

Sarnobat

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO. 3 OF 2017
WITH
CIVIL APPLICATION NO. 3 OF 2017**

Shri Govind Subrao Patil (deceased
through the legal heirs)

1-A. Shri Makrand Govind Patil.

... Appellant.

Vs.

Shri Dhakalu Subrao Patil (deceased
through the legal heirs)

1-A. Shri Vilas Govind Patil & Ors.

... Respondents.

Mr. Rahul S. Kate, for the Appellant.

Mr. G. N. Salunke, for the Respondent No. 1-A.

CORAM : A. M. DHAVALA, J.

DATE : 24th AUGUST, 2018.

ORAL JUDGMENT. :

1. Heard learned advocate Mr. Kate for the appellant and Mr. Salunke for the respondent No.1-A. After hearing the parties, I frame following substantial question of law.

(i) Whether both the Trial Court and First Appellant Court erred in not considering the provisions of Section 4(3)(b) of provisions of Benami Property Transaction Act, 1988 and framing proper issues thereon?

(ii) Whether the First Appellate Court erred in not giving fresh findings about the title of the property on the ground that there were no cross objections?

2. Considering the nature of proceedings, by consent of both the advocates, the matter is taken up for final hearing at admission stage.

3. RCS No. 91/2000 was filed by respondent No. 1 herein against the appellants and respondent No. 2 who are his the real brothers. By registered sale deed dated 21st May, 1962 the suit property at Gat No. 365 of village Bagilage, admeasuring 1 H. 67 R half part was purchased in the name of plaintiff Dhakalu. The plaintiff claimed that he was enjoying possession and cultivation of the said land as owner thereof. In 1988 filed Suit RCS No. 81/88 for perpetual injunction. The same was dismissed for default in 1992. In 1964 name of defendant No. 1 Govind was mutated in 7 x 12 extract of the suit land. In 1992 it is alleged that he has forcibly taken possession of the suit land. Hence, the plaintiff filed suit for possession on the basis of title.

4. Defendant No. 2 did not contest the suit. Defendant No. 1 denied the ownership of the plaintiff. He claimed that at the relevant time he was serving in Mumbai and it was agreed that the suit land should be purchased in the name of the plaintiff and himself. He sent the entire money as he was in Mumbai. The plaintiff obtained the sale deed in his own name . However, the said land was belonging to both

of them jointly. The same was in joint cultivation and possession. When defendant No. 1 noticed that the sale deed was only in the name of plaintiff, he made inquiry with the plaintiff and the plaintiff admitted his half share and entered his name in the 7 x 12 extract on 18/03/1965. Thus, the defendant was in possession of half share in the suit land, as owner thereof.

5. It is obvious that main dispute is about the ownership. The defence raised shows that the defendant has made payment for purchasing the land to the plaintiff but, the plaintiff got it purchased in his exclusive name. If the pleadings are properly understood it is a case of Benami Transaction and the defendant No. 1 is raising his plea probably under Section 4(3)(b) which reads as under :-

4(3) Nothing in this section shall apply,--

(a) is not applicable.

(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.

6. Section 4(2) prohibits the defendant from raising a plea of Benami but 4(3) (b) carves out exception and if the defendant can bring

his defence under Section 4(3)(b). The bar under Section 4(2) will not be applicable. No doubt as per the recent amendment on 1st November, 2016 sub Section 3 has been omitted but at the relevant time the said provision was in existence.

7. The learned Trial Judge has not considered the written statement properly in proper perspective and has not properly framed the issues. Issue No. 1 about the ownership which is the main issue is framed without any reference to the provisions of Benami Property Transaction Act and the exceptions therein. It shows non application of mind as the bar of Benami Transaction Prohibition Act and the exceptions therein are not taken into consideration. The subsequent events that the name of defendant No. 1 was incorporated in the revenue record and defendant No. 1 came into possession of half part was sufficient to show prima facie material to frame specific issue. But that has not been done. He has considered the case of joint family property or ancestral property. It is not the case that it was a joint family property. Before 1988 Benami Transactions were permitted and the exception permits the parties to take defence to wriggle out of bar under Section 4(1) and 4(2) when these facts are not properly considered, the fact that the sale deed is in the name of plaintiff became prominent. I therefore, find that this was a serious error on the

point of law with regard to the purchase transaction made by the Trial Court.

