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

+ FAO(OS) 91/2017 & CM No.12098/2018

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Date of decision : 13th March, 2018

NEENA SHARMA

..... Appellant

Through : Mr. T.N. Saxena, Adv.

versus

SUDESH SHARMA & ORS

... Respondents

Through : Mr. Abhijat and Mr. Pratyush
Sharma, Adv.

CORAM:

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE C.HARI SHANKAR

JUDGMENT (ORAL)

GITA MITTAL, ACTING CHIEF JUSTICE

1. By way of this appeal, a challenge has been laid by the appellant (plaintiff in the suit) to the order dated 1st August, 2016 passed by the ld. Single Judge in I.A.No.16601/2015 (filed under Order VII Rule 11 of the CPC) in *CS(OS)No.241/2015 titled Neena Sharma v. Sudesh Sharma & Ors.* by the respondents (defendants in the suit).

2. We have heard ld. counsels for the parties on this appeal.

3. The parties before us are the widow and children of late Shri Om Prakash. Late Shri Om Prakash was married to Smt. Sudesh

Sharma (respondent no.1 herein). From their marriage, they were blessed with one daughter (appellant herein) and three sons, who have been arrayed as respondent nos.2 to 4 in the present appeal (defendant nos.2 to 4 in the suit).

4. Late Shri Om Prakash expired on the 17th of June 2004. Eleven years thereafter, the plaintiff filed the suit on 8th January, 2015 for partition of the property as well as rendition of accounts making the following prayers :-

“a) pass a preliminary decree of partition of the property declaring one fifth share of the plaintiff in it, more appropriately described in paragraphs 3 of the plaint.

b) appoint local commissioner to divide physically the property more appropriately described in paragraph 3 of the plaint into the five equal workable shares and separate 1/5th share of plaintiff by metes and bound, if plaintiff and defendants fails to come to consensus terms in dividing the property by separating the 1/5th share of plaintiff.

c) pass a final decree in favour of the plaintiff for partition by confirming the report of the local commissioner to divide physically and separating one fifth shares of the plaintiff or confirm the consensus terms arrived by plaintiff and defendants in dividing the suit property appropriately described in paragraph 3 of the plaint.

d) pass a decree of accounts rendering the defendants to give fair accounts of the realized rent from the suit properties since 17.06.2004.

e) award the cost of suit to the plaintiff against the defendants.”

5. Asserting that late Shri Om Prakash died intestate, the appellant claimed 1/5th share in the properties and sought partition as well as rendition of accounts. The properties of which partition was sought are averred in para 3 of the plaint as follows :

“3. That the father/husband of parties to suit during his life time by his own earnings purchased following properties and improved them to their present structure situated in Ashok Park Main, Delhi-110 035 :-

- a) Property bearing no.41-42A, having total area about 205 sq.yds. Constructed four stories, in the name of defendant no.1.*
- b) Property bearing No.5 (Constructed four stories) & 6 (Constructed three stories) having total area about 113 sq.yds. & about 60 sq. yds. Respectively, in the name of late father / husband of parties to suit.”*

6. The respondents filed a joint written statement dated 5th August, 2015 wherein the following preliminary objections were taken with regard to ownership of the properties :

*“2. That the Plaintiff has no locus standi to claim partition or any other consequential relief in respect of property no. 41-42A, Ashok Park Main, Delhi-110035 or properties no.5 & 6, Ashok Park Main, Delhi-110035 (hereinafter referred to as the “**Suit properties**”). The Plaintiff has filed the present Suit on the premise that the Suit properties are self acquired properties of Late Sh. Om Prakash, father of Plaintiff and Defendant Nos.2 to 4 and husband of Defendant No.1 and as Class I Legal heir of Late Sh. Om Prakash, the Plaintiff is entitled to equal share in the said Suit properties along-with the Defendants. However, the factual position is that the Plaintiff whilst filing the present Suit has malafidely*

suppressed from this Hon'ble Court that the Defendant No.1 is the sole and absolute owner of abovementioned suit properties. The Plaintiff has no right, title or interest in the said Suit properties and the Plaintiff is not entitled to any relief qua the Suit properties. Thus, the Plaint is liable to be rejected. The ownership of the Defendant No.1 of the aforementioned suit properties is detailed hereunder :

(i) **Property No.5, Ashok Park Main, Delhi - 110035**

This property admeasuring about 200 sq. Yards was purchased by Late Shri Om Prakash from Smt. Savitri Kapoor vide registered sale deed dated 03.10.1980. Late Sh. Om Prakash had executed a Will dated 05.02.1986 bequeathing the said property unto the defendant no.1. On demise of late Shri Om Prakash on 17.06.2004, the Will dated 05.02.1986 came into force and the ownership of this property came to vest with the defendant no.1. This fact is to the express knowledge of the plaintiff. This suit property was thereafter mutated in the year 2005 in favour of defendant no.1 in the municipal records, on the basis of no-objection certificate provided by other legal heirs of late Shri Om Prakash including the plaintiff.

ii **Property No.6, Ashok Park Main, Delhi - 110035**

This property admeasuring about 200 sq. Yards was purchased by defendant no.1 from Sh. Kanti Kumar vide sale deed dated 06.03.1980.

iii **Property No.41 and 42 A, Ashok Park Main, Delhi – 110035**

These properties admeasuring about 206.25 sq.

