

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

RSA No.1504 of 2016

Date of Decision: 07.09.2016

Smt. Kanchan Jain and another

... Appellants

Vs.

Babita Jain

... Respondent

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

1. To be referred to the Reporters or not?
2. Whether the judgment should be reported in the Digest?
3. Whether the order is speaking/reasoned?

Present:- Mr. Naveen Bawa, Advocate,
for the appellants.

Amol Rattan Singh, J.

This is the second appeal of the defendants in a suit filed by the respondent-plaintiff, seeking partition of the suit property by metes and bounds and separate possession thereof to the extent of her 1/4th share in the property, which is a building standing on land measuring 154 square yards, bearing no.B.VII 395 (old) & B.VII 269 (New) in Mohalla Mullan Shakoor, Ludhiana.

The plaintiff further sought a decree of permanent injunction restraining the defendants from changing the nature and construction of the building or alienating it in any manner. Still further, she had prayed for mesne profits qua her share in the suit property.

2. The suit having been decreed in her favour and the first appeal

filed by the present appellants having been dismissed, the present second appeal has been filed.

3. The facts, as taken from the judgments of the learned Courts below, are that as per the respondent-plaintiff, she and the defendants are joint owners in possession of the suit property, with she and defendant no.2 being owners to the extent of a 1/4th share each and defendant no.1 having a half share in the suit property.

Defendant no.1 is the mother-in-law of the plaintiff and defendant no.2, the plaintiff and defendant no.2 being married to two brothers.

4. It was contended by the plaintiff that after her marriage on 23.09.1990, she lived happily in her matrimonial home for some time, alongwith her husband, the defendants and their families. Thereafter, allegedly, the plaintiffs' husband as well as the defendants and defendant no.2s' husband, started maltreating the plaintiff on account of insufficient dowry, further stating that she was not beautiful, whereas her husband was a smart and handsome boy.

Despite several attempts at mediation etc., eventually, on 25.08.2000, allegedly an attempt was made to pressurise her into accepting a divorce from her husband, and she was turned out of her matrimonial home. Eventually, an FIR was lodged for the alleged commission of offences punishable under Sections 406/498-A/120-B IPC on 10.04.2001, and her husband also filed a petition for divorce under Section 13 of the Hindu Marriage Act.

5. In the above situation, the plaintiff sought a partition of the suit property in which she had a 1/4th share, and upon the defendants not agreeing

to give any such possession, she filed the suit.

She also claimed that the rental value of the property was Rs.30,000/- per month and that she was accordingly entitled to mesne profits to the extent of 1/4th thereof.

6. Upon notice issued to them, the defendants appeared and filed their written statements with the usual preliminary objections of non-joinder of necessary parties etc. and on merits, contended that the property was purchased by the late husband of defendant no.1 (father-in-law of the plaintiff) Shri Chaman Lal, in the name of the parties to the suit and that the entire sale consideration was paid by him.

As such, it was contended that the plaintiff having made no contribution towards the purchase of the property, she could claim no right in it.

7. Upon the aforesaid pleadings, the following issues were framed by the learned Civil Judge (Junior Division), Ludhiana:-

1. Whether the plaintiff is entitled to separate possession by the parties with respect to the suit property as prayed for? OPP
2. Whether plaintiff is entitled to the relief of permanent injunction as prayed for? OPP
3. Whether the plaintiff is entitled to mesne profit from the defendant? If so, at what rate and from which party? OPP
4. Whether suit is bad for non joinder of necessary parties? OPP
5. Whether suit is not properly valued for the purposes of court fee and jurisdiction? OPD
6. Whether plaintiff has no locus standi or cause of action to file this suit? OPD
7. Relief.

8. The plaintiff examined herself and her father Darshan Kumar Jain, and exhibited a copy of the sale deed of the suit property and the FIR lodged, as Exs. P1 and P2 respectively.

The defendants examined defendant no.2 as DW1.

9. Upon appraising the pleadings of the parties and the evidence led, the learned Civil Judge found that the defence taken by the defendants was that the property had been purchased *benami* in the name of the plaintiff.

However, it was held that even if the property was purchased from the fund of the late Chaman Lal only, the plea of a *benami* transaction was barred in terms of Sections 3 and 4 of the Benami Transactions (Prohibition) Act, 1988 (hereinafter to be referred to as the Act).

It was further found that the only two exceptions to the aforesaid bar, as per the Act itself, were, firstly, if the person in whose name the property is held is a coparcener in a Hindu Undivided Family, or second, if the person in whose name the property is held is a trustee or stands in a fiduciary capacity to the person who actually purchased it. It was held that the petitioner was neither a coparcener nor in a fiduciary capacity to the purchaser, the late Shri Chaman Lal.

