

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

909 SECOND APPEAL NO. 378 OF 2015

Shaikh Shahed s/o Shaikh Pasha
age 45 years, occupation business
& Agriculture, Resident of Georai
c/o Shameer Krushi Seva Kendra
Near State Bank of India,
Mondha Road, Georai, Taluka Georai
District Beed.

... Appellant
(Orig. Deft. No.2)

versus

1. Shaikh Pasha s/o Shaikh Umar,
age 65 years Occupation Agriculture
Resident of Kamkheda, Taluka
and District Beed.

... Respondent
(Orig. Plaintiff)

2. Shaikh Taher s/o Shaikh Pasha,
age 47 years, Occupation service,
Resident of Asef Nagar, Behind
District Hospital, Beed.

3. Babita w/o Babasaheb Salukne,
age 39 years, Occupation Agriculture,
Resident of Kamkheda, Taluka
and District Beed.

4. Bhamabai w/o Arjunrao Jadhav,
age 37 years, Occupation Agriculture
Resident of Kamkheda, Taluka
and District Beed.

... Respondents
(Orig. Deft Nos. 1,3 & 4)

.....

Mrs. A. N. Ansari, Advocate for the Appellant.
Mr. Hrishikesh V. Tungar, Advocate for Respondent No. 3 & 4.

.....

CORAM : A. M. DHAVALA, J.

DATED : 20th DECEMBER, 2018

ORAL JUDGMENT :-

1. This is an appeal filed by defendant no.2. He is challenging the judgment passed by learned District Judge-1, Beed in Regular Civil appeal No. 11 of 2007. The facts leading to this appeal are as follows:

a. The original plaintiff Shaikh Pasha is the father of defendant no.1 Shaikh Taher and defendant no.2 Shaikh Shahed. As per the plaint pleadings, by registered sale deed dated 25.11.1980, he purchased land block no. 233 ad-measuring 3 H. 58 R. in the name of his son defendant no.1 Shaikh Taher, land block no. 21 by registered sale deed dated 12.02.1987 in the name of defendant no.2 Shaikh Shahed and land block no. 87 by registered sale deed dated 02.07.2001 in the name of defendant no.1. Though the lands were purchased in the name of defendant nos. 1 and 2, the real purchaser was the plaintiff and these transactions were *benami* transactions. The plaintiff was in cultivating possession of these lands. Defendant nos. 1 and 2 thereafter started residing separately.

b. On 27.03.2002, defendant no.1 sold land block no. 233 to defendant nos. 3 and 4 and therefore, on 05.09.2002, the plaintiff filed suit for declaration that he is owner of the suit properties and defendant nos. 1 and 2 are *Benamidars* and for perpetual injunction to restrain defendants from disturbing his possession. The suit is not valued as per the sale price shown in the sale deed but on a fixed valuation of Rs.200/- by assessing the suit as per the land revenue. Defendant no.1 contested the suit. He denied that the suit properties were purchased by his father. He claimed that he and his brother were the owners of the suit properties purchased in their respective names. Defendant nos. 3 and 4 also filed written statements.

c. This appeal is not dealing with the lands block nos. 233 and 87 which were purchased in the name of defendant no.1. The appeal is filed by defendant no.2 in whose name land block no.21 was purchased. He did not appear in the trial court. Learned trial judge framed issues. Issue no.2 was relating to proof of ownership of plaintiff with regard to land block no.21 purchased in the name of defendant no.2. There was also an issue regarding bar of the provisions of The Prohibition of Benami Property Transactions Act, 1988 (for short, "the Act of 1988").

d The trial judge held that the bar of provisions of the Act of 1988 was applicable only in respect of land block no.87. He observed that there was thick and fiduciary relationship between the plaintiff and defendant nos. 1 and 2 and therefore, the bar was not attracted in respect of other lands. The findings in this regard are not specific. However, strangely he observed that defendant nos. 1 and 2 were the owners of the respective lands and therefore the plaintiff was not entitled for perpetual injunction. Hence he dismissed the suit.

e The plaintiff filed Regular Civil Appeal No.11 of 2007. Again defendant no.2 appeared through one Advocate. According to defendant no.2, his father made some representation to him and his father had provided an Advocate for him who made wrong submissions before the Judge. The first appellate court held that land block no.21 was standing in the name of defendant no.2 as *benami* and plaintiff was the real owner and was in exclusive possession and therefore, he partly allowed the appeal in respect of land block no.21. He granted declaration of the plaintiff's ownership and also granted perpetual injunction against defendant no.2 in respect of land block no.21. The appeal was dismissed with regard to other two properties of defendant no.1.

f. It may be pertinent to note here that land block no.233 was purchased in 1980 when defendant no.1 was aged 15 to 16 years and it is held not *benami* whereas land block no.21 was purchased in the name of defendant no.2 in 1987 when he was aged around 21 years and it is held to be *benami*.