8. The first Appellate court has heard the arguments of both the parties. He has not recorded whatsoever the arguments advanced by the advocate for the appellant. It is necessary in the appeal that the appellate court must record all the material arguments on record and give findings on those arguments.

9. The points formulated by the learned first Appellate Court and the observations in para 19 disclose that the learned Appellate Court was under impression that the findings recorded by the Trial Court should be challenged by the appellant by filing cross objections by the defendant. Since suit was dismissed in the Trial Court, there was no decree against the defendant and therefore, as per order 41 Rule 22 there was no necessity to file any cross objections for the respondents in the first appeal. Under Order 41 Rule 22 the cross objections are to be filed against the decree.

Order 41 Rule 22 reads as follows;

22. Upon hearing, respondent may object to decree as if he had preferred separate appeal.- (1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree [but may also state that the finding against him in the Court

below in respect of any issue ought to have been in his favour; and may also take any cross objection] to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.

10. The language clearly shows that the cross objections are just like appeal and if there is decree against the defendant he could have filed appeal. The same grounds he could raise by way of cross objection. In the present case there was no decree against the defendant and the defendant could not have preferred any appeal and therefore, there was no necessity to file any cross objection. It is an error on the part of First Appellate Court to decline to re-appreciate the findings of the Trial Court regarding the ownership and the limitation only on the ground that no cross objections were raised by the defendant. In view of this mistake, the Appellate Court has also not considered the issue of Benami Transaction Prohibition Act and the exceptions under Section 4(3)(b). I therefore, find that both judgment and decree of Trial Court as well as Appellant Court are not sustainable and it is necessary to remand the matter. In the circumstances, matter will have to be remanded to the Trial Court with direction to frame

proper issues as follows;

- (i) Whether the suit property was purchased by the plaintiff and the defendant jointly?
- (ii) Whether the defence raised in this regard by the defendant No. 1 can come under Section 4(3)(b) of Benami Transaction Prohibition Act ?

11. It is clarified that all these discussions have been made only with regard to the substantial question of law involved in this matter and framing of proper issues by the Trial Court. This Court has not expressed any opinion either in respect of plaintiff's case or in respect of defendant's defence. The Trial Court will not be influenced by any observations made in this appeal.

12. It is also clarified that the First Appellate Court must consider all the points raised by the defendants in the appeal filed by the plaintiff and should consider whether the findings recorded by Trial Court are correct or not. It is not permissible to blindly accept those findings on the ground that there was no cross objections against the findings given by the Trial Court.

13. With these observations, I answer both the substantial questions in the affirmative. Hence, I pass the following order.

ORDER

- (i) The impugned judgment and decree of both the Courts below are hereby set aside, directing the Trial Court to

frame the issues as above and give opportunity to the parties to lead evidence and decide the said issue afresh as per the provisions of law.

- (ii) It is made clear that the trial court shall not get influenced by any of the observations made in this appeal.
- (iii) Considering the fact that original suit is of 2000, the Trial Court is directed to expedite the hearing of the suit and try to dispose of it within six months after receipt of this order.
- (iv) Parties are directed to remain present in the Trial Court Civil Judge, Chandgad on 17th September, 2018. The direction regarding expeditious hearing will be equally applicable to the appellate court if any party preferred appeal against the judgment delivered by the trial court.
- (v) Second appeal is disposed of in the above terms.
- (vi) Pending Civil Application No. 3 of 2017 filed in the appeal does not survive and is accordingly disposed of.

Sd/-
[A. M. DHAVAL, J.]