10. On the issue of mesne profits, the plaintiff not having been able to lead any evidence that the property had actually been tenanted out for Rs.30,000/- per month, eventually, the contention of the defendants was accepted that they were receiving Rs.1500/- per month in the property and accordingly, the plaintiff was held entitled to a 1/4th share of Rs.375/- per month, by way of mesne profits.

11. Thus, the issues on the partition and separate possession having been held in favour of the plaintiff, (the plea of a *benami* transaction being

barred), the suit was decreed in her favour, further restraining the defendants from changing the existing nature and construction of the property.

12. In the first appeal filed by the present appellants, the learned Additional District Judge, Ludhiana, after considering the judgment of the learned Civil Judge, as also the evidence adduced by both sides, referred to a judgment of the Supreme Court in **Bina Pani Paul v. Pratima Ghosh and others** 2007 (2) RCR (Civil) 801, and also eventually came to the same conclusion, that the plaintiff was neither a coparcener in the Hindu Undivided Family of the deceased Chaman Lal, nor was in any fiduciary relationship to him and as such, in view of the bar contained in the Act, the suit property, to the extent of share of the plaintiff, would have to be treated as her own property.

Consequently, the first appeal was dismissed.

13. Before this Court, Mr. Naveen Bawa, learned counsel for the appellants, essentially reiterated the arguments raised before the Courts below on behalf of the appellants and submitted that once it was not denied by the plaintiff that the consideration towards the purchase of the suit property was entirely paid by the late Shri Chaman Lal, it would not be a case of a *benami* transaction, but the holding over of the property by the plaintiff in trust for the deceased.

14. Having considered the aforesaid argument, as well as the judgments of the learned Courts below, first of all the provisions of the Act need to be considered. Sections 3 and 4 thereof read as follows:-

“3. Prohibition of *benami* transactions- (1) No person shall enter into any *benami* transaction.

(2) Nothing in sub-section (1) shall apply to -

(a) 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 or the unmarried daughter;

(b) the securities held by a -

(i) depository as registered owner under sub-section (1) of section 10 of the Depositories Act, 1996

(ii) participant as an agent of a depository.

Explanation.- The expressions “depository” and “Participants shall have the meanings respectively assigned to them in clauses (e) and (g) of sub-section (1) of section 2 of the Depositories Act, 1996.

(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.

14-A. Section 6 of the Act may also be noticed, wherein it is stipulated that nothing in the Act shall affect the provisions of Section 53 of the Transfer of the Property Act, 1882, or any law relating to transfers for an illegal purpose. However, Section 53 of the Act of 1882 is not seen to be applicable to the present circumstances of the case and hence, is not referred to, except to notice that the said provision pertains to fraudulent transfers. There being no issue raised of any fraudulent transfer in the present case, nothing further need be said on that.

15. As regards Section 3(2) of the Act, undoubtedly, defendant no.1 was the wife of the late Chaman Lal and as such, half the property, as was purchased by him in her name, would obviously be deemed to be for her benefit and not for the benefit of either the plaintiff or defendant no.2, they being his daughters-in-law.

Coming then to the exceptions carved out in Section 4(3) of the Act, by which property held in the name of a coparcener in a Hindu Undivided Family, or in the name of a person standing in a fiduciary capacity to the purchaser, have been held to be not affected by the provisions of Section 4(1) & (2).

It is, therefore, to be seen whether the respondent-plaintiff was a coparcener in the Hindu Undivided Family, at the time when the property was purchased during the life time of the late Chaman Lal, or whether she stood in any fiduciary capacity to him.

16. As regards her being a coparcener in the Hindu Undivided Family, firstly, of course, no contention whatsoever is seen to have been

raised that the property was ancestral in the hands of Chaman Lal, so as to make even his sons to be coparceners in the property.

Hence, the question of the respondent-plaintiff enjoying only a life interest in such coparcenary property also does not arise, other than the fact that a daughter-in-law, is not a coparcener herself.

In this regard, if any reference is to be quoted, passages from Mulla on Hindu Law, 22nd edition, can be referred to. (Reference Chapter XII on coparceners, page 315).

“210. Joint Hindu Family.-(1) A joint Hindu family consists of all person lineally descended from a common ancestor, and includes their wives and unmarried daughters. A daughter ceases to be a member of her father's family on marriage, and becomes a member of her husband's family.”

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“211. Hindu coparcenary.- A Hindu coparcenary is a much narrower body than the joint family. It includes only those persons who acquire by birth an interest in the joint or coparcenary property. These are the sons, grandsons and great-grandsons of the holder of the joint property for the time being, in other words, the three generations next to the holder in unbroken male descent (see 217). The above propositions must be read in the light of what has been stated in the note at the top of this chapter. After the amendment of the Hindu Succession Act in 2005, a daughter of a coparcener has been included as a coparcener along with the sons of the coparcener. The commentary will not have to be read accordingly.”

