Karur.

For Appellant : Mr.R.Devaraj

For Respondent : Mr.M.Karthikeya Venkatachalapathy

JUDGMENT

Heard Mr.R.Devaraj, the learned counsel for the appellant and Mr.M.Karthikeya Venkatachalapathy, the learned counsel for the respondent and perused the records.

2. The appellant and respondent are brother and sister. The suit properties were purchased by their mother (Nachammal) under two sale deeds dated 2.12.1970 marked as Exs.A1 and A2. On 31.3.2006, she executed a gift settlement deed in respect of the suit properties in favour of her daughter viz., the respondent herein. The said settlement deed has been marked as Ex.A3. As the property which was the subject matter of the gift settlement deed was in possession of the appellant herein/defendant, the respondent herein/plaintiff filed the suit in O.S.No.588 of 2006 on the file of the Additional District Munsif, Karur for recovery of possession.

3.The suit was resisted by the appellant herein/defendant contending that their mother was not the owner of the suit properties and she was only a name lender; that it was Chellappa Gounder the father of the appellant, who was the purchaser of the suit properties under Exs.A1 and A2. The case of the appellant/defendant was that the purchase made under Exs.A1 and A2 in the name of Nachammal was a benami transaction made by Chellappa Gounder. On the said basis alone the appellant/defendant resisted the claim of the respondent/plaintiff for recovery of possession that was made on the derivation of title by virtue of Ex.A3 settlement deed dated 31.3.2006. The contention of the appellant/defendant was that the transactions made under Exs.A1 and A2



were benami transactions and the real purchaser being Chellappa Gounder, the father of the parties to the suit, the respondent/plaintiff could not claim to be the absolute owner of the suit properties. The sustainability of the said contention has to be tested with reference to the provisions of the Benami Transactions (Prohibition) Act, 1988.

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4. The following contentions have been raised on behalf of the respondent/plaintiff:-

"i) Sub-section 1 of section 3 makes every benami transaction a punishable offence, besides making such property subject to acquisition by the competent authority without paying compensation. Only as an exemption from the penal consequence and the consequence of the property becoming liable to be acquired under section 5, section 3 (2)(a) has been provided. It does not say that though it is a benami transaction, it will not attract the abovesaid penal consequence or the consequence contemplated under section 5. On the other hand, it implies a presumption that it shall not be a benami transaction if the purchase is made with the funds provided by the husband or the father of the unmarried daughter as the case may be. In other words, such act of making available the funds can be treated to be a gift in favour of wife or unmarried daughter. That is the reason why the Parliament, in its wisdom, has chosen to state that such a purchase made by a person in the name of the wife or unmarried daughter shall not be deemed to be a benami transaction and it shall be deemed to have been purchased for the benefit of the wife or the daughter as the case may be. In other words, it is implied that the purchaser is none other than the wife or the daughter as the case may be and that the husband or the father providing fund cannot claim to be the real purchaser or owner of the property.

ii) In Section 4 itself, certain exemptions are provided. Such exemptions protect the interest of the members of the Hindu Undivided Family and the person claiming to be a beneficiary for whose benefit the property is held by another person as trustee in a fiduciary capacity. The definition clause in section 3(2)(a) excluding the transaction from benami transaction found cannot be read into section 4. Then the further questions that arise are: 1) who shall be competent to rebut the presumption contemplated under section 3(2)(a)? and 2) on such rebuttal, what shall be the consequences. The State, which is given the power to punish the person entering into benami transaction and the power to acquire the property purchased benami without paying compensation by virtue of sections 3(3) and 5 of the Benami Transactions Prohibition Act, 1988, shall have the competence to rebut the presumption. If a person purchases a property with his own funds in the name of his wife or in the name of his unmarried daughter, the transaction will be protected and the person in whose name the purchase is made, shall stand protected unless it is established that it has not been for the benefit of the wife or the daughter as the case may be, and that it is actually a purchase made by the husband or the father, as the case may be, for his own benefit. Then, he can be punished under section 3(3) and the

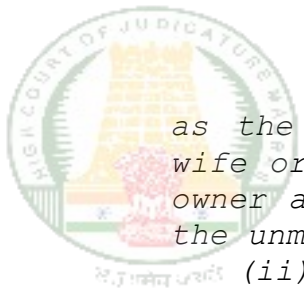


property can be confiscated (acquired without compensation) under section 5 of the Benami Transactions (Prohibition) Act, 1988. Simply because section 4 of the said Act attaches a disability on a person claiming to be the real owner from claiming the property or making a defence on the said basis against the person in whose name the property has been purchased, the State does not lose its power of punishing the person entering into the benami transaction and acquire the property under section 5 of the said Act."

