

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

+ **RSA No. 109/2017**
RSA No. 123/2017

% **27th July, 2017**

+ **RSA No. 109/2017 and C.M. Appl. No. 13477/2017**

LALITA SHARMA Appellant

Through: Mr. Jawahar Chawla, Advocate.

versus

KALAWATI Respondent

Through: Mr. S.K. Sharma, Advocate.

+ **RSA No. 123/2017 and C.M. Appl. Nos. 15155/2017, 15225/2017**

YOGESH KUMAR SHARMA Appellant

Through: Mr. Jawahar Chawla, Advocate.

versus

AMARNATH Respondent

Through: Mr. S.K. Sharma, Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not? **YES**

VALMIKI J. MEHTA, J (ORAL)

C.M. Appl. Nos. 15156-57/2017 (for exemptions) in RSA No. 123/2017

Exemptions allowed, subject to all just exceptions.

The applications stand disposed of.

RSA No. 109/2017

RSA No. 123/2017

1. These Regular Second Appeals are filed by the plaintiffs in the suits against the impugned judgments of the first appellate court dated 26.11.2016. The first appellate court has by its common judgment dated 26.11.2016 allowed the first appeals which were filed by the defendants in the suit, respondents herein in these second appeals, and thereby the first appellate court set aside the judgment of the trial court dated 4.3.2014. Trial court had by its common judgment dated 4.3.2014 decreed the two suits for possession with respect to the two portions of the property no. 556/27, Onkar Nagar, B, Tri Nagar, Delhi-35 filed by the appellants/plaintiffs. Trial court had decreed the suit holding the plaintiffs in the suits to be the owners of the suit properties on account of their having purchased the suit properties in terms of chain of the title deeds. The first appellate court allowed the appeals and dismissed the suits holding that original owner of the property was Smt. Kalawati but the first title documents in the chain were not executed by Smt. Kalawati and instead were executed by husband of Smt. Kalawati namely Sh. Bhim Singh, and thus subsequent purchasers in the title documents including the

plaintiffs acquired no title to the suit properties as the original title deeds executed by Sh. Bhim Singh were not by the owner Smt. Kalawati.

2. I may note that two suits were filed, one by the plaintiff Sh. Yogesh Sharma against Sh. Amarnath and the second by Smt. Lalita Sharma against Smt. Kalawati, and which suits were numbered as Suit No. 93/2010 and Suit No. 1072/2010 respectively. Both these suits were disposed of in terms of the common judgment of the trial court dated 4.3.2014. Two appeals which were filed by the respondents/defendants have been allowed by the first appellate court in terms of its judgment dated 26.11.2016. Two second appeals are therefore filed in this Court by the two plaintiffs in the suits, being RSA No. 109/2017 and RSA No. 123/2017, and which two RSA's are being disposed of by the present judgment. For the sake of convenience reference is made to the facts in RSA No. 109/2017 pertaining to the suit filed by Smt. Lalita Sharma, inasmuch as, facts of both the suits are more or less identical except that one plaintiff has purchased one part of the suit property i.e in favour of Smt. Lalita

Sharma, and another part of the suit property has been purchased by the plaintiff in the second suit namely Sh. Yogesh Kumar Sharma.

3. At the outset, it is required to be noted that the right of the respondents/defendants to file written statement was closed. Therefore, there are no pleadings of the respondents/defendants in the trial court and no evidence was led by the respondents/defendants.

4. The facts of the case with respect to the suit filed by Smt. Lalita Sharma are that the original owner of the suit property Smt. Bharto Devi had sold her rights in the suit property in two portions of 50 sq. yards and 125 sq. yards in terms of the sale deeds dated 12.3.1963 (Ex.PW1/D2) and 27.11.1959 (Ex.PW1/D1) to one Smt. Kalawati. Smt. Kalawati's husband was Sh. Bhim Singh. Sh. Bhim Singh is said to have paid the consideration for the purchase of two portions in the name of his wife Smt. Kalawati. In spite the title documents being in the name of Smt. Kalawati, it was Sh. Bhim Singh who sold two portions of the property in terms of the usual documentation being the agreement to sell, General Power of Attorney, affidavit, receipt, Will, etc. dated 24.10.2000 (Ex.PW1/1 to Ex.PW1/4) to one Sh. Bhoo Dev. Sh. Bhoo Dev sold the suit property

to Smt. Lalita Sharma and Sh. Yogesh Kumar Sharma vide the same set of usual documents dated 25.1.2001 (Ex.PW1/5 to Ex.PW1/9).

