

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**First Appeal No.210 of 2006****Reserved on 16.10.2020****Pronounced on 29.10.2020**

1. Smt.Geeta Bai, Wd/o Late Lilehswar Das, Aged About 45 Years, R/o Village Chote Kareli, Tahsil Kurud, District Dhamtari, Chhattisgarh (Appellant/Defendant).
2. Gopal, S/o Late Lileshwar Das, Aged About 28 Years, R/o Village Chote Kareli, Tahsil Kurud, District Dhamtari, Chhattisgarh (Appellant/Defendant).
3. Vijay Laxmi, D/o Late Lileshwar Das, W/o Tukeshwar, R/o Village Chote Kareli, Tahsil Kurud, District Dhamtari, Chhattisgarh (Appellant/Defendant).

---- Appellants**Versus**

1. (Deleted) Devendra Kumar As Per Hon'ble Court Order Dated 06.08.2020.
2. Kumari Pushplata, D/o Salikdas, R/o Village Rampur, Tahsil Kurud, District Dhamtari, Chhattisgarh (Respondent/Plaintiff).

---- Respondents

For Appellant	:	Mr. Shobhit Koshta, Advocate.
For Respondent	:	Mr. Ratnesh Kumar Agrawal, Advocate

Hon'ble Shri Justice Sanjay S. Agrawal, J**CAV Judgment**

1. This Appeal has been preferred by Defendants under Section 96 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'CPC') questioning the legality and propriety of the judgment and decree dated 05.09.2006 passed by the Additional District Judge, Dhamtari, in Civil Suit No.27-A/2004, whereby the plaintiff's claim for declaration of title and injunction has been decreed. The parties to this appeal shall be referred hereinafter as per their description before the Court below.
2. The facts essential to be stated for adjudication of this appeal

are that the Plaintiff Smt. Meena Bai (since deceased, now represented by her legal representative Ku. Pushplata), instituted a suit claiming declaration of title and injunction in a mandatory form along with relief of *Nistari Right* over the property in question bearing Khasra No.516/4 and 517/4 total admeasuring 0.03 acres situated at Village Hatkeshwar, Tehsil & District Dhamtari. According to the Plaintiff, it was purchased by her mother Smt. Padmini Bai from one Ramlal under a registered deed of sale dated 11.01.1980 and, thereafter, executed a registered deed of Will dated 15.04.1991 bequathing her said property to her daughter Smt. Meena Bai and son Lileshwar. Further contention of the Plaintiff is that her brother Lileshwar has obtained the revenue papers in his name alone with the connivance with the revenue authority and denying her (Smt. Meena Bai) interest, giving rise to the institution of the claim in the instant nature, instituted on 27.01.1999.

3. While denying the execution of the alleged Will, it is pleaded by the defendant Lileshwar Das (since deceased, now represented by his legal representatives Smt. Geeta Bai & Others) that the same is a forged and a fictitious document. It is contested further on the ground that the alleged suit property was purchased by him (Lileshwar Das) under the registered deed of sale dated 11.01.1980 and for love and affection it was got registered in the name of mother Smt. Padminin Bai. It is pleaded further that since he was the real purchaser of the property in question, therefore, the mother had no right whatsoever to execute such a Will.

4. In support, the Plaintiff has examined as many as 4 witnesses including the attesting witness of the alleged Will namely Ashok Yadav (PW-4), while two were examined by the defendant including the attesting witness of the alleged sale in rebuttal.
5. The trial Court after analyzing the evidence led by the parties, arrived at a conclusion that the property in question was purchased by the Plaintiff's mother Smt. Padmini Bai under the registered deed of sale dated 11.01.1980 and the defence as set up by the defendant that he was a real purchaser and the property in question was purchased *Benami* in the name of his mother is prohibited by virtue of sub-section (2) of Section 4 of the Prohibition of Benami Transactions Act, 1988 (hereinafter referred to as 'the Act of 1988'). It held further that the mother had bequathed the same to her daughter (Original Plaintiff- Smt. Meena Bai) and son (Original Defendant- Lileshwar Das) by executing a registered deed of Will dated 15.04.1991, while specifying their respective share along with their *Nistari Right*. In consequence, decreed the Plaintiff's claim.
6. According to Mr. Koshta, learned counsel appearing for the Appellants/Defendants, the trial Court has committed an illegality in holding that the property in question was purchased by Smt. Padmini Bai under the registered deed of sale dated 11.01.1980. It is, however, contended while referring to the evidence of Khemraj (DW-1), the attesting witness of the alleged sale that the property in question was purchased by the Defendant/Lileshwar Das from his own income in the name of his mother *Benami* and he alone was the real purchaser of it

and, the mother (Smt. Padmini Bai) had, therefore, no right to execute the alleged Will dated 15.04.1991. It is contended further while referring to the statement of attesting witness (Ashok Yadav) to the said Will (Ex.P-1) that the plaintiff has failed to prove its due execution and attestation in accordance with the provisions prescribed under Section 63 (c) of the Indian Succession Act, 1925, read with Section 68 of the Evidence Act, 1872. In support, he placed his reliance upon the decisions rendered by the Supreme Court in the matter of Benga Behera and Anr. vs. Braja Kishore Nanda and Ors reported In **AIR 2007 SC 1975** and also upon the decision passed by this Court in the matter of Dinesh Kumar Dubey & Ors vs. Ayodhya Dubey (died and deleted) & Ors decided on 12.10.2018 in Second Appeal No.284/2003.

