

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

RSA No.870 of 2007

Date of Decision:20.11.2018

Rajesh Sachdeva

...Appellant

Vs.

Haryana Urban Development Authority and another

...Respondents

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present:- Mr. Neeraj Kumar Jain, Senior Advocate,
with Mr. Deepak Thapar, Advocate,
for the appellant.

Mr. Deepak Manchanda, Advocate,
for respondent no.1.

None for respondent no.2.

Amol Rattan Singh, J.

Vide this regular 2nd appeal, the plaintiff in a suit has challenged the judgment of the learned first appellate court (District Judge, Gurgaon), setting aside the decree issued in his favour by the trial Court, the suit instituted by him being one seeking a declaration of his ownership over the suit land, with a relief of mandatory injunction also sought, as also one of permanent injunction, the mandatory injunction being that his name be inserted as the owner and real purchaser of the suit property bearing plot no.1081, Sector-46, Urban Estate, Gurgaon, “by making the entire sale consideration thereof including all the installments and enhanced compensation amount”; and that the name of the first defendant (respondent no.2 herein), i.e. his wife, be considered to be only *benami*. He further sought that all the documents of the plot in question be handed over to him from the record of the first respondent

herein, i.e. the Haryana Urban Development Authority (defendant no.2 in the

suit), showing the plot to be in his (the plaintiffs') ownership.

The prohibitory injunction that the appellant had sought was against his wife, i.e. respondent no.2, restraining her from disposing of the property in any manner.

2. As per the case of the appellant-plaintiff (hereinafter to be referred to as the appellant), respondent no.2 was his legally wedded wife. The original owner/allottee of the aforesaid plot, measuring 286 sq. metres, was one Romesh Kumar, who had transferred it in the name of one Parmod Kumar, from whom the appellant had purchased it in the year 1996, by making 'full and final payment', with a registered power of attorney also issued by the aforesaid Parmod Kumar on 03.09.1996.

As per the appellant, the entire consideration was paid out of his own pocket, in support of which bank account details had also been given by him in the plaint, but with the property transferred in the name of his wife, i.e. respondent no.2, vide a re-allotment letter issued by respondent no.1 on 08.12.1997, though the wife had never actually paid 'even a single rupee' towards the purchase of the plot.

As per the appellant, she, being a housewife, had no source of income prior to her marriage or thereafter, and therefore, the plot was actually a *benami* transaction in her name, with her always treating him (the appellant) to be the full-fledged owner thereof.

3. In the month of June 2004, when the appellant decided to construct a house over the plot, he approached the first respondent (HUDA) to enquire about any dues pending, upon which he was told that Rs.15,000/- still remained to be cleared as the final amount due against the plot.

He therefore made a request to respondent no.2 to sign the

requisite affidavits and papers but, as contended, she avoided doing so and kept delaying the matter and in fact, her attitude thereafter became arrogant and disrespectful towards him, and eventually she refused to sign the papers or transfer the plot in his favour.

As per the appellant, she even took away the original documents from the almirah and 'challenged the title of the plaintiff', allegedly out of her greed and lust for the property.

Hence, the suit was filed, essentially against the contended 'usurpation' of the plot by the appellants' wife, she not being the real purchaser thereof (according to the appellant).

4. Upon being put to notice, she however, i.e. respondent no.2 herein (defendant no.1), did not appear before the trial Court and was consequently proceeded against *ex parte*.

5. Respondent no.1 (defendant no.2), i.e. the Haryana Urban Development Authority, appeared and filed a written statement, taking firstly the usual preliminary objections of non-maintainability of the suit, mis-joinder and non-joinder of parties and *locus* of the appellant etc.

On merits, the said respondent refuted the claim of the appellant, though admitting that the plot had been transferred by the original allottee in favour of Parmod Kumar, who had executed a general power of attorney in favour of the appellants' wife, on the basis of which re-allotment letters dated 22.09.1997 and 08.12.1997 were issued in her favour.

It was further contended that she (defendant no.1) had failed to deposit the balance amount within the period stipulated, despite notice issued to her.

Consequently, dismissal of the suit was prayed for by the first

respondent herein.

6. On the aforesaid pleadings, the following issues were framed by the learned trial Court:-

- “1. Whether the plaintiff is lawful owner of plot no.1081 measuring 286 sq. meter on the grounds as alleged? OPP
2. Whether the name of defendant no.1 in the documents of ownership of the aforesaid plot in the office of defendant no.2 mere “*Benami*” of the plaintiff? OPP
3. Whether the plaintiff is entitled for relief of mandatory injunction on the grounds as alleged? OPP
4. Whether the Civil Court has no jurisdiction to try and entertain the present suit? OPD
5. Whether the plaintiff has no locus standi to file the present suit? OPD
6. Whether the plaintiff has not come to the court with clean hands? OPD
7. Relief.”