5. Accordingly, the plaintiff Smt. Lalita Sharma claimed to be the owner of 50 sq. yards portion. The other portion of 125 sq. yards was sold by Sh. Bhoo Dev to Sh. Yogesh Kumar Sharma in terms of the same set of documents. The facts with respect to plaintiffs in the suits leading evidence is mentioned in paras 5 to 8 of the judgment of the trial court, and these paras read as under:-

“5. To prove his case plaintiff in suit bearing No. 93/2010 has examined himself as PW1. PW1 has filed his evidence by way of affidavit Ex. PW1/AA. In his affidavit the PW1 has reiterated the facts mentioned in the plaint and relied upon the following documents:

- i) Site plan of the suit property is Ex. PW1/A.
- ii) GPA, receipts, Agreement to sell, affidavit all dt. 24.10.2000 is Ex. PW1/1 to Ex. PW1/4.
- iii) Agreement to sell, receipts, GPA, Regd. Will, Affidavit all dt. 25-01-2001 are Ex. PW1/5 to Ex. PW1/9.
- iv) Photocopy of Assessment order dt. 29-03-2001 is Mark B.
- v) Photocopy of reply dt. 19-05-2001 is Mark A
- vi) Copy of legal demand notice dt. 31-12-2003 is Ex. PW1/12, copy of AD Card and postal receipt of the same are Ex. PW1/12 A & B respectively.

During cross-examination the PW1 has filed document Ex. PW1/D1 & PW1/D2 which are sale deeds. The document Ex. PW1/D3 i.e. order dt. 02-12-2003 of Hon'ble Delhi High Court, PW1/D4 i.e. certified copy of FIR, Challan, and various order sheets in case FIR No. 10/02 was confronted to the PW1.

6. Further the plaintiff in suit bearing no. 93/2010 has examined Sh. Hemant Bhatia, record keeper Office of Sub-registrar-I, Kashmiri Gate, Delhi as PW2 who has brought the summoned record i.e. Ex. PW1/7 and PW1/8. Further the plaintiff has examined Sh. Om Prakash , UDC, Sub-registrarII, Kashmiri Gate, Delhi who brought the original of document Regd. No. 3175 dt. 27-04-1959.

7. To prove her case plaintiff in suit bearing No. 1072/2010 has examined Sh. Yogesh Sharma as PW1. PW1 has filed his evidence by way of affidavit Ex. PW1/P. In his affidavit the PW1 has reiterated the facts mentioned in the plaint and relied upon the following documents:

- i) GPA executed in favour of the PW1 is Ex. PW1/X.
- ii) Site plan of the suit property is Ex. PW1/A.
- iii) GPA dt. 24-10-2000 is Mark B,
- iv) Receipt dt. 24-10-2000 is Mark C,
- v) Agreement to sell dt. 24-10-2010 is Mark D
- vi) Affidavit dt. 24-10-2000 is Mark E
- vii) Reply dt. 19-05-2001 to legal notice is Mark F
- viii) Deed of agreement dt. 25-01-2001 is Ex. PW1/5.
- ix) Receipts, GPA, Regd. Will, Affidavit all dt. 25-01-2001 are Ex. PW1/6 to Ex. PW1/9.
- x) Photocopy of Assessment order dt. 29-03-2001 is Mark B.
- xi) Copy of legal demand notice dt. 31-12-2003 is Ex. PW1/11, copy of postal receipt and AD Card of the same are Ex. PW1/12 & Pw1/13 respectively.

During cross-examination the PW1 has was confronted with document Ex. PW1/DX1 colly i.e. sale deeds & PW1/DX2 i.e. GPA and family arrangement dt. 20-09-1980. Affidavit of Smt. Kala Wati dt. 20-09-1980 Ex. PW1/DX3.

8. Further the plaintiff in suit bearing no. 1072/2010 has examined Sh. Pradeep Kumar Sharma, Assist. Zonal Inspector MCD, Property Tax Department, Rohini Zone, New Delhi as PW2. Further the plaintiff has examined Sh. Hemant Bhatia, record keeper Office of Sub-registrar-I, Kashmiri Gate, Delhi as PW2 who has brought the summoned record i.e. Ex. PW1/7 and PW1/8. Further the plaintiff has examined Sh. Laxman Singh ,Draft man who deposed that he prepared the site plan Ex. PW1/A.”

