

In the High Court of Punjab and Haryana at Chandigarh

Date of decision: 25.2.2015

R.S.A.No.79 of 1989

Bimla Devi

.....Appellant

Versus

Devinder Singh and others

.....Respondents

R.S.A.No.169 of 1989

Jal Kaur

.....Appellant

Versus

Devinder Singh and others

.....Respondents

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr.G.S.Sandhu, Advocate and
Mr.A.P.Kaushal, Advocate,
for the appellants.

None for the respondent.

Raj Mohan Singh, J.

1. Vide this common judgment, aforesaid two appeals are being disposed of. Facts are taken from RSA No. 79 of 1989.

2. Before embarking upon merits of the case, it is necessary to take stock of status of the parties. The record of RSA No.79 of 1989 reveals that sole plaintiff/respondent Devinder Singh died on 24.12.1991. Civil Miscellaneous No.1-C of 1992 was moved on 24.7.1992 for bringing his brother Tarlok Singh son of Gurdev Singh

on record as legal representative. Aforesaid Application was allowed and necessary note about impleading of legal representative in the memo of parties was ordered to be recorded vide order dated 11.9.1992 passed by this Court. Thereafter, notice/ fresh notice was issued to said Tarlok Singh son of Gurdev Singh and ultimately, this Court recorded the following order on 17.5.1993 in CM No. 2453-C of 1989:-

“The only brother of Devinder Singh deceased/ respondent, who was allowed to be impleaded as legal representative by this Court, has written on the summons that he was not interested in the case. Consequently, the stay order granted by this Court is made absolute.”

3. In view of aforesaid, since Tarlok Singh legal representative of respondent Devinder Singh was not interested in pursuing this appeal, therefore, none appeared on his behalf before this Court on preceding dates. This Court proceeds to decide the appeals on merits on the aforesaid premise.

4. These appeals are directed against the judgment and decree dated 8.10.1988 passed by Additional District Judge, Ludhiana, whereby judgment and decree dated 18.11.1986 passed by Sub Judge, Khanna was reversed and suit of the plaintiff was decreed in appeal.

5. Brief facts of the case are that plaintiff Devinder Singh filed a suit for possession on the ground that Harjit Kaur, daughter of Gurdev Singh, was the owner of the land measuring 6 marla detailed in head note of the plaint. The land was purchased from Hari Singh

son of Harnam Singh vide registered sale deed dated 8.6.1976. Harjit Kaur expired on 28.11.1977. Plaintiff being the only legal heir of Harjit Kaur (deceased), filed the aforesaid suit with the allegations that defendant No.2 Jal Kaur had illegally obtained mutation of the land in question in her favour due to connivance of revenue officials. Jal Kaur had sold the land in favour of defendants No.3 and 4, namely, Charanjit Kaur and Jaswinder Kaur for which she had no right, title or interest. Defendants No.3 and 4, in turn, sold the same to Bimla Devi-defendant No.1.

6. The suit was contested by the defendants on numerous grounds. Defendants No.1 and 2 contested the claim of the plaintiff on the ground that the suit was not maintainable. Jal Kaur alleged that the plot in question was purchased by her in the name of her daughter Harjit Kaur as *benami* transaction. Defendant No.1 Bimla Devi took the stand that she purchased the plot in question from defendants No.3 and 4 in a bona fide manner.

7. On the pleadings of the parties, trial Court framed the following issues:-

“1. Whether the sale in favour of Smt.Harjit Kaur deceased was got executed *benami* by defendant No.2?