5. At the outset, the above said contentions seem to be logically sound and sustainable, but for the decision of a three Judge Bench of the Supreme Court in *Nand Kishore Mehra vs. Sushila Mehra* reported in AIR 1995 SUPREME COURT 2145. In the said judgment, the Supreme Court observed that Section 3(1) of the Benami Transaction (Prohibition) Act, 1988 prohibits a person from entering into any benami transaction; that sub section (3) of Section 3 makes a person who enters into a benami transaction liable for punishment; that Section 5 makes the properties held benami liable for acquisition without payment of compensation; that however sub section 2 of section 3 permits a person to entered into a benami transaction of purchase of property in the name of his wife or unmarried daughter by declaring that the prohibition contained against a person in entering into a benami transaction in sub section (1) of Section (3) does not apply to him and that in such cases, the question of punishing the person under Section 3(3) or acquiring the property under Section 5 of the Benami Transaction (Prohibition) Act, 1988 can never arise, since, according to the perception of the Supreme Court, the exception granted under Section 3(2) would otherwise become redundant. It was further observed in the said judgment by the Supreme Court that the property concerned in Sub section (2) of section 3 in relation to non-applicability of section 3(3) and section 5 shall equally hold good for non-applicability of the provisions of sub sections 1 and 2 of section 4 in the matter of filing a suit or taking up a defence. The reason assigned by the Supreme Court is that it shall be difficult to hold a person permitted to purchase a property in the name of his wife or unmarried daughter under sub-section (2) of section 3 notwithstanding the prohibition to enter into a benami transaction contained in sub-section (1) of section 3, cannot enforce his rights arising therefrom.

6. In this context, though the learned counsel for the respondent/plaintiff would contend that the Supreme Court in *Nand Kishore Mehra's* case did not deal with the presumption contemplated under Section 3(2) of the Benami Transaction (Prohibition) Act, 1988 which has also been made a rebuttable one and the consequences of the presumption being drawn or the presumption being rebutted. It is his further contention that if proper interpretation of the said clause is adopted it shall have the following effects:

"(i) the purchase made by a person in the name of his wife or unmarried daughter shall be presumed, unless otherwise rebutted, to be a purchase made for the benefit of the wife or unmarried daughter, as the case may be, thereby making the wife or unmarried daughter in whose name the property purchased to be the real owners with the consequence that the property thus purchased shall not be construed to be a property held benami by such wife or unmarried daughter for the husband or the father,



as the case may be. The resultant position shall be that the wife or the daughter, as the case may be, shall be the absolute owner and the husband cannot claim title as against the wife or the unmarried daughter, as the case may be.

(ii) In case of rebuttal of the presumption contemplated under sub-section (2) of Section 3, the transaction will become a benami transaction prohibited under sub-section (1) of Section 3 inviting the penal consequence contemplated under sub-section (3) of Section 3 and also the civil consequences of the property becoming liable to be acquired by the Government without payment of compensation under Section 5. As a necessary corollary, the husband or father, as the case may be, shall be barred from making any claim over the property on the premise that he is the real purchaser and hence the real owner of the property."

The above said contention raised by the learned counsel for the respondent/plaintiff also seems to be logically sustainable.

7. The dictum laid down in *Nand Kishore Mehra's* case is to the effect that a person to succeed in a suit for establishment of his title in respect of a property purchased by him with his own funds in the name of his wife or unmarried daughter, he should prove that the purchase was not made for the benefit of the wife or unmarried daughter, as the case may be, on the other hand, it was purchased for his own benefits.

