

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

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Reserved on : 6th November, 2019

Decided on : 18th February, 2020

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CS(OS) 46/2017

DR.SURAJ PRAKASH SETH & ORS. Plaintiffs

Represented by: Mr. R.K. Dhawan and Mr.Uday
Seth, Advocates with plaintiff No.1
in person.

versus

DR. ASHOK KUMAR SETH & ORS. Defendants

Represented by: None

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By the present suit, the plaintiffs seeks following reliefs:

a. Pass decree of declaration in respect of suit properties bearing:(i) House no. K-44B, Kalkaji, New Delhi-110019, wherein Plaintiff No. 3 and 4 are entitled to 1/4th share each and Plaintiff Nos. 1 and 2 are entitled to 1/20th share each; (ii) plot bearing no. 95, Block Alistonia, Sector Chi-03, Greater Noida Industrial Development Area, District Gautam Budh Nagar, Uttar Pradesh wherein Plaintiff No. 3 and 4 and Defendant No. 2 are entitled to 1/3rd share each.

b. Pass a preliminary decree of partition following final decree of partition by metes and bounds in respect of suit properties:(i) House no. K-44B, Kalkaji, New Delhi-110019, wherein Plaintiff No. 3 and 4 are entitled to 1/4th share each and Plaintiff Nos. 1 and 2 are entitled to 1/20th share each; (ii) plot bearing no. 95, Block Alistonia, Sector Chi-03, Greater Noida Industrial Development Area, District Gautam Budh Nagar, Uttar Pradesh wherein Plaintiff No. 3 and 4 and Defendant No. 2 are entitled to 1/3rd share each.

c. In the event that it is found that the suit properties are not partitionable by any metes and bounds, this Hon'ble Court may direct other modes of partition including sale of the suit properties and apportioning the sale proceeds as per the shares of the co-sharers.

d. Pass a Decree of Permanent injunction in favour of Plaintiffs and against the Defendant nos. 1 and 2, restraining them and their agents/assignees/representatives/nominees, etc. to interfere in any manner in the peaceful possession of the suit properties which rightfully belong to the plaintiffs according to the law.

e. Grant the costs of present Litigation.

2. It is the case of the plaintiffs, that Plaintiff No. 1, Plaintiff No. 2 and Defendant No. 1 are sons of Lt. Shri Piara Lal while Plaintiff No. 3, Plaintiff No.4 and Defendant No.2 are their wives respectively. Defendant No.4 is daughter and Defendant No. 3 the widow of Lt. Shri Piara Lal Seth.

3. Plaintiff No.3, plaintiff No. 4 and defendant No. 2 along with Lt. Shri Piara Lal Seth were the joint owners of the suit property being House No. K-44B, Kalkaji, New Delhi-110019 (in short 'Kalkaji property'), vide sale deed registered on 5th May 2003 at office of Sub-Registrar -V, Mehrauli, Delhi.

4. Lt. Shri Piara Lal Seth expired intestate on 8th April 2008. The suit property situated at Kalkaji devolved upon his legal heirs. Defendant No. 1 and Defendant No. 2 are in actual possession of the ground floor of the suit property whereas the Plaintiffs are in constructive possession through their tenants in the remaining portion.

5. In the year 2003, when the Kalkaji property was purchased it was only a single storey construction. It was mutually agreed between the parties that a new

construction would be carried out by demolishing the old construction. Defendant No. 1 and defendant No. 2 expressed their inability to contribute funds to carry out construction or assist in any manner to raise loan. Thus, as per the understanding arrived between the parties, it was agreed that plaintiff No. 3 would apply for a housing loan and that the accounts would be reconciled from time to time to determine respective liabilities of the parties.

6. Plaintiff No.3 applied for a housing loan from Punjab National Bank in the year 2004, which was sanctioned and a sum of ₹20,00,000/- was availed by way of creating equitable mortgage of suit property. The House Building Loan amount was returned in installments of ₹5,00,000/- on 5th November 2004, ₹7,00,000/- on 17th November 2004, ₹2,00,000/- on 29th November 2004, ₹1,00,000/- on 14th January 2005 and ₹5,00,000/- on 27th January 2005. Thus the entire cost of construction was borne by Plaintiff No. 3.