If not its effect ? OPD

2. If issue No.1 is proved, whether the plaintiff is owner of the suit property ? OPP

3. Whether the defendant No.1 is a bona fide purchaser of the property in suit ? OPD

4. Whether the suit is not maintainable in the present

form ? OPD

5. Whether the suit is barred by the time ? OPD

6. Relief.”

8. Trial Court under issue Nos. 1 and 2 found as a matter of fact that admittedly, Harjit Kaur was daughter of Jal Kaur. Harjit Kaur expired on 28.11.1977. The plot in question was purchased by Jal Kaur in the name of Harjit Kaur vide registered sale deed dated 8.6.1976 Ex.D-1. Marriage of Harjit Kaur was solemnized with Devinder Singh (plaintiff) on 13.7.1975. The land in question was purchased from Hari Singh and name of Harjit Kaur was recorded being daughter of Gurdev Singh. It was nowhere mentioned in the sale deed that she was wife of Devinder Singh (plaintiff). The land was purchased under the direction of father Gurdev Singh and father was shown present in the transaction, who put his thumb impression on the sale deed. On the other hand, presence of Devinder Singh was not shown. In this transaction, total 18 marlas of land was the subject matter which was purchased for a total sale consideration of ₹ 10,000/- and 1/3rd share i.e. the suit land was equated with ₹ 3,300/-. On 8.6.1976 itself Gurdev Singh executed pronote and receipt Ex.D-2 and Ex.D-5 respectively in favour of Hari Singh and obtained ₹ 2,300/- qua which one Jagir Singh was the witness. Gurdev Singh also appeared as DW-4 and admitted the sale deed to be a transaction on account of love and affection but the possession always remained with him. The sale consideration was paid in the form of cash as well as the pronote amount obtained vide pronote Ex.D-2 and receipt Ex.D-5. Endorsement Ex.D-3 and Ex.D-

4 at the back of pronote and receipt proved that the amount was duly returned to Hari Singh on 25.12.1976 and 26.2.1977 and Hari Singh himself, while appearing as DW-1, admitted the factum of amount being returned to him. Trial Court discussed the evidence that the sale in question was, in fact, in the name of Harjit Kaur but the sale consideration was paid by Jal Kaur and Gurdev Singh and the possession always remained with them. The source of *benami* transaction was duly proved.

9. Devinder Singh appeared as PW-2 and only stated that he had given an amount of ₹ 4,000/- to Harjit Kaur to purchase the land. No connecting evidence came on record. No bank account was mentioned and no witness was examined. Possession of land and possession of the sale deed always remained with defendant No.2 Jal Kaur. Even during life time of Harjit Kaur, possession of land as well as sale deed remained with Jal Kaur and sale deed was also produced in the Court by her. The suit in question was filed on 30.4.1984, after seven years of death of Harjit Kaur. Trial Court held the transaction to be *benami* and dismissed the suit after returning necessary findings under other issues also.

10. Lower Appellate Court under Issue No.1 reversed the finding by giving interpretation of Section 4 (3) (b) of the Benami Transaction (Prohibition) Act, 1988 ('the Act for short) and held that Jal Kaur herself claimed as real owner. Mother stands in fiduciary capacity qua her children and a child cannot be said to be standing in fiduciary capacity qua her parents. Lower Appellate Court held that Harjit Kaur, deceased, was not a person, who held the property as a

trustee or other person standing in fiduciary capacity as against defendant No.2 (her mother) and, therefore, provision in terms of Section 4 (3) (b) of the Act was not attracted. Therefore, no exception could have been made to the general rule which provided that no suit, claim or action to enforce any right in respect of any property held *benami* shall lie and no defence based on any right in respect of any property held *benami* shall be allowed in any suit, claim or action. The exceptions regarding property held *benami* as given in Section 4 (3) (a & b) were refuted in the aforesaid manner.

11. It is relevant to point out here that the transaction in question took place on 8.6.1976 and the present suit was filed on 30.4.1984. Trial Court decree came to be passed on 18.11.1986. Now the question arises for determination at the hands of this Court is:-

“Whether sale deed dated 8.6.1976 in favour of Harjit Kaur registered prior to the coming into force of the Act between the ostensible owner or the real owner was void in terms of provisions of the Benami Transaction (Prohibition) Act ?”

12. Sections 3 and 4 of the Act are being reproduced herein below:-

“3. Prohibition of benami transactions- (1) No person shall enter into any benami transaction. (2) Nothing in sub-section (1) shall apply to the purchase of property by any person in the name of his wife or unmarried daughter and it shall be presumed, unless the contrary is proved,

that the said property had been purchased for the benefit of the wife of the unmarried daughter. (3) Whoever enters into any benami transaction shall be punishable with imprisonment for a term which may extend to three years or with fine or with both. (4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, an offence under this section shall be non-cognizable and bailable.