7. On the other hand, Mr. Ratnesh Kumar Agrawal, learned counsel appearing for the Respondent/Plaintiff submits that the defence as taken by the defendant claiming his exclusive ownership over the property in question is not available with him by virtue of Section 4 (2) of the Act of 1988 and the trial Court has, therefore, not committed any illegality in holding that the mother Smt. Padmini Bai alone was the exclusive owner of the property in question acquired under the alleged registered deed of sale dated 11.01.1980. It is contended further while referring to the statement of the attesting witness to the alleged Will dated 15.04.1991 that the due execution, attestation and validity of it has rightly been upheld by the trial Court and, therefore, no interference is required to be made in this appeal.

8. I have heard learned counsel for the parties and perused the entire record carefully.
9. From perusal of the registered deed of sale dated 11.01.1980 (Ex.P-3), it appears that the property in question was purchased in the name of Smt. Padmini Bai, the predecessor in interest of the parties for a consideration of Rs.3,000/- from one Ramlal. According to the Defendant, the mother was the ostensible owner of the property in question viz., *Benamidar* and in support thereof, he placed his reliance upon the statement of its attesting witness namely Khemraj (DW-1).
10. It is, however, to be noted at this stage that the suit in the instant nature was filed on 27.01.1999 and the defence as set up was made on 15.03.2005 and by the said time, the Act of 1988 has already come into force. Section 4 of the Act of 1988, which prohibits the right to recover the property held *Benami* is relevant for the purpose, reads as under:-

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) (.....) omitted by Act 43 of 2016, sec. 7 (w.e.f. 1-11-2016, vide S.O. 3289(E), dated 25th October, 2016)

11. Sub-section (1) of the aforesaid provision clearly provides that 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. The expression “any property held *Benami*” is not limited to any particular time, date or duration. Once the property is found to have been held *Benami*, no suit, claim or action to enforce any right in respect thereof lie. Similarly, sub-section (2) of the said provision would nullifies the defences 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 in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property. It means that once a property is found to have been held a *Benami*, the real owner is deprived of such defence against the person in whose name the property is held or any other person.

12. In view of the aforesaid sub-sections of Section 4 of the Act of 1988, neither the claim with regard to the property held *Benami* could file nor any defence could lay as such. It is to be noted at this stage the principles laid down by the Supreme Court in the matter of **R. Rajagopal Reddy (Dead) By Lrs. And Others Versus Padmini Chandrasekharan (Dead) By Lrs.,** reported in **(1995) 2 SCC 630**, where a question as to when the law nullifies the defences available to the real owners in recovering the *Benami* property from the *Benamidar* was considered and it was held that the law must apply irrespective of the time of the Benami Transactions. Paragraphs 11, 12 & 20 are relevant for

the purpose, which read as under:-

“11.Even when we come to Section 4, it is easy to visualise that sub-section (1) of Section 4 states that 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 shall lie by or on behalf of a person claiming to be the real owner of such property. As per Section 4(1) no such suit shall thenceforth lie to recover the possession of the property held benami by the defendant. Plaintiff's right to that effect is sought to be taken away and any suit to enforce such a right after coming into operation of Section 4(1) that is 19-5-1988, shall not lie. The legislature in its wisdom has nowhere provided in Section 4(1) that no such suit, claim or action pending on the date when Section 4 came into force shall not be proceeded with and shall stand abated. On the contrary, clear legislative intention is seen from the words "no such claim, suit or action shall lie", meaning thereby no such suit, claim or action shall be permitted to be filed or entertained or admitted to the portals of any court for seeking such a relief after coming into force of Section 4 (1).....It is, however, true as held by the Division Bench that on the express language of Section 4(1) any right inhering in the real owner in respect of any property held benami would get effaced once Section 4(1) operated, even if such transaction had been entered into prior to the coming into operation of Section 4(1), and henceafter Section 4(1) applied no suit can lie in respect to such a past benami transaction. To that extent the Section may be retroactive. To highlight this aspect we may take an illustration. If a benami transaction has taken place in 1980 and a suit is filed in June 1988 by the plaintiff claiming that he is the real owner of the property and defendant is merely a benamidar and the consideration has flown from him, then such a suit would not lie on account of the provisions of Section 4(1). Bar against filing, entertaining and admission of such suits would have become operative by June, 1988 and to that extent Section 4(1) would take in its sweep even past benami transactions which are sought to be litigated upon after coming into force of the prohibitory provision of Section 4(1); but that is the only effect of the retroactivity of Section 4(1) and nothing more than that.....”