7. During the same time, a scheme for allotment of residential plots was floated by Greater Noida Industrial Development Authority. While applying for a plot neither the Defendant Nos. 1 and 2 nor the plaintiffs individually had any means to purchase the plot in the said scheme. Therefore, after mutual consultation amongst the parties it was orally agreed that defendant No.2 would apply for the allotment of 500 square meters plot in the said scheme and in the event of its allotment the entire cost of acquisition and construction shall be equally shared by the plaintiffs and defendant Nos.1 and 2 with consequential benefits of equal share in ownership, usage and all other rights.

8. The plot situated at Greater Noida (in short 'the Greater Noida property') was allotted to defendant No.2 in April 2004 by the appropriate authority. As per the mutual understanding between the parties the entire amount for purchase of

Greater Noida plot was paid by plaintiffs and defendant Nos.1 and 2 from the year 2004 to 2009.

9. It was further averred in the plaint that two accounts bearing savings account no. 3087000100251195 and loan A/c No. 308700NC00401558 (PNB95 & PNB58) were opened at Punjab National Bank and were maintained by Plaintiff No.3 for construction of the property situated at Kalkaji. It was further agreed that after the release and credit of House Building loan instalments by the Punjab National Bank in the account PNB95, the credited amount shall be transferred to HDFC Bank, Anand Niketan savings account of Plaintiff No.3 bearing A/c No. 03362560000065(HDFC 65). All the expenditure for construction of property at Kalkaji was incurred from those accounts.

10. Plaintiff No.3 also agreed to use her current account at HDFC Bank (Patna) bearing account No. 2352560000277(HDFC 77) in connection with construction of suit property and also to pay for instalments of plot in Greater Noida. In order to ensure adequacy of availability of funds and to meet requirement of payment of Greater Noida property, all the parties after mutual consultation agreed that, plaintiff No.3 would avail an overdraft from HDFC Bank and same was obtained by hypothecating her Hyundai car.

11. It was mutually agreed between the parties that the accounts HDFC65 and HDFC77 would be used for credit of rental payments with respect to portion of suit property situated at Kalkaji let out to facilitate account maintenance. It was also agreed that after completion of construction of the suit property all the rental proceeds from first and second floor shall be credited into HDFC65/HDFC77 that is account of plaintiff No.3 and the rental from top floor and the basement shall be credited to the account of Late Shri Piara Lal Seth and defendant No.2. It was further agreed that the deceased will not be requested to make any

contribution towards construction of the suit property but he would be given 1/4th share in the property, and further he would be given ground floor during his lifetime or lifetime of Defendant No.3, whichever is later. It was also agreed that rest of the built-up property would be let out to pay for EMI of loan taken by Plaintiff No.3.

12. In the year 2010, the loan amount stood discharged. The contribution of the Defendant No.3 was around ₹ 5,00,000. The plaintiffs and defendants made their contribution for Greater Noida plot in following manner:

Date	Amount (₹)	Purpose	Payer
February 2004	₹1,54,200	Registration	Defendant no.1 & no.2
19/07/2004	₹3,30,600	Allotment Money	Defendant Nos.1&2 = ₹1,00,000 Plaintiff No.3 = ₹1,00,000 Plaintiff No.4= ₹1,30,600
14/10/2004	₹1,51,284	-	By Manager's cheque (MC) No.000043 Dated 13/10/2004, Drawn on A/C No. HDFC77
28/01/2005	₹1,51,284	-	Bank Draft no. 040272 dated 24.01.2005; UTI Hauz Khas, New Delhi
February 2005	₹820 (Cash)	-	Plaintiff No.2
08/04/2005	₹ 1,51,284	-	MC No. 000407 dated 08/04/2005; A/C No.HDFC65
10/10/2005	₹ 1,51,284	-	MC No. 000737 dated 08/10/2005; A/C No.HDFC65
09/01/2006	₹ 1,51,284	-	MC No. 000900 dated 08/01/2006; A/C

			No.HDFC65
08/04/2006	₹ 1,51,284	-	MC No Ref No. 336120000117244 dated 07/04/2006; A/C No.HDFC65
07/07/2006	₹ 1,51,284	-	MC No. 001287 dated 07/07/2006; A/C No.HDFC65 Anand Niketan, New Delhi
31/05/2007	₹ 2,11,225 (Cash)	-	Rs.1,85,000 withdrawn as cash from HDFC65 on 31/05/2007; Balance also paid by Plaintiffs