7. The appellant-plaintiff examined three witnesses, including himself, one Sat Parkash (a bank employee) and one Dharambir Singh, a Clerk in the office of the first respondent, i.e.HUDA.

Other than that, by way of documentary evidence, he tendered the following documents:-

Office note dated 21.05.2001 (calculation)	Ex.P1
Re-allotment letter	Ex.P2
Conditions of re-allotment letter	Ex.P3
Receipt	Ex.P4
Receipt	Ex.P5
Receipt	Ex.P6
Receipt	Ex.P7
Receipt	Ex.P8
Passbook	Ex.P9
Statement of account	Ex.P10

8. As regards the defendants (respondents herein), with respondent no.2 (defendant no.1) already having been proceeded against *ex parte*, it appears from the judgments of the Courts below, that even respondent no.1 (HUDA), other than the written statement filed on its behalf, led no evidence.

In fact, nothing has been pointed out from the records of those courts (as have been summoned by this Court), by counsel for respondent no.1, that any evidence was actually led by the Urban Development Authority in defence of the suit.

9. On the basis of the evidence led by the appellant herein, the trial Court came to the conclusion that no evidence could be shown to the effect that payment for the plot in question had been made actually by defendant no.1 independently, whereas the appellant on the other hand had proved his passbook (Ex.P9), to show that all money transactions had been carried out through his account.

It was also found that it could not be proved by the defendants, that defendant no.1 was not a simple housewife, she in any case not having appeared in Court. Therefore, it was held that the transaction in her favour, was a *benami* transaction.

Consequently, the primary issues of the appellant-plaintiff being entitled to the declaration sought as also the injunctions sought, were decided in his favour.

As regards the remaining three issues, including the one on jurisdiction of the civil Court, they were found to be not pressed by the defendants.

10. On the aforesaid basis, the suit of the appellant-plaintiff herein

was decreed in his favour, with the suit property held to be in his ownership and with respondent no.1 directed to hand over its original documents to him, also directing it to record his name, instead of that of the second respondent, in its records.

Respondent no.2 was also, therefore, restrained from alienating the suit property in any manner.

11. Even after the decree issued against her, the first respondent-defendant (wife) did not challenge it before the first appellate Court, with only respondent no.1, i.e. the Haryana Urban Development Authority, having filed an appeal against the said judgment and decree.

12. After noticing the pleadings and the evidence led, that Court went on to discuss the provisions of the Benami Transactions (Prohibition) Act, 1988 (hereinafter to be referred to as the Act), i.e. essentially Sections 3 and 4 thereof, to adjudicate upon the second issue framed by the trial Court (on whether or not purchase of the plot was a *benami* transaction), upon adjudication of which the remaining claim of the appellant would naturally depend.

13. Even having noticed sub-section (2) of Section 3 of the Act, and having come to the conclusion that the appellant herein had been able to prove that he made the entire payment which was required to be made, the statutory presumption was held to be favour of his wife, to the effect that the plot was purchased for her benefit.

To arrive at that conclusion, a judgment of the Supreme Court in **G. Mahalingappa v. G. M. Savitha** 2005 (4) RCR (Civil) 200, was referred to by that Court, to hold that simply because payment of the money had been made by the appellant herein, the presumption could not be that the property

was not purchased for the benefit of his wife, which was a statutory presumption in any case under the Act.

14. On that reasoning, the judgment of the Supreme Court relied upon by the trial Court, in Nand Kishore Mehra v. Sushila Mehra (1995) 4 SCC 572, was held to be not applicable, as even in that case it was found to have been held that the filing of a suit for taking a defence involving the purchase of the property in the name of a wife or unmarried daughter, would still be prohibited. Hence, in fact, it was held by the lower appellate Court that simply because a *benami* transaction in favour of a wife was not prohibited, the statutory presumption raised in Section 3(2) of the Act of 1998 had to be accepted as it was, with the property therefore presumed to be purchased for such benefit of the wife, i.e. respondent no.2 herein.

15. Thus, having held that the appellant had not been able to rebut the said statutory presumption, in terms of sub-section (2) of Section 3, the appeal of the first respondent (HUDA) was allowed, with the judgment and decree of the trial Court reversed, thereby dismissing the suit filed by the appellant.