8. At the outset, the general principle incorporated in Section 4 of the Benami Transactions (Prohibition) Act, 1988 is a person claiming to be the real owner is debarred from making any plea against the person in whose name the property stands. As per Section 4 of the Benami Transactions (Prohibition) Act, 1988 except the case in which such acquisitions can be made for the joint family in the name of one of the coparceners or in the name of the person who occupies the possession of the trustee for another as they are in a fiduciary capacity, the said bar shall get attracted. However Section 3 of the said Act came to be interpreted that there is no prohibition for a person for entering into a benami transaction by purchasing the property with his own funds in the name of his wife or unmarried daughter. Section 3 of the Act proceeds on the assumption that if any purchase is made by a person with his own money in the name of his wife or unmarried daughter, the same shall be presumed to be for the benefit of the wife or unmarried daughter as the case may be and not for his own benefit. Such a presumption has been made rebuttable. What are the consequences of such presumption being rebutted? There is conflict of views. One view is that in case such a presumption is rebutted, the penal consequences of punishment prescribed under Section 3(2) for entering into a benami transaction and the property being liable for acquisition without payment of compensation under Section 5 of the Benami Transactions (Prohibition) Act, 1988 will follow. The other view is that when the person purchasing the property in the name of his wife or unmarried daughter pleads and proves that the purchase was made not for the benefit of the wife or the unmarried daughter, as the case may be, and on the other hand it was made for his own benefit, then not only the penal consequences will stand excluded but also the bar provided under Section 4 shall be inapplicable. Such a view has been taken by a Larger Bench of the Hon'ble Supreme Court and the Judgment was scribed made by Hon'ble Mr. Justice Kuldeep Singh. We need



not go into the conflicting views as we are bound by the law declared by a Larger Bench of the Supreme Court.

9. However, the appellant/defendant cannot rely on the said judgment in support of his case. In the said judgment itself, the Supreme Court held that the persons claiming to have purchased the property in the name of his wife or unmarried daughter cannot succeed if he fails to plead and prove that such purchase was for his own benefit and not for the benefit of his wife or the daughter. The appellant/defendant could have pleaded and proved that the purchase made in the name of his mother was not only made by his father but also it was made for his own benefit and it was not intended to benefit his mother Nachammal. No such plea has been raised and no evidence has been adduced.

10. Apart from the same, there are also admissions made by DW.1 (defendant himself) that the mother Nachammal did have sridhana properties and she was also having income by rearing cattles and doing agricultural work. The father of the parties to the suit, who was alive till the filing of the suit and who died, admittedly, after filing of the suit, did not come forward to claim the property to be his. On the other hand, the appellant/defendant alone contended that the property was purchased by his father benami in the name of his mother. The said contention tantamounts to a plea that purchase was made by the joint family consisting of himself and his father purchased the properties in the name of his mother. It is a settled proposition that a purchase made in the name of the wife of a coparcener is not one that comes under the exception to Section 4 of the Benami Transactions (Prohibition) Act, 1988.

11. Therefore there is no substance in the contention of the appellant/defendant that the property belongs to him. It is also pertinent to note that when Nachammal executed gift settlement deed under Ex.A3, her husband Chellappa Gounder was very much alive and he did not question the right of Nachammal to execute such a gift settlement deed in favour of respondent/plaintiff. When the husband of Nachammal himself had not chosen to claim the purchase made under Exs.A1 and A2 in the name of Nachammal was in fact the purchases made by him for his own benefit and thus he could claim the same from her or anybody claiming through her, the appellant/defendant cannot sustain his contention that the transactions made under Exs.A1 and A2 were benami transactions and that the title of the respondent/plaintiff derived from Nachammal did not confer a valid title on the respondent/plaintiff. The title derived by the respondent/plaintiff under Ex.A.3 settlement deed does not stand defeated by the appellant/defendant by making necessary plea and proving the same. Hence, he cannot successfully resist the claim for recovery of possession made by the respondent/plaintiff and the Courts below have not committed any error in decreeing the suit.

12. The above said narration will make it clear that there is no merit in this second appeal and the second appeal does not give rise to any substantial question of law.



13. In the result, the second appeal is dismissed. However, there shall be no order as to costs.

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Sd/-
Assistant Registrar (Writs)

Sub Assistant Registrar

To

1. The Principal Subordinate Judge, Karur.
2. The Additional District Munsif, Karur.

Copy to
The Section Officer, VR Section,
Madurai Bench of Madras High Court, Madurai.

+1cc to MR.R.DEVARAJ, Advocate in SR.No. 19702
+1cc to MR.K.BALASUBRAMANI, Advocate in SR.No.19504

Vks/Sms
SR/PRV : 16.06.2015 : 6p/6c

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16.4.2015