13. For construction upon the plot situated at Greater Noida, the defendant No. 2 entered into a agreement dated 20th October 2008 with Shiv Shakti Buildcon and the amounts were paid from HDFC 51 and HDFC 65 account in following manner:

Date	Amount (Rs.)	Purpose	Account Paid from
08/10/2008	₹ 50,000	Construction Cost	HDFC 51
04/11/2008	₹ 2,00,000	Construction Cost	HDFC 51
11/11/2008	₹ 1,00,000	Construction Cost	HDFC 51
11/11/2008	₹ 50,000	Construction Cost	HDFC 51
04/03/2009	₹ 2,00,000	Construction Cost	HDFC 65

14. In the year 2005, defendant Nos.1 and 2 acting in contravention with family agreement took the actual physical possession of the ground floor of the suit property and confined Late Shri Piara Lal Seth to a small room on the same floor. Defendant Nos. 1 and 2 are in actual physical possession of ground floor of suit property till date.

15. After the demise of Late Shri Piara Lal Seth, Defendant No.3 on advice of Plaintiffs shifted to live with them alternatively whereas Defendant No.1 and 2

were woefully unable to keep her for even a short period of time. Plaintiff No.2 and 4 approached Defendant No.1 and 2 in the year 2014 with a request to sell off the plot situated at Greater Noida to arrange funds for marriage of their only son. Defendant No.1 and 2 neglected and opposed this request. Thereafter plaintiff again approached Defendant No.1 and 2 with intention to enter into written registered agreement to the effect that the parties shall be entitled to 1/3rd share in plot situated at Greater Noida and for partitioning of the property at Kalkaji. However, defendant No.1 and 2 were reluctant to enter into such an agreement. On 23rd March 2015, defendant No.1 sent a copy of Income Tax Return via email, that was intended to be filed for defendant No.2 for AY 2014-2015 whereby defendant No.2 was claiming 1/3rd share from the rent with respect to suit property situated in Kalkaji. Defendant No.1 and 2 were occupying ground floor of the said property and they were not entitled to any rental share. Resultantly, plaintiffs harbored an apprehension that the defendants would disrupt their peaceful constructive possession with intention to deprive them of their share in the suit property.

16. In order to protect their interest in the Greater Noida property, the Plaintiffs got a caution notice published in Statesman/Sikh Times (both Delhi/NCR editions) dated 9th September 2015/28th August respectively and locally published Dainik Varataman Saptah dated 28th August 2015 whereby it was noted that no person should engage in any kind of transaction with respect to Greater Noida plot without obtaining NOC from the plaintiffs.

17. Around January 2014, the defendants Nos.1 and 2 refused to share the keys to the entrance of ground floor thus breaching their agreement with Defendant No.3. Furthermore defendant No.1 has raised apprehensions in the minds of the Plaintiffs that defendants Nos.1 and 2 are colluding to, with the

assistance of the Police as claimed by defendant No.1, to dispossess the plaintiffs from their rightful possession.

18. Plaintiffs in order to resolve the matter amicably issued a legal notice dated 16th September 2015 to defendants Nos.1 and 2 which was returned.

19. Summons in the suit were issued to the defendants vide order dated 02nd February, 2017. None appeared on behalf of defendants nor did they file any written statement. Thus, they were proceeded ex-parte vide order dated 13th December, 2017.

20. Evidence by way of affidavit of Suraj Prakash Seth (PW-1) was tendered vide Ex. PW-1/X. The contents of the plaint were reiterated in the aforesaid affidavit. The site plan of suit property situated at Kalkaji and Greater Noida were proved as Ex.PW-1/1 and Ex.PW-1/2 respectively. Certified copy of the Sale Deed of Kalkaji property was proved as Ex.PW-1/3. The Allotment-cum-Allocation letter dated 4th June, 2004 in the name of defendant No.2 was marked as Mark A. The possession certificate dated 16th August 2007 issued by Greater Noida Industrial Development Authority was marked as Mark B. Death certificate of Late Shri Piara Lal Seth was proved as Ex.PW-1/4. Copy of the legal notice dated 16th September 2015 to defendant Nos.1 and 2 along with returned envelope were proved as Ex.PW-1/6 (colly). Caution notices dated 9th September 2015 and 28th August were proved as Ex.PW-1/5 (colly). The agreement dated 2nd October 2008 by defendant No.2 with Shiv Shakti Buildcon was proved as Ex.PW-1/7.

