

CR No.162 of 2017

{1}

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

CR No.162 of 2017 (O&M)

Date of decision:20.11.2018

Gurinder Singh and others

... Petitioners

Vs.

Jagdish Varinder Singh Sandhu and another

... Respondents

CR No.19 of 2017 (O&M)

Bhupinder Kaur and another

... Petitioners

Vs.

Jagdish Varinder Singh Sandhu and another

... Respondents

CR No.20 of 2017 (O&M)

Bhupinder Kaur and another

... Petitioners

Vs.

Jagdish Varinder Singh Sandhu

... Respondent

CR No.22 of 2017 (O&M)

Bhupinder Kaur and another

... Petitioners

Vs.

Jagdish Varinder Singh Sandhu and another

...Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr.R.B.S.Chahal, Advocate
for the petitioners.

Mr. Prateek Gupta, Advocate
for respondent no.1(in CR Nos.162, 19, 22 and 20 of 2017).

Mr. Manish Dadwal, Advocate
for respondent No.2 (in CR No.22 of 2017).

Mr. Arshdeep Bhullar, Advocate
for respondent no.2(in CR No.162 of 207).

AMIT RAWAL J.

This order of mine shall dispose of four revision petitions bearing Nos.19, 20, 22 and 162 of 2017 arising out of the order dated 17.10.2016, whereby, applications filed under Order 7 Rule 11 CPC for rejection of the civil suits bearing Nos.269 of 2010 titled as “Jagdish Varinder Vs. Gurpal Kaur and others”; 294 of 2010 titled as Jagdish Varidner Vs. Gurpal Kaur and another” 266 of 2010 titled as Jagdish Varinder Singh Vs. Bhupinder Kaur and others and 268 of 2010 titled as “Jagdish Varinder Vs. Gurinder Singh and others” being not maintainable under law, have been dismissed.

Mr. R.B.S.Chahal, learned counsel appearing on behalf of the petitioners submitted that in all the suits, pith and substance of the plaint reveals that the declaration of ownership has been sought by taking up the plea of Section 4 of Prohibition of Benami Property Transactions Act, 1988 (for short “1988 Act”) on the premise that they purchased the land at various places including the suit land owing to the fact that the plaintiff had dispute with his former wife Shubreet Kaur. Due to close relationship, the defendants were in fiduciary relations and trustees of the plaintiff. In this regard, their names being ostensible owners were reflected in the sale deeds subject matter of the aforementioned suits. The said plea in lieu of the provisions of Section 2(9) and 4 of 1988 Act, is not admissible but the

Court below has abdicated in not noticing the aforementioned fact holding it to be mixed question of fact and law and dismissed the applications by keeping the question open to be decided at the final stage.

In support of the aforementioned, relied upon the judgment rendered by the Delhi High Court in **Anil Bhasin Vs. Vijay Kumar Bhasin 2003(2) RCR (Civil) 839** as all the sale deeds are post 1988. There would have been some force in the defence of the respondent-plaintiffs, had the transactions are prior to 1988.

Learned counsels appearing on behalf of the respondents opposed the revision petitions by supporting the impugned orders and jointly submitted that suit at the threshold cannot be dismissed as the question of fiduciary capacity for purchasing the property for the benefit of other person as ostensible owner in the name lender as the aforementioned pleadings and arguments can only be elaborated if the parties are given opportunity to lead evidence after framing of the issues.

In support of the aforementioned submissions, laid reliance upon the ratio decidendi culled out by the Hon'ble Supreme Court in **Marcel Martins vs. M.Printer and others 2012(5) Supreme Court Cases 342**, wherein the Hon'ble Supreme Court on facts held that defendants had stood in fiduciary capacity vis-a-vis plaintiff and transaction was, thus, saved from prohibition under Section 4 of 1988 Act.

I have heard the learned counsel for the parties and appraised the paper book.

The legislature in the wisdom while promulgating the prohibition of 1988 Act, had put a complete ban on the benami transactions/ostensible owners except by keeping exception in sub-section (3) of Section 4 of 1988 Act, by deleting the relevant provisions in Trust Act, as well.

The aforementioned Act was held to be retrospective by the Hon'ble Supreme Court in **Mithlesh Kumari Vs. Premi Bihari Khare JT 1989(1) SC 275**.

On coming to question of transaction being benami or otherwise, many litigation arose after promulgation of Benami Transaction Act, 1988. The Hon'ble Supreme Court in **Mithlesh Kumari Vs. Premi Bihari Khare JT 1989(1) SC 275**, held that Section 4(1) of the 1988 Act would apply to the suit filed even prior to the coming into force of the Act. The aforementioned decision was referred to larger Bench of this Court in **R.Rajagopal Reddy (D) by LRs and others Vs. State of Tamil Nadu 1995(1) RRR 353**, wherein, it was held that provisions of the Act would apply prospectively, i.e. sale deeds affected in this case prior to promulgation of the Act, thus, would not hit by the provisions of 1988 Act . In various other judgments, i.e., in **Binapani Paul Vs. Pratima Ghosh and others 2007(6) SCC 100**, the Hon'ble Supreme Court laid down the provisions to be a guide for determining the nature of following circumstances:-