16. Hence, the present appeal.

At the time when this appeal was admitted to regular hearing on May 08, 2007, the following substantial question of law was found to have arisen, for consideration, by a co-ordinate Bench:-

“From the facts and circumstances of the case, whether the appellant-plaintiff has rebutted the presumption under proviso to Section 3 (2) of the Act to the effect that the property was not purchased by the plaintiff for the benefit of his wife?”

However, in my opinion, a second substantial question of law also arises, to the following effect:-

“Even if it is held that the presumption raised in Section 3(2) of

the Act, is found to be successfully rebutted by the appellant, would he still be entitled to the declaration sought by him, as also the mandatory and permanent injunctions that he seeks?”

17. Before proceeding further, it is to be noticed at this stage that though the appeal had been admitted to regular hearing on the first date that it came up before this Court on May 08, 2007, subsequently, upon the appellant having filed an application (CM no.5538-C-2014), seeking permission of the Court to raise construction over the plot, notice in that application had been issued to both the respondents on 27.03.2015, but with only respondent no.1 having answered the notice. Another application was thereafter filed on 09.01.2017 (CM no.116-C-2017), for the same purpose, in which again notice was issued on 18.01.2017.

As per the report of the Registry, respondent no.2, i.e. the wife of the appellant, had refused to accept notice.

Consequently, she is to be proceeded against *ex parte*, though obviously this Court (this Bench) had erred in observing in its order of July 13, 2018, that respondent no.2 was stated to “have been proceeded against *ex parte*”.

Actually no order to that effect had been passed prior to that date; however, she having refused to accept notice issued by this Court in the application, and also not having responded to notices issued to her by the Courts below also, leading to her being proceeded against *ex parte* there too, she is therefore to be proceeded against as such before this Court too, she never having put in appearance right till the present time.

18. Before this Court, Mr. Neeraj Kumar Jain, learned senior counsel appearing for the appellant, first referred to sub-section (2) of Section 3 of the aforesaid Act, to submit that undoubtedly a presumption is created that the

property purchased by the husband in the name of his wife and children, was so purchased for the benefit of the wife or unmarried daughter (as the case may be), but the said presumption was duly rebutted by the appellant as has been held by the trial Court (reference paragraph 27 of its judgment).

He further submitted that the learned Ist appellate Court in the appeal (filed not by the wife, i.e. respondent no.2 /defendant no.1 in the suit) but by the Haryana Urban Development Authority, relied upon the contents of paragraphs 8 to 10 of the plaint to hold that the presumption did not stand rebutted and that the property had to be treated as 'Benami' property for the benefit of the wife, the implication being that the appellant-plaintiff had no right to it.

Learned senior counsel further submitted that admittedly the appellants' former wife, i.e. respondent no.2, having filed no appeal whatsoever against the finding of the trial Court decreeing the suit of the appellant-plaintiff in his favour, declaring him to be the lawful owner / purchaser of the suit property and further restraining the defendant wife from alienating it any manner, yet further directing her to hand over the original documents of the suit property to the plaintiff, HUDA had actually no locus or cause to file any appeal.

The contention therefore is that with the actually affected party not having filed any appeal against that decree against her, whether or not the suit property is to be held as belonging to the appellant or to respondent no.2-defendant no.1, it cannot in any case be the property of HUDA.

19. Mr. Jain also relied upon judgments of the Supreme Court to support his case, as were referred to by the Courts below, i.e.:-

1. G.Mahalingappa vs. G.M.Savitha,

2. Nand Kishore Mehra vs. Sushila Mehra,

20. Last, though there is no prayer in the appeal to that effect, he submitted that if the appeal is to be allowed, then from the date of the judgment of the trial Court till judgment is pronounced by this Court, the appellant should not be burdened with any costs for non construction of the suit property by the respondent-HUDA, such non construction being on account of the appeal filed by the said respondent before the Ist appellate Court.

21. To controvert the aforesaid arguments, Mr. Deepak Manchanda, learned counsel appearing for respondent no.2, i.e. the Haryana Urban Development Authority, reiterated what has been held by the first appellate Court, to submit that in view of the fact that the suit property stood in the name of respondent no.2, i.e. the wife of the appellant, he could not be declared to be the owner thereof, he having actually purchased it for her benefit.