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“Ancestral property is a species of coparcenary property. As stated above, if a Hindu inherits property from his

father, it becomes ancestral in his hands as regards his son. In such a case, it is said that the son becomes a coparcener with the father as regards the property so inherited, and the coparcenary consists of the father and the son. However, this does not mean that coparcenary can consist only of the father and his sons. It is not only the sons, but also the grandsons and great-grandsons, who acquire an interest by birth in the coparcenary property. xxxxxxxx”

“212. Formation of coparcenary. -(1) The conception of a joint Hindu family constituting a coparcenary is that of a common male ancestor with his lineal descendants in the male line within four degrees counting from, and inclusive of, such ancestor (or three degrees exclusive of the ancestor). No coparcenary can commence without a common male ancestor, though after his death, it may consist of collaterals, such as brothers, uncles, nephews, cousins, etc.

(2) A coparcenary is purely a creature of law; it cannot be created by act of parties, save in so far that by adoption a stranger may be introduced as a member thereof.

(3) No female can be a coparcener, although a female can be a member of a joint Hindu family (see 215). This was the position prior to the amendment of the Hindu Succession Act in 2005. By virtue of the amendment, the daughters of a coparcener are included as coparceners along with his sons and are recognized as coparceners in their own right.”

Thus, obviously a daughter-in-law cannot be a coparcener and consequently, the respondent-plaintiff is not ousted by the exception carved out in Section 4(3(a) of the Act.

16. Coming then to the question of whether the property purchased in her name, by Chaman Lal, was purchased in trust, if she stood in any fiduciary capacity to him.

Though no specific arguments have been addressed before this Court on that issue, however, it needs to be seen that if the intention of Chaman Lal had been to purchase the property for the welfare of the entire Hindu Undivided Family, he could simply have purchased it in his own or in his wives' name or in their joint names. The very fact that he chose to purchase the property in the name of his wife and two daughters-in-law, goes to show that he intended to ensure the financial security of the female members of his family.

The issue of what relationship can be termed to be a “fiduciary” one came up for consideration before the Supreme Court in **Sri Marcel Martins v. M. Printer and others** (2012(2) RCR (Civil) 922, wherein their Lordships observed as follows:-

“21. We may at this stage refer to a recent decision of this Court in ***Central Board of Secondary Education and Anr. V. Adiya Bandopadhyay and Ors.***, 2011(3) RCR (Civil) 914: 2011 (4) Recent Apex Judgments (R.A.J.) 371: (2011) 8 SCC 497, where Ravindeeran, J. speaking for the Court in that case explained the term 'fiduciary' and 'fiduciary relationship' in the following words:

“39. 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.”

22. It is manifest that while the expression “fiduciary capacity” may not be capable of a precise definition, it implies a relationship that is analogous to the relationship between a trustee and the beneficiaries of the trust. The expression is in fact wider in its import for it extends to all such situations as place the parties in positions that are founded on confidence and trust on the one part and good faith on the other.”

17. Thus, whether any one person stood in a fiduciary capacity to another, in the context of a particular property transaction, has to be seen in the circumstances of individual cases.

One argument, of course, could be raised that by purchasing the property in the names of the wives in the family, the late Chaman Lal was securing the interest of his own wife, as also the interest of his sons. That argument even if raised, would also have to be rejected, because nothing prevented him from then purchasing the property in the name of his wife and sons, with no mention of the daughters-in-law. The very fact that he chose to purchase the property in the name of his wife and daughters-in-law, would go to prove that he actually intended it to be for their benefit.

That being so, it cannot be said in the context of the circumstances of the present case, that the property was purchased by Chaman Lal in the name of his wife and daughters-in-law, because they stood in any

fiduciary capacity to him. If that were so, he could have executed any instrument by way of a family settlement etc. to make any such intention clear in that regard. That no having been done, the property cannot be said to have been purchased for the benefit of any other person, other than those in whose names it was purchased.

18. Finally, though I agree with learned counsel for the appellants that there is no specific pleading shown by which the respondent-plaintiff denied that the property had been purchased from the funds of her father-in-law and not from her own funds, however, no provision in the Act carves out an exception by which, if it is shown that a property is purchased from the funds of one person, in the name of another person, such property would not fall within the prohibition and bar stipulated in Sections 3 and 4 of the Act.

19. That being so, I find absolutely no error in the judgments of the learned Civil Judge and the learned Additional District Judge, in decreeing the suit of the plaintiff and in dismissing the appeal filed by the present appellants-defendants.

Consequently, finding no merit in this appeal, it is dismissed *in limine*, with no order as to costs.

September 7, 2016
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(AMOL RATTAN SINGH)
JUDGE