4. Prohibition of the right to recover property held

benami- (1) No suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property. (2) No defence based on any right in respect of any property held benami, whether against the person in whose name the property is held or against any other person, shall be allowed in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property. (3) Nothing in this section shall apply,-- (a) where the person in whose name the property is held is a coparcener in a Hindu undivided family and the property is held for the benefit of the coparceners in the family or:

(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.”

13. At the time of filing of the present suit as well as at the time of decree passed by the trial Court, the interpretation of Sections 3 and 4 of the Act was summarised by Division Bench of this Court in **Mithilesh Kumari vs. Prem Behari Khare (1989) 2 SCC 95.**

14. The question poised before the Division Bench was whether Section 4 (1) of the Act can be applied to suit, claim or action to enforce any right in property held *benami* against person in whose name such property is held or any other person. If such proceeding is initiated on or behalf of person claiming to be the real owner thereof, prior to the coming into force of Section 4 (1) of the Act. This question was considered by the Division Bench and it was held that though Section 3 of the Act is prospective and though Section 4 (1) of the Act is also not expressly made retrospective by necessary implication, it appears to be restrospective and would apply to all pending proceedings, wherein right to property allegedly held *benami* is in dispute between the parties and that Section 4 (1) of the Act will apply at whatever stage the litigation might be pending in the hierarchy of proceedings. At the time of filing of the suit and the decree passed by the lower Appellate Court, the aforesaid was the view prevailing and made the applicability of Section 4 of the Act to be retrospective in character and the lower Appellate Court held that the transaction was squarely hit by the prohibition of the Act after making distinction between trustee and other persons standing in

the fiduciary capacity as against real owner.

15. The lower Appellate Court brought out the case from the ambit of exception in terms of Section 4 (3) (b) of the Act and accepted the appeal of the plaintiff by holding that the right held by Harjit Kaur on the basis of sale deed could not be defeated on the basis of plea of *benami* transaction taken by defendant No.2 and the same was prohibited by the operation of the Act. Since the plaintiff was the only heir of Harjit Kaur being husband, therefore, right of ownership, was conferred upon the plaintiff after the death of Harjit Kaur.

16. The view expressed in **Mithilesh Kumari's case (supra)** came to be considered before Hon'ble the Apex Court in **R.Rajagopal Reddy (dead) by L.Rs vs. Padmini Chandrasekharan (dead) by L.Rs 1996 ARI (SC) 238**. The Apex Court in the aforesaid case held after observing that a mere look at the provision of the Act shows that the prohibition under Section 3 (1) is against persons who are to enter into *benami* transaction and it has laid down that no person shall enter into any *benami* transaction which obviously means from the date on which this prohibition comes into operation i.e. with effect from September 5, 1988. **Mithilesh Kumari's case (supra)** was concurred to the extent of prohibition that Section 3 of the Act cannot have retrospective operation. The issue for consideration in terms of Section 4 (1) of the Act was taken care of by the Apex Court.

17. The preamble of the Act itself states that it is an act to prohibit *benami* transaction and the right to recover property held

benami, for matter connected therewith or incidental thereof. Thus, it was enacted to efface the then existing rights of the real owners of properties held by other *benami*. Such an Act was not given any retrospective effect by the legislature.

18. As per Section 4 (1) of the Act, no suit shall henceforth lie to recover the possession of the property held *benami* by the defendant. Any suit to enforce such a right after coming into operation of Section 4 (1) of the Act w.e.f. 19.5.1988 shall not lie. The Hon'ble Supreme Court in **R.Rajagopal Reddy's case (supra)** held that the operation of Section 4 (1) would be prospective in nature. In the said judgment, the Court held in the following manner.

“13. According to us this difficulty is inbuilt in Section 4 (2) and does not provide the rationale to hold that this Section applies retrospectively. The legislature itself thought it fit to do so and there is no challenge to the vires on the ground of violation of Article 14 of the Constitution. It is not open to us to re-write the section also. Even otherwise, in the operation of Section 4 (1) and (2), no discrimination can be said to have been made amongst different real owners of property, as tried to be pointed out in the written objections. In fact, those cases in which suits are filed by real owners or defences are allowed prior to coming into operation of Section 4(2), would form a separate class as compared to those cases where a state for filling such suits or defences has still not reached by the time Section 4(1) and (2) starts operating.