6. As already stated above the trial court decreed the suits for possession holding the plaintiffs to be the owners but the first appellate court dismissed the suits by holding that the suits were barred by the Benami Transactions (Prohibition) Act, 1988 (hereinafter referred to as the ‘Benami Act’) on account of the fact that it was not Sh. Bhim Singh who was the owner of the suit property for

transferring the same further to Sh. Bhoo Dev and thereafter to the plaintiffs because the original title deeds of the suit properties were not in the name of Sh. Bhim Singh but were in the name of his wife Smt. Kalawati. The first appellate court held that the payment of the consideration by Sh. Bhim Singh on behalf of Smt. Kalawati will make the transaction as a benami transaction in favor of Smt. Kalawati and therefore the rights claimed by the plaintiffs means in terms of documents originally emanating from Sh. Bhim Singh and thus they are hit by Section 4 of the Benami Act. The suit was hence held to be barred by Section 4 of the Benami Act.

7. For the disposal of the Regular Second Appeal, the following substantial questions of law are framed:

- (i) Whether the first appellate court has fallen into a manifest error in applying Section 4 of the Benami Act, in view of the fact that the bar under Section 4 of the Benami Act would apply with respect to the documents which are relied upon to claim title and it is not that historical documents would be barred as per the Benami Act?
- (ii) Whether the respondents/defendants on the language of Section 4 of the Benami Act were not entitled to seek the benefit of the bar contained in that section because the respondents/defendants were not claiming ownership rights in the suit properties?

(iii) Whether the first appellate court has not committed a manifest illegality and perversity in holding that the appellants/plaintiffs did not acquire a valid title although the respondents/defendants had no *locus standi* to question the transfer of title once Smt. Kalawati herself never questioned the transfer of title in the property on her behalf by her husband Sh. Bhim Singh to Sh. Bhoo Dev and who sold the property of the two plaintiffs in the two subject suits?

8. In my opinion, the three substantial questions of law have to be answered in favour of the appellants/plaintiffs and the suit filed by the appellants/plaintiffs are bound to be decreed and the judgment of the trial court decreeing the suits for possession have to be sustained. The reasons are given hereinafter.

9. The first issue is as to whether historical documents come within the fold of the bar under Section 4 of the Benami Act or it is only the last set of documents and which are relied upon for claiming title which have to be looked into and with respect to which there is no allegation of the transaction being a benami transaction. Section 4 of the Benami Act reads as under:-

“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.”

10. A reading of Section 4 of the Benami Act shows that no suit or claim or action or defence is permissible with respect to a property held benami against the person in whose name the property is held or against any other person on behalf of a person claiming to be the real owner of the property. Section 4 of the Benami Act in the one part therefore envisages a dispute between a person who claims to be the real owner and against the benami owner. Bar under Section 4 of the Benami Act is not envisaged, except for a limited exemption stated hereinafter, with respect to the documents which are not in issue between the alleged real owner and the apparent benami owner. This is all the more so when the documents which are alleged to be benami documents are only historical documents in a chain of title documents and last chain of title documents are not alleged to be benami documents. In the present case, the last set of title documents are

admittedly executed in the name of and in the favour of the appellants/plaintiffs. It is not the case of the respondents/defendants that the appellants/plaintiffs are only benami owners for someone else. Of course the issue of benami may also be argued to exist beyond the disputes arising between a person claiming to be the real owner and the benami owner, but that is only provided the person who is raising such an issue is claiming to be a real owner of the property. In the present case, the respondent/defendants are not claiming any ownership interest in the suit properties. Therefore, it is seen that firstly the issue of defence under Section 4 of the Benami Act either applies only between a real owner and the benami owner or secondly between a real owner and against a person who claims to be the owner of the property. Once, therefore, the respondents/defendants did not claim ownership rights in the suit properties, the bar under Section 4 of the Benami Act does not operate as against the appellants/plaintiffs. It only bears reiteration at the cost of repetition that there is no written statement of the respondents/defendants and nor have the respondents/defendants led any evidence whatsoever and therefore there is no case of the respondents/defendants claiming to be the real

owners of the properties. It is therefore held that the first appellate court has wrongly applied the bar under Section 4 of the Benami Act as against the appellants/plaintiffs.