“12. So far as Section 4(2) is concerned, all that is

provided is that if a suit is filed by a plaintiff who claims to be the owner of the property under the document in his favour and holds the property in his name, once Section 4(2) applies, no defence will be permitted or allowed in any such suit, claim or action by or on behalf of a person claiming to be the real owner of such property held benami. The disallowing of such a defence which earlier was available, itself suggests that a new liability or restriction is imposed by Section 4(2) on a pre-existing right of the defendant.....It is also pertinent to note that Section 4(2) enjoins that no such defence "shall be allowed" in any claim, suit or action by or on behalf of a person claiming to be the real owner of such property. That is to say no such defence shall be allowed for the first time after coming into operation of Section 4(2)....."

"20. As to reason 6 relating to nullification of all the defences of benami-holders, we say with respect that according to us, as already discussed, future defences of real owners against benamidar-holders have been nullified as are covered by the sweep of Section 4(2) and not others."

13. In view of the aforesaid settled principles of law, the Appellant/Defendant is, thus, precluded from raising such a defence that though the property was purchased in the name of mother Smt. Padmini Bai, but he was in fact the real owner of it. Further contention of Mr. Koshta that since the mother was the elder member in the joint family, therefore, it was purchased by defendant Lileshwar Das from his own income in the name of his mother is, however, noted to be rejected as no plea as such was made in the written statement so as to examine the said contention of him. Consequently, the trial Court has not committed any illegality in holding that the mother Smt. Padminin Bai was the real owner of the property in question acquired under the alleged registered deed of sale, dated 11.01.1980 (Ex.P-3) and, I do not find any infirmity in the same.

14. In so far as the genuineness of the alleged registered deed of Will, dated 15.04.1991 (EX.P-1) executed by Smt. Padmini Bai bequathing all her properties, i.e., the suit land in favour of her daughter and son, is concerned, it appears that, it was executed and got it registered in presence of the two witnesses as required under Section 63 of the Indian Succession Act, 1925. It appears further that one of its attesting witness namely Santosh Kumar has died, while the other one namely Shri Ashok Yadav was examined by the Plaintiff as (PW-4) in order to prove its genuineness. According to the said witness, the alleged Will was executed in his presence and the contents of it was read over to Smt. Padmini Bai, who in turn, upon her satisfaction had put her thumb impression on it. In his cross-examination, it was denied by him that the said executor had not put her thumb impression on it when a specific question in this regard was put to him. He was, thus, stuck in his cross-examination with regard to the execution of it. It reveals further from his testimony that she (testatrix) was in fit mental condition at the time of its execution and she and others have put their signatures on it. The initial burden regarding its due execution and attestation as required was duly established by the plaintiff and the defendants, who on the other hand, have however, failed to prove that it was a forged or a fabricated document, as alleged by them.
15. In so far as the reliance of the Appellants as placed upon the decision rendered by the Supreme Court in the matter of *Benga Behera and Anr. vs. Braja Kishore Nanda and Ors* (supra) is

concerned, the same is however, distinguishable from the facts involved in the present case. As in the said matter, a Will was executed by one Sarajumani Dasi in favour of the stranger (Braja Kishore Nanda), but the attesting witness of it namely Banabehari has failed to prove its execution as he admitted in his evidence categorically that the said executor had not put her "Left Thumb Impression" (L.T.I.) on it in his presence at the time of its execution. That apart, it was neither read over and explained to the said testatrix nor she had put her thumb impression upon understanding the contents and purport of it. In that view of the matter, the execution and attestation of the said Will was not upheld. Likewise, the observation made by this Court in the matter of Dinesh Kumar Dubey & Ors vs. Ayodhya Dubey & Ors (supra) is also a distinguishable one as the attesting witness (Dilbaran) of the Will, said to have been executed by one Jaishree Pandey, had failed to state that he signed the Will in presence of the said executor. The validity of the Will was, therefore, not upheld for non-compliance of the provisions prescribed under Section 63(c) of the Indian Succession Act, 1925 read with Section 68 of the Evidence Act, 1872. However, as observed hereinabove, the alleged Will (Ex.P-1) was not only read over and explained to the said testatrix but she had also put her thumb impression on it upon her due satisfaction in presence of the attesting witness Ashok Yadav (PW-4). The reliance of both these decisions of Mr. Koshta would, therefore, be of no use.

16. Consequently, the trial Court has not committed any illegality in upholding the due execution, attestation and validity of the

alleged registered deed of Will dated 15.04.1991 (Ex.P-1) and I do not find any infirmity in the same as well.

17. In view of above, the appeal being devoid of merit is accordingly dismissed. No order as to costs.
18. A decree be drawn accordingly.

Sd/-
(Sanjay S. Agrawal)
Judge

Deepti Jha