

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

+ **RFA No. 903/2017**

% **13th March, 2018**

APARNA SHARMA & ORS Appellants

Through: Mr. Manish Vashisht and Mr.
Sameer Vashisht, Advocates.

versus

SIDHARTHA SHARMA & ANR. Respondents

Through: Mr. Somesh Chandra Jha and
Ms. Pyoli, Advocates for R-1
and 2.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not? **YES**

VALMIKI J. MEHTA, J (ORAL)

RFA 903/2017 and C.M. Appl. No. 38618/2017 (for stay)

1. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the appellant nos. 1 and 2 /defendant nos. 1 and 2/counter-claimants impugning the judgment of the Trial Court dated 11.8.2017 by which the trial court has dismissed the counter claim as being barred by the Benami Transactions

(Prohibition) Act, 1988. I may note that with effect from 1.11.2016 the Benami Transactions (Prohibition) Act, 1988 was amended and the new Act is now called as the Prohibition of Benami Property Transactions Act, 1988. Since the new Act has now become applicable with effect from 1.11.2016 and the counter claim was filed by the appellant nos. 1 and 2 /defendant nos. 1 and 2 in May, 2017, therefore what will govern the parties is not the Benami Transactions (Prohibition) Act, 1988 but the Prohibition of Benami Property Transactions Act, 1988.

2. By the subject suit the respondents/plaintiffs sought possession, damages etc. of the suit property being Flat No. 501, block 6, Plot no. 2, Sector-22, Dwarka, New Delhi. As per the admitted position appearing from pleadings of both the parties it is not in dispute that the suit property in terms of the title deeds is in the name of the respondents/plaintiffs. appellant nos. 1 and 2 /defendant nos. 1 and 2/counter claimants however set up a case that the suit property was only purchased in the name of the respondents/plaintiffs and that actually the appellant nos. 1 and 2 /defendant nos. 1 and 2 were the *de jure* owners as they had paid consideration with respect to the suit

property to the seller/Delhi Development Authority. appellant nos. 1 and 2 /defendant nos. 1 and 2 also relied upon two power of attorneys dated 5.12.2013 executed by the respondents/plaintiffs in favour of the appellant nos. 1 and 2/defendant nos.1 and 2 that these power of attorneys showed that appellant nos. 1 and 2/defendant nos.1 and 2 were the owners of the suit property.

3. As already stated above trial court has rejected the counter claim on account of the same being barred by Section 4 of the Benami Transactions (Prohibition) Act, 1988. The counter claim has been rejected under Order VII Rule 11 CPC. This Court as already stated will consider the issue from the stand point of the provisions of law as contained in the Prohibition of Benami Property Transactions Act, 1988.

4. It is relevant to at the outset state that Section 4(3) of the Benami Transactions (Prohibition) Act, 1988 as it stood was repealed in terms of the Amended Act which came into force with effect from 1.11.2016 and what was contained in some part of sub-sections (3) of Section 4 of the Benami Transactions (Prohibition) Act, 1988 as originally stood was incorporated in the definition of 'Benami

Transaction' as found in Section 2(9) of the Prohibition of Benami Property Transactions Act. This provision of Section 2(9) of the Prohibition of Benami Property Transactions Act, 1988 is reproduced as under:-

“(9) "benami transaction" means,—

(A) a transaction or an arrangement—

(a) where a property is transferred to, or is held by, a person, and the consideration for such property has been provided, or paid by, another person; and

(b) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration, except when the property is held by—

(i) a *Karta*, or a member of a Hindu undivided family, as the case may be, and the property is held for his benefit or benefit of other members in the family and the consideration for such property has been provided or paid out of the known sources of the Hindu undivided family;

(ii) a person standing in a fiduciary capacity for the benefit of another person towards whom he stands in such capacity and includes a trustee, executor, partner, director of a company, a depository or a participant as an agent of a depository under the Depositories Act, 1996 and any other person as may be notified by the Central Government for this purpose;

(iii) any person being an individual in the name of his spouse or in the name of any child of such individual and the consideration for such property has been provided or paid out of the known sources of the individual;

(iv) any person in the name of his brother or sister or lineal ascendant or descendant, where the names of brother or sister or lineal ascendant or descendant and the individual appear as joint-owners in any document, and the consideration for such property has been provided or paid out of the known sources of the individual; or

(B) a transaction or an arrangement in respect of a property carried out or made in a fictitious name; or

(C) a transaction or an arrangement in respect of a property where the owner of the property is not aware of, or, denies knowledge of, such ownership;

(D) a transaction or an arrangement in respect of a property where the person providing the consideration is not traceable or is fictitious;

Explanation.—For the removal of doubts, it is hereby declared that benami transaction shall not include any transaction involving the allowing of possession of any property to be taken or retained in part performance of a contract referred to in section 53A of the Transfer of Property Act, 1882, if, under any law for the time being in force,—

(i) consideration for such property has been provided by the person to whom possession of property has been allowed but the person who has granted possession thereof continues to hold ownership of such property;

(ii) stamp duty on such transaction or arrangement has been paid; and

(iii) the contract has been registered.”