11. Really the first appellate court has applied, not the bar of the Benami Act, but the doctrine of *nemo dat quod non habet* i.e no one can give what he has not got. The first appellate court has held that since Smt. Kalawati was the owner of the suit properties and not her husband Sh. Bhim Singh, hence Sh. Bhim Singh could not have transferred the suit properties to Sh. Bhoo Dev and who thereafter transferred the suit properties to the two plaintiffs in the subject suits. Really, therefore, the issue decided by the first appellate court is not with respect to bar of Section 4 of the Benami Act. In law, once there are original set of documents which are 'benami' documents, however, inspite of such documents showing title in the name of one person, subsequent rights in the property can always vest with a third person. Putting it in other words, title deeds of a property may be in the name of one person, however another person can become an owner, for example by adverse possession or even owner by conduct wherein the benami owner does not object to the ownership of the

person who claims to be the owner. In the present case, it is seen that the transfer by means of title documents by Sh. Bhim Singh husband of Smt. Kalawati to Sh. Bhoo Dev took place on 24.10.2000, i.e around 41 years after 1959 and 37 years after 1963, being the two years when Smt. Kalawati had in her favour the title deeds of the properties from the original owner Smt. Bharto Devi. In this long period therefore once Sh. Bhim Singh has acted as the owner of the properties, the issue no longer remains of any benami nature of the title documents in favour of Smt. Kalawati instead of being in the name of Sh. Bhim Singh. Sh. Bhim Singh therefore has to be taken to be the owner of the properties. This is all the more so in view of the documents filed and proved on behalf of the appellants/plaintiffs in the trial court and which have been marked as PW1/PX2 and PW1/PX3. In my opinion, these documents Mark PW1/PX2 and PW1/PX3 have been wrongly marked and have to be exhibited documents. The reason for the same is given hereinafter while dealing with the arguments urged on behalf of the respondents/defendants that the entire original chain of title documents prior to the documents in

favour of the present appellants/plaintiffs being only photocopies should be held not to be proved.

12. The Supreme Court in the case of ***R.V.E. Venkatachala Gounder Vs. Arulmigu Viswesaraswami & V.P. Temple and Another, (2003) 8 SCC 752*** has held that even if the documents which are exhibited are photocopies, once they are exhibited and no objection is raised at the time of their exhibition because of the documents being photocopies, objection as to the mode of proof has to be deemed to be waived. Supreme Court has so held because it gave the reason that if objection is taken to exhibition of documents when they are exhibited on the ground that the documents are only photocopies then the person who is proving the documents as photocopies would thereafter stop leading his evidence and continue evidence only after bringing the original documents for proving and exhibiting the same. Once no objection is raised, the person who is proving photocopies does not need to stop leading his evidence because there is no objection to the mode of proof of the documents on account of the same being only photocopies. In the present case it is seen that the respondents/defendants at the time of cross-

examination of the witness Sh. Yogesh Kumar Sharma being the husband and attorney of the appellant/plaintiff/Smt. Lalita Sharma only objected to mode of proof on the ground that the witness is neither the author nor the beneficiary nor the witness of the documents i.e there is no objection to the documents not being originals but only being photocopies. Once that is so, the ratio laid down by the Supreme Court in the case of *R.V.E. Venkatachala Gounder (supra)* clearly applies and the documents which have been filed and proved by the appellants/plaintiffs have to be taken as proved and exhibited documents and not marked documents. Therefore, the documents are exhibited as Ex.PW1/PX2 and Ex.PW1/PX3 and they are taken to have been proved.

13. These documents Ex.PW1/PX2 and Ex. PW1/PX3 are documents executed by Smt. Kalawati in favour of her husband Sh. Bhim Singh and these documents show the family arrangement whereby Smt. Kalawati had agreed to take her husband Sh. Bhim Singh as the owner of the suit properties. Accordingly, once Sh. Bhim Singh is taken by Smt. Kalawati herself to be the owner of the suit properties and it is Sh. Bhim Singh who had executed the title

documents of the suit properties in favour of Sh. Bhoo Dev hence there does not arise even the application of doctrine of *nemo dat quod non habet* or the bar of the Benami Act for that matter because Ex.PW1/PX2 and Ex.PW1/PX3 will make these documents as proving existence of the title documents being of Sh. Bhim Singh.

14. In view of the aforesaid discussion since the substantial questions of law are answered in favour of the appellants/plaintiffs and against the respondents/defendants, the impugned judgment of the first appellate court dated 26.11.2016 is set aside. The judgment of the trial court dated 4.3.2014 is therefore sustained whereby the suit of the appellants/plaintiffs will stand decreed. RSA Nos. 109/2017 and 123/2017 are therefore allowed by decreeing the suits of the appellants/plaintiffs in terms of the judgment of the trial court dated 4.3.2014. Parties are left to bear their own costs.

JULY 27, 2017

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VALMIKI J. MEHTA, J