“(1) the source from which the purchase money came;

(2) the nature and possession of the property, after the purchase;

(3) motive, if any, for giving the transaction a benami colour;

(4) the position of the parties and the relationship, if any, between the claimant and the alleged benamidar;

(5) the custody of the title deeds after the sale;

(6) conduct of parties concerned in dealing with the property

after the sale”

In **V. Shankaranarayana Rao (D) by LRs and others vs. Leelavathy (dead) by LRs and others 2007(3) RCR (Civil) 143**, the Hon'ble Supreme Court while referring to all the law on the point of applicability of 1988 Act held as under:-

“11. Principle on the basis whereof determination of the question as to whether a transaction is a benami one or not depends upon a large number of factors. Some of them had been noticed by this Court in [Thakur Bhim Singh \(Dead\) By LRs and Another v. Thakur Kan Singh \[\(1980\) 3 SCC 72\]](#) in the following terms:

"18. The principle governing the determination of the question whether a transfer is a benami transaction or not may be summed up thus: (1) the burden of showing

that a transfer is a benami transaction lies on the person who asserts that it is such a transaction; (2) it is proved that the purchase money came from a person other than the person in whose favour the property is transferred, the purchase is prima facie assumed to be for the benefit of the person who supplied the purchase money, unless there is evidence to the contrary; (3) the true character of the transaction is governed by the intention of the person who has contributed the purchase money and (4) the question as to what his intention was has to be decided on the basis of the surrounding circumstances, the relationship of the parties, the motives governing their action in bringing about the transaction and their subsequent conduct, etc."

The said principle has been reiterated by this Court in [Binapani Paul v. Pratima Ghosh & Ors.](#) [2007 (6) SCALE 398] In the aforementioned judgments, this Court has inter alia emphasised on the fact that the role and / or the motive on the part of the person who had advanced the amount of consideration plays an important role in determination of the nature of transaction. The High Court unfortunately had not considered the question from the said angle. The High Court while pronouncing the impugned judgment had also not considered the effect and purport of the requisite ingredients

for arriving at a decision as to whether the transaction in question is benami or not.

12. The High Court did not deal with the question thoroughly. It had not taken into consideration the totality of the circumstances. We, therefore, are of the opinion that in the fitness of things, the impugned judgment should be set aside and matter remitted back to the High Court for consideration of the matter afresh which would meet the interest of justice. As the matter has to be remitted to the High Court, we have not considered the findings of the High Court in respect of other items of the property in regard where to different conclusions have been arrived at by the courts below. We are sure, High Court would consider the same in the light of its findings on the principal issue.

13. For the reasons aforementioned, the impugned judgment is set aside. The appeal is allowed. The matter is remitted back to the High Court for consideration of the matter afresh. In the facts and circumstances of this case, however, there shall be no order as to costs.”

The aforementioned decision was referred to the larger Bench.

The Hon'ble Supreme Court in **R.Rajagopal Reddy (D) by LRs and others Vs. State of Tamil Nadu 1995(1) RRR 353** held the findings/ratio laid down in Mithlesh Kumari to be not retrospective in nature. It was clarified

that the defendants can claim the defence of fiduciary capacity or the transaction being benami in case they were prior to 1988 by carving out certain guidelines. In the subsequent judgments, the aforementioned explanations/guidelines were added. The question now to be pondered upon in the present revision petitions is whether the sale deeds in all the civil suits are of post 1988 or prior thereto. On going through the averments in the suit, all the sale deeds are post 1988. This fact has not been controverted by Mr. Prateek Gupta, Advocate representing the plaintiff.

In Marcel Martin's case (supra), the Hon'ble Supreme Court after noticing the facts of the case found that the transaction was affected prior to 1988 and in such circumstances, prohibition under Section 4 was held to be not applicable. In other words, ostensible owner and real owner were held to be in fiduciary capacity. The aforementioned fact is drawn from the reading out of the para 4 of the judgment wherein the transactions was of 1986 and 1987. In such circumstances, the aforementioned ratio decidendi culled out in the judgment relied upon by the learned counsel for the respondents would not be applicable.

I would be failing in duty in not extracting the prohibitions provided in sub-section 3 of Section 4 of 1988 Act. The same reads thus:-

Section 4 Prohibition of the right to recover property held benami

(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.”

The aforementioned provisions by Act No.43 of 2016 have been omitted w.e.f.1.11.2016.

As an upshot of my findings, I am of the view that the parameters for dealing with the application under Order 7 Rule 11 CPC is to see the averments in the plaint. Admittedly, the plaintiff has sought the injunction vis-a-vis sale deeds post 1988 executed in favour of ostensible owner to be his, thus, by looking at the averments, the plaint, in view of the un-amended provisions extracted above, *ex facie* was not maintainable.

The trial Court while dismissing the application has not adverted to the provisions of law. Thus, the impugned order suffers from illegality and perversity. The same is hereby set aside. The applications under Order 7 Rule 11 CPC are allowed. The plaints are ordered to be rejected.

Consequently, the revision petitions are allowed.

November 20, 2018
savita

(AMIT RAWAL)
JUDGE

Whether Speaking/Reasoned
Whether Reportable

Yes/No
Yes/No