Yeads were together purchased by defendant no.1 in two parts. The defendant no.1 purchased undivided 2/3rd share in the said properties jointly from Sh. Kailash Narain Bhatnagar and Sh. Bhupender Kumar Bhatnagar vide registered sale deed dated 26.07.1984 and the remaining undivided 1/3rd share in the said properties from Sh. Iqbal Narain vide registered sale deed dated 25.10.1991.”

7. It appears that premised on the plea that the appellant had not affixed proper court fees on the plaint, the respondents herein filed the I.A.No.1660/2015 seeking rejection of the plaint under Order VII Rule 11 of the Code of Civil Procedure.

8. The suit came up before the court on the 1st of August, 2016 for framing of issues when the ld. Single Judge accepted the pleas of the defendants/respondents that all the properties (property bearing No.41-42A, Ashok Park Main, Delhi 110 035 and property No.6, Ashok Park Main, Delhi – 110 035) were always in the name of respondent/defendant no.1 herein and were never owned by or in the name of Late Shri Om Prakash, father of the plaintiff. The ld. Single Judge records that the plaintiff agreed to the two properties being in the name of the respondent no.1, but claimed that though they were in the name of the respondent no.1, were acquired with the funds of the husband.

9. We may also note that the ld. Single Judge has also examined the fact that the plaintiff had not set up a plea that the property was held *benami* by the respondent no.1 though it was actually owned by her husband, i.e., late Shri Om Praksh, the father of the plaintiff and defendant nos.2 to 4. Consequently, it was held that in the absence of

such pleadings, the plaintiff had no right to lead evidence on that issue and the suit had to be confined to the third property being property No.5, Ashok Park Main, Delhi 110 035. We have perused the plaint which shows that no such plea is contained in the plaint. As such, this observation of the Id. Single Judge cannot be faulted.

10. It was further held that the only issue, which arose for consideration, and had to be decided in the suit, was the validity of the Will dated 5th February, 1986, relied upon by the defendants regarding this property. The appellant is aggrieved by these findings contending that there was no evidence at all to support the plea taken up by the respondents.

11. We find that on the admitted pleadings and submissions of the parties accepting that the property No.41-42A, Ashok Park Main, New Delhi-110035 and the property No.6, Ashok Park Main, New Delhi-110035 were in the name of Late Shri Om Prakash, father of the plaintiff in the suit, the only question which remains for trial was the issue of validity of the Will dated 5th February, 1986. Therefore, the order dated 1st of August 2016 is unassailable.

12. It is submitted by Mr. T.N. Saxena, learned counsel for the appellant that the appellant was never given an opportunity to file a replication to meet the case set up by the respondents herein and that it was the appellant's case that as per the disclosure made in the written statement, the properties had been purchased in the name of the defendant no.1 out of the funds of the deceased Shri Om Prakash. The appellant was, therefore, precluded from pressing a plea that the defendant no.1 was holding the same *benami* for and on behalf of the

real owner i.e. Late Shri Om Prakash.

13. So far as such plea is concerned, it cannot be disputed that the plaint must contain requisite pleadings to enable the parties to prove the same. In this regard, Mr. Abhijat, learned counsel for the respondents has placed reliance on the pronouncement of the Supreme Court reported at (2007) 10 SCC 732, *V. Shankaranarayana Rao (Dead) by Lrs. & Ors. v. Leelavathi (Dead) by Lrs & Ors.* wherein the principles, on the basis whereof the issue as to whether a transaction was *benami* or not has to be decided, have been set out. For expediency, we extract para 11 of the said judgment which reads as follows :

“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 v. Thakur Kan Singh[(1980) 3 SCC 72] in the following terms: (SCC p. 84, para 18)

“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) if 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.”

14. As noted above, other than the bald assertion in para 3 of the plaint that the father had out of his own earnings, purchased the three properties, there is not even a whisper of pleading to support a claim under Section 3 of the Benami Transactions (Prohibition) Act, 1988.

15. It was in this background, given the order dated 1st August, 2016, confining the suit to one property and keeping in view the evaluation thereof, that the suit was transferred from the Original Side of this court to the District Courts in view of the pecuniary jurisdiction thereof.

16. The original record relating to the Civil Suit No.1291/2017 had been called from the District Courts, which has been received and perused by us.

17. Ld. counsel for the appellant would further contend that the appellant would have taken such a plea if an opportunity to file its replication was given. A perusal of the trial court record would show that on 7th of October 2016 and 28th of November 2016, the appellant sought time before the Id. Trial Judge to enable him to file an application under Order VI Rule 17 for effecting amendments in the plaint. This was not done.

18. As noted above, the impugned order dated 1st August, 2016 is premised on the admission made on behalf of the appellant herself to the effect that two of the properties, detailed in para 3 of the plaint, stood in the name of the defendant no.1 and were never in the name of

the father. We are therefore, of the view that the present challenge is completely misconceived.

19. At this stage, ld. counsel for the appellant submits that he may be permitted to withdraw this appeal with liberty to file an appropriate application for amendment of the plaint to incorporate a plea that the properties, detailed in para 3 of the plaint, had been purchased out of the funds of Late Shri Om Prakash and were held *benami* in the name of the respondent no.1.

20. In view of the above, this appeal is dismissed as withdrawn with liberty as prayed for. As and when, such application for amendment of the plaint is filed, the same shall be considered in accordance with law.

21. We make it clear that we have not expressed any view on the merits of the rival contentions. We also make it clear that we have not expressed any view on the maintainability and legality of any amendment which may be sought by the appellant.

22. Let the record of trial court be sent back forthwith.

23. No order as to costs.

Dasti.

ACTING CHIEF JUSTICE

C.HARI SHANKAR, J

MARCH 13, 2018

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