2. Being aggrieved, defendant no.2 has preferred this appeal. Learned Advocate Mrs. Ansari pointed out that the learned trial judge has not considered the provisions of the Act of 1988 nor there was proper pleading and evidence to show that land block no. 21 was actually purchased by the plaintiff from his own funds. The entire judgment shows only the following discussion with regard to land block no.21.

“22. So far as Gut No.21 is concerned, I am of the opinion that there is no written statement of defendant No.2. Moreover, his advocate has submitted at bar and supported the plaint allegations. In my opinion, his submission is worthy acceptable against defendant No.2 only and not regarding whole suit. In such circumstances to that extent this appeal is required to be allowed. In the result, I answer the points accordingly and pass the following order.”

3. This appeal has been admitted on 09.10.2015 on the basis of following substantial question of law formulated.

(1) Whether there was material to hold that transaction was not Benami transaction?

(2) Whether there was sufficient record which is ignored by the Courts below on the basis of which the Courts below could have held that the plaintiff has failed to prove that he was in possession of the property bearing Gat No. 21?

My findings on these issues are as follows:

(1) In the negative.

(2) In the affirmative.

4. On plain reading of the plaint, the plaintiff is claiming to be the real owner and defendant no.2 is shown as Benamidar. Though the transaction has taken place before the introduction of the Act of 1988, from the date of applicability of the Act not only there is prohibition to enter into *benami* transactions, but even the right to claim any relief by way of suit or right to raise defence on the plea of *benami* are taken away. Section 4 of the Act of 1988 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.”

5. The only exception available before the amendment of 2016 was under sub-section (3) which reads as under :

- (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.”

On the face of record, the parties being Muslim the exception under sub-section 3(a) would not be applicable to them.

6. As far as sub-section 3(b) is concerned, there is absolutely no pleading or evidence to show that defendant nos. 1 and 2 were trustees or persons standing in fiduciary capacity to the plaintiff and the property was held for the benefit of the plaintiff for whom they were trustees. Apart from the fact that there are no specific pleadings, the evidence also does not indicate that the plaintiff had paid money to them for purchasing property in his own name, but they have purchased the property in their own names. There is not even remote material to suggest that defendant no.2 was a trustee for the plaintiff in respect of purchase of property block no. 21. I rely on the decision in the case of ***R. Rajagopal Reddy and Ors. vs Padmini Chandrasekharan***, reported in ***(1995) 2 SCC 630*** to hold that the plaintiff's claim is clearly hit by Section 4 of the Act of 1988 and the suit itself was not maintainable.

7. In view of my above findings, I answer question no.1 in the negative.

8. In view of my above findings, question no.2 does not survive. But if it survives, I find absolutely no material to support the plaintiff's contention that the land block no. 21 was purchased by

him from his own funds. No doubt, defendant no.2 has not filed written statement nor contested the matter. Still there is a registered sale deed in his name and the plaintiff was bound to lead cogent material to establish that the actual consideration was passed from him to the purchaser. In this regard, I find that the plaintiff has not produced the original sale deed. If he was the real owner, the sale deed would have been in his possession. The plaintiff has not examined the purchaser or the attesting witness to the sale deed. He has not produced any documentary evidence to show that he had advanced the consideration amount to the purchaser. In the evidence, he was cross-examined by defendant no.1 with regard to the transactions of defendant no.1. His evidence shows that he was claiming that he was having a grocery shop, a matador, two crane machines and income from 10 acres of ancestral agricultural land but in cross-examination he admitted that he was not in a position to produce licence for the grocery shop. He has no documents that he was holding a matador or crane as claimed by him. There are no pleadings also to that effect. When the registered sale deed is in the name of defendant no.2, even in absence of written statement, the court could not have accepted the bare words of plaintiff as a gospel truth.

9. The appreciation of evidence by both the courts is poor. The trial court has held that the provisions of the Act of 1988 are applicable in respect of the lands of defendant no.1 but not to the lands purchased in the name of defendant no.2. At the same time, he says that defendant no.2 is the owner of block no.21. The findings are self-contradictory. But ultimately, he has dismissed the suit and defendant no.2 had no right to challenge the same. In the appeal, strangely the learned judge of the lower appellate court did not consider the pleadings and the evidence on record, rather, the dearth of pleading and dearth of evidence on record. He has also not considered why the trial judge has not granted the relief to the plaintiff in respect of land block no.21 purchased in the name of defendant no.2. He simply relied on the fact that there was no written statement by defendant no.2 and that Advocate for defendant no.2 made some concessions. It is well settled that court cannot rely on any concessions or admissions given by the defendant without express authority given by the party. I find that the first appellate court has totally neglected to consider the statutory bar under the Act of 1988. The material pleadings and evidence and the absence thereof has been also overlooked. The

findings recorded by the first appellate court in this regard are perverse and based on no material. Hence those cannot be sustained. Hence, question no.2 is answered accordingly in the affirmative.

10. Hence, the appeal is allowed. The judgment and decree of the first appellate court in Regular Civil Appeal No. 11 of 2007 is set aside. The suit is dismissed with regard to the land block no. 21 as well. There shall be no order as to costs.

(A. M. DHAVALE)
JUDGE

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