22. Before going on to consider the arguments raised on both sides, as also the judgments of the learned Courts below, to consider the two questions of law that arise in this 2nd appeal (as reproduced in paragraph 16 of this judgment *supra*), the relevant provisions of the Act of 1988 need to be looked at and are consequently reproduced as follows:-

“2. Definitions.-In this Act, unless the context otherwise requires,-

(a) “*Benami* transaction” means any transaction in which property is transferred to one person for a consideration paid or provided by another person;”

XXXXX

XXXXX

XXXXX

“3. Prohibition of *benami* transaction.- (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;”

XXXXXX

XXXXXX

XXXXXX

“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.

5. Property held *benami* liable to acquisition.-(1) All properties held *benami* shall be subject to acquisition by such authority, in such manner and after following such procedure, as may be prescribed.

(2) For the removal of doubts, it is hereby declared that no amount shall be payable for the acquisition of any property under sub-section (1).

6. Act not to apply in certain cases.- Nothing in this Act shall affect the provisions of section 53 of the Transfer of Property Act, 1882 (4 of 1882), or any law relating to transfers for an illegal purpose.”

Section 53 of the Transfer of Property Act, reads as follows:-

“[53. **Fraudulent transfer.**—(1) Every transfer of immoveable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed.

Nothing in this sub-section shall impair the rights of a transferee in good faith and for consideration.

Nothing in this sub-section shall affect any law for the time being in force relating to insolvency.

A suit instituted by a creditor (which term includes a decree-holder whether he has or has not applied for execution of his decree) to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor shall be instituted on behalf of, or for the benefit of, all the creditors.

(2) Every transfer of immoveable property made without consideration with intent to defraud a subsequent transferee shall be voidable at the option of such transferee. For the purposes of this sub-section, no transfer made without consideration shall be deemed to have been made with intent to defraud by reason only that a subsequent transfer for consideration was made.]

23. Thus, as per Section 3, read with clause (a) of Section 2 of the Act, no person shall enter into any transaction on behalf of another person who actually pays the consideration, and *vice-a-versa*, i.e. no person shall pay or provide consideration for a transaction entered into by another person.

However, clause (a) of sub-section 2 of Section 3 carves out an exception for the purchase of property by any person in the name of his wife or unmarried daughter, which purchase would normally be considered to have been made for the benefit of the wife/daughter, unless it is proved to the contrary.

The question then is that if such presumption is rebutted by showing that the purchase was not actually made for the benefit of the

wife/daughter but for the benefit of the husband/father/mother (as the case may be), would sub-section (1) of Section 3 automatically start to operate, i.e. would such a transaction automatically become prohibited in terms of sub-section (1) or whether, the husband/father/mother who has actually paid the consideration for the purchase of the property, in the name of the wife/unmarried daughter, be entitled to enjoy that property, even though it does not stand in his/her name but in the name of the wife/daughter.

This is to be seen with the fact that sub-sections (1) and (2) of Section 4 even prohibit the institution of any suit, or to defend any suit, on the basis of a 'benami claim' to any property.

24. In my opinion that question has to be answered in favour of the 'benamidar', in view of what has been held by the Supreme Court in the judgments in *Mahalingappas'* and *Mehras'* cases (supra), viz, that in fact, once a person is able to rebut the presumption that a property that was purchased in the name of his wife/unmarried daughter, was not actually for the benefit of the wife/daughter, then that person would be entitled to claim the property as his own.

Very obviously therefore, if the presumption in favour of the wife/daughter is rebutted, sub-section (1) of Section 3 still does not become operative, with the husband/father/mother, who has purchased the property in the name of the wife/unmarried daughter, then entitled to be declared the owner thereof.

Though *Mahalingappas'* case was one in which the transaction actually took place well before the coming into effect of the Act, yet what is observed in paragraph 24 thereof is as follows:-

“24. Section 3(2) makes it abundantly clear that if a property is purchased in the name of an unmarried daughter for her benefit,

that would only be a presumption but the presumption can be rebutted by the person who is alleging to be the real owner of the property by production of evidences or other materials before the court. In this case, the trial court as well as the appellate court concurrently found that although the suit property was purchased in the name of the respondent but the same was purchased for the interest of the appellant. We are therefore of the opinion that even if the presumption under section 3(2) of the Act arose because of purchase of the suit property by the father (in this case appellant) in the name of his daughter (in this case respondent), that presumption got rebutted as the appellant had successfully succeeded by production of cogent evidence to prove that the suit property was purchased in the benami of the respondent for his own benefit.