Consequently, latter type of cases would form a distinct category of cases. There is no question of discrimination being meted out while dealing with these two classes of cases differently. A real owner who has already been allowed defence on that ground prior to coming into operation of Section 4(2) cannot be said to have been given a better treatment as compared to the real owner who has still to take up such a defence and in the meantime he is hit by the prohibition of Section 4(2). Equally there cannot be any comparison between a real owner who has filed such suit earlier and one who does not file such suit till Section 4 (1) comes into operation. All real owners who stake their claims regarding benami transactions after Section 4(1) and (2) came into operation are given uniform treatment by these provisions, whether they come as plaintiffs or as defendants. Consequently, the grievances raised in this connection cannot be sustained.”

19. The aforesaid view was fully endorsed in the subsequent judgment of the Hon'ble Supreme Court in **Sankara Hali and Sankara Institute of Philosophy and Culture vs. Kishorilal (1996) 7 SCC 55**. It was held therein that a reading of Section 4 of the Act shows that the real owner is precluded from claiming title to the property against person holding the same *benami* either by way of assertion or defence. Under the Act any transaction entered into prior to the coming into force of the Act, between the ostensible

owner and the real owner is not voided by any provision whatsoever.

20. The aforesaid view was again reiterated by the Hon'ble Supreme Court in **Vijay Kumar and another vs. Dharampal and others** 2009 (2) RCR (Civil) 64. The Provisions were held not applicable in respect of transactions made prior to coming into force of the Act in the year 1988.

21. In view of aforesaid, the question of law as framed in the case is answered in the manner that the transaction of sale effected prior to coming into force the Benami Transaction (Prohibition) Act, 1988 is not hit by the prohibition as the operation of the Act is prospective in nature in view of **R.Rajagopal Reddy's case (supra)**.

22. Word "Fiduciary" has been defined in number of contexts. In **Marcel Martins vs. M.Printer and others** 2012 (2) RCR (Civil) 922, the Hon'ble Supreme Court referred the definition of 'fiduciary' explained in number of dictionaries and relied upon the definition given in **Central Board of Secondary Education and another vs. Aditya Bandopadhyay and others** 2011 (3) RCR (Civil) 914, wherein the Court explained the term 'fiduciary' and 'fiduciary relationship' in the following manner:-

"The term fiduciary refers to a person having a duty to act for the benefit of another, showing good faith and candour, where such other person reposes trust and special confidence in the person owing or discharging the duty. The term fiduciary relationship is used to describe a situation or transaction where one person (beneficiary) places complete confidence in another person (fiduciary)

in regard to his affairs, business or transaction(s). The term also refers to a person who holds a thing in trust for another (beneficiary). The fiduciary is expected to act in confidence and for the benefit and advantage of the beneficiary, and use good faith and fairness in dealing with the beneficiary or the things belonging to the beneficiary. If the beneficiary has entrusted anything to the fiduciary, to hold the thing in trust or to execute certain acts in regard to or with reference to the entrusted thing, the fiduciary has to act in confidence and is expected not to disclose the thing or information to any third party.”

23. The fiduciary relationship is not exhausted by the few well known patterns of relationship. Any relationship in which one party enjoys the 'active confidence' of another party who is lean on him and is inclined to repose implicit confidence in him is enough to approximate to the kind of relationship. The relationship of parent and child is also inclusive so as to cover the present case in which mother purchased the property as *benami*.

24. In view of aforesaid legal position, the case was not hit by the retrospective applicability of provision of Section 4 of the Act and the view taken by lower Appellate Court cannot be held to be a correct interpretation of law in view of **R.Rajagopal Reddy's case (supra)**

Hence, these appeals are allowed. Impugned judgment and decree dated 8.10.1988 passed by the lower Appellate Court is

set aside and that of the trial Court dated 18.11.1986 is ordered to be restored, dismissing the suit with costs throughout.

**(RAJ MOHAN SINGH)
JUDGE**

February 25, 2015
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