5. A reading of the aforesaid definition of benami transaction shows that only those transactions are saved from being hit as a benami transaction which are subject matter of Section 2(9)(A)(b) (i) to (iv) of the Prohibition of Benami Property Transactions Act, 1988. In the present case, as per the facts arising from the pleadings we would not be concerned with sub-sections 2(9)(A)(b) (i) to (iii) and we would only be concerned with sub-section 2(9)(A)(b)(iv). Additionally it is required to be stated that the provision of sub-sections 2(9)(A)(b)(ii) of the Prohibition of Benami Property Transactions Act, 1988 comprising of exception of fiduciary capacity would not apply to the facts of the present case because the meaning of fiduciary capacity which was left as very general, expensive and

undefined in the earlier provision of Section 4(3) of Benami Transactions (Prohibition) Act is now removed by clarifying that only certain relationships having fiduciary capacity as stated in Section 2(9)(A)(b)(ii) of the Prohibition of Benami Property Transactions Act, 1988 would be covered under exceptions of the transactions which will not be hit by benami transactions. The appellant nos. 1 and 2 /defendant nos. 1 and 2/counter-claimants have not claimed to be trustees, executors or partners or directors of company, etc. as per the meaning of these expressions in Section 2(9)(A)(b)(ii) the Prohibition of Benami Property Transactions Act.

6. Let us now examine as to whether appellant nos. 1 and 2 /defendant nos. 1 and 2 can take benefit of Section 2(9)(A)(b)(iv) of the Prohibition of Benami Property Transactions Act, 1988.

7. A reading of the provision of Section 2(9)(A)(b)(iv) of the Prohibition of Benami Property Transactions Act, shows that no doubt there can be a transaction, which will not be a benami transaction, if the same is entered into between sisters, but the pre-condition for applicability of the exception in Section 2(9)(A)(b)(iv) of the Prohibition of Benami Property Transactions Act, is that a

person who claims entitlement to a property by the same falling in the exception of Section 2(9)(A)(b)(iv), is a person who is shown as a joint owner in any document, i.e. a document besides the title deeds of the property. In the present case, the only documents which are relied upon by the appellant nos. 1 and 2 /defendant nos. 1 and 2 are the two power of attorneys dated 5.12.2013, and these attorneys in no manner shows any right, title and interest of the appellant nos. 1 and 2 /defendant nos. 1 and 2 in the suit property because these attorneys are simple General Power Of Attorneys executed by the respondents/plaintiffs in favour of the appellant nos. 1 and 2 /defendant nos. 1 and 2 in order to enable the appellant nos. 1 and 2 /defendant nos. 1 and 2 to get the suit property transferred from DDA to the respondents/plaintiffs by execution of Conveyance Deed by the DDA in favour of the respondents/plaintiffs. There is absolutely no language contained in the General Power Of Attorneys dated 5.12.2013 that the appellant nos. 1 and 2 /defendant nos. 1 and 2 in any manner are co-owners with the respondents/plaintiffs for the suit property or that in any manner the appellant nos. 1 and 2 /defendant nos. 1 and 2 are shown to have any title or interest in the suit

property. Once that is so, appellant nos. 1 and 2 /defendant nos. 1 and 2 cannot seek the benefit of Section 2(9)(A)(b)(iv) of the Prohibition of Benami Property Transactions Act, to claim that they are exempted from the bar of the case pleaded by them being hit as a benami transaction under the Act.

8. In view of the aforesaid discussion, the impugned judgment of the trial court is upheld by holding that the claim of the appellant nos. 1 and 2 /defendant nos. 1 and 2 to the suit property is a claim based upon a benami transaction, and which transaction does not fall in the exceptions contained in Section 2(9)(A)(b)(i) to (iv) of the Prohibition of Benami Property Transactions Act, 1988. Thus for the completely independently reasoning given by this Court than as given in the impugned judgment, and which independent reasoning this Court is always entitled to in terms of Order XLI Rule 24 CPC, the impugned judgment of the trial court is sustained.

9. Dismissed.

MARCH 13, 2018

AK/ib

VALMIKI J. MEHTA, J