(Emphasis applied in this judgment only)

In *Mehras'* case, their Lordships held as follows:-

“8. xxxxx

xxxxx

xxxxx

.....Since the plaintiff is the husband who had the right to enter into a benami transaction in the matter of purchase of property in the name of his wife or unmarried daughter, as we have held earlier, he is entitled to enforce his rights in the properties concerned if he can succeed in showing that he had purchased them benami in the name of his wife. But in view of the statutory presumption incorporated in sub-section (2) of Section 3 of the Act, he can get relief sought in the suit only if he can prove that the properties concerned had not been purchased for the benefit of the wife, even if he succeeds in showing that the consideration for the purchases of the properties had been paid by him.

(Emphasis applied in this judgment only)

25. Consequently, that issue stands well settled, that if the presumption statutorily raised in sub-section (2) of Section 3, is successfully rebutted by the real purchaser of the property, he can claim the property to be

his own even by filing a suit, Section 4 of the Act notwithstanding.

Hence, as regards the second question of law raised by this Court in paragraph 16 hereinabove, it is to be held, on the principle contained therein, that if the presumption raised in Section 3(2) of the Act is successfully rebutted, the appellant would be entitled to the declaration sought by him, as also the injunctions that he seeks.

25. Coming then to the other question of law that arises in the specific circumstances of the present case (as also reproduced in paragraph 16 hereinabove), i.e. whether the appellant-plaintiff has successfully rebutted the aforesaid statutory presumption that would stand raised the moment he purchased the property, in the name of his wife, i.e. defendant no.1 in the suit?

In my opinion, the trial Court was correct and the first appellate Court erred, in holding that such presumption did not stand rebutted despite, firstly, the appellant (plaintiff) having shown that the suit property was purchased from his own funds, which he had so proved by exhibiting his bank statements before the trial Court, and second, with his wife (defendant no.1) never ever having attempted say that the property was purchased for her benefit.

Though I do agree, on principle, with the fact that there would otherwise be no legal reason for a person to purchase any property in his wife or daughters' name, and not his own, unless such property was for the benefit of the wife/daughter, though of course he may do so solely out of love and affection, however, in the circumstances of this case, other than the fact that the appellant duly proved before the Courts below that the suit property was purchased from his funds, the defendant wife (respondent no.2 herein), having

chosen to not even defend the suit, or even the first or second appeals right up to this Court, very obviously therefore, she is not interested in claiming that the property was purchased for her benefit.

As learned counsel for the appellant had informed this Court, the appellant and respondent no.2 in fact now stand legally divorced, or at least separated; however, she, despite service of notice at each stage, never having even attempted to claim any right over the property, I do not see how the learned first appellate Court would have presumed anything other than the fact that the presumption in favour of the wife, as raised in sub-section 2 of Section 3 of the Act, did not actually stand rebutted by both facts, i.e. the payment of consideration to respondent no.1 herein, HUDA, made by the appellant and second, that she has never claimed any right to the property.

26. Having held as above, that such presumption stood well rebutted, one question still does arise in my mind; viz, as to whether the appellant purchased the property in his wives' name only to perhaps not disclose the factum of such purchase, for any reasons of him being in any Government service or to evade any tax enquiries etc?

However, that again would be going to the realm of speculation by this Court, with even counsel for the first respondent not having raised that issue in any manner, nor it having been shown to be raised before the Courts below.

In fact, it is found to be strange by this Court that respondent no.1, i.e. HUDA, filed an appeal in the absence of any appeal by respondent no.2, with no ground raised that the suit property was actually purchased simply to either hide any illegal money with the appellant, or for any other unlawful reason.

Learned counsel for the first respondent has also not pointed to anything at all to show that the said argument was raised at any stage and if so, that any evidence was led to that effect.

Obviously, if at any stage the purchase by the appellant in the name of respondent no.2 is found to be for any unlawful reason, such purchase would be hit by Section 23 of the Indian Contract Act, 1872, but in these proceedings at least this Court cannot raise any such presumption, it never having raised at any stage at all. In fact, the observation made hereinabove, is only because a natural question did arise in the mind of this Court as to why a person could not purchase the property in his own name, if it was not for the benefit of his wife.

27. Even having observed as above, only by way of speculation, the finding of this Court that the presumption in sub-section (2) of Section 3 of the Act stood fully rebutted, the other question of law as raised in the circumstances of the present case is also answered to the effect that the said presumption stood effectively rebutted.

28. In view of the findings hereinabove, this appeal is allowed with the judgment and decree issued by the first appellate Court set aside and that of the trial Court restored.

The appellant would also be entitled to his costs throughout.

November 20, 2018
dinesh

(AMOL RATTAN SINGH)
JUDGE

1. Whether speaking/reasoned?
2. Whether reportable?

Yes
Yes