21. Evidence by way of affidavit of Mr.Harsh Kumar Seth was tendered vide Ex. PW-2/X. The contents of the plaint were reiterated in the aforesaid affidavit. He further tendered his subsequent affidavit vide Ex.PW-2/XA. Certified copy of lease deed (residential) dated 31st May, 2007 bearing registration number 2343 in

Book Number 1 Serial No. 9752 from Page 117 top 192 was exhibited as Ex.PW-2/1.

22. Mrs. Neeraj tendered her evidence by way of an affidavit vide Ex. PW-3/X. Contents of the plaint were reiterated in the affidavit. The letter issued by Punjab National bank dated 14th September, 2007 and certificate dated 7th September, 2008 along with copy of statement of ledger account depicting house loan of ₹20,00,000/- availed by PW-3 were proved as Ex. PW-3/1(colly). The challan copies issued by the Greater Noida Industrial Development Authority from 17th July 2004 to 31st May 2007 showing payments made directly to the authority were proved as Ex. PW-3/2. The statement of account no. 03362560000065 from 21st October 2004 to 31st March 2009 and account number 03368490000051 from 10th January 2008 to 31st December 2008 showing payments made by Plaintiff No.3 to Greater Noida Industrial Development Authority and Shiv Shakti Buildcon for construction of plot situated at Greater Noida were proved as Ex.PW-3/3(colly). The letter dated 27th February 2009 evidencing final payment received by Greater Noida Industrial Development Authority was proved as Ex.PW-3/4. The certificates issued by HDFC dated 11th June 2016 and Union Bank of India dated 2nd February, 2016 further certifying the relevant entries establishing payments made by plaintiff with respect to Greater Noida plot were proved as Ex.PW-3/5. Copy of email dated 23rd March 2015 addressed to plaintiff No.3 by defendant No.1 were proved as Ex. PW-3/6 (colly).

23. Evidence by way of an affidavit was tendered by Mrs. Sarita Seth vide Ex. PW-4/X. She deposed in sync with the evidence of PW-1.

24. Mrs. Neerja Seth, tendered her supplementary evidence by way of an affidavit in compliance to the order dated 27th August 2019 to prove reconciliation of the accounts. She deposed in her affidavit that the entire cost

incurred in allotment and construction of Greater Noida plot was ₹23,55,893/- and that defendant Nos.3 and 4 have nothing to claim in said property. It was agreed between the parties that the plaintiff Nos.1 and 3, plaintiff Nos.2 and 4 and defendant Nos.1 and 2 were required to contribute 1/3rd amount, that is ₹7,85,298/-. The total rent received from the first and second floor of the Kalkaji Property was computed to be around ₹13,34,840/- which was to be divided into three equal shares, that is ₹4,44,946/-.

	Contribution directly made to Greater Noida Industrial Development Authority	Remaining amount to be paid to Mrs. Neeraj Seth for reconciliation of accounts.	Amount payable after adjusting rental proceeds of Rs. 4,44,946 each from Kalkaji property	Payment Status
Plaintiff Nos .2 and 4	₹ 3,08,989	₹ 4,76,309	₹ 31,363	Paid
Defendant Nos .1 and 2	₹ 2,54,200	₹ 5,31,098	₹ 86,152	Paid

25. As noted above, the plaintiffs in the present suit seek a decree of declaration of the respective shares in the two suit properties, that is, Kalkaji property and plot bearing No.95, Block Alistonia, Sector Chi-03, Greater Noida Industrial Development Area, District Gautam Budh Nagar, Uttar Pradesh i.e. Greater Noida property. In respect of Kalkaji property the plaintiff Nos.3, 4, defendant No.2 along with late Piara Lal Seth were the joint owners, there was no contribution to the construction of the upper floors of the property by defendant No.1 or defendant No.2 but the housing loan taken thereon was for construction of the property which was repaid from the rents so received pursuant to

construction. Thus the plaintiff Nos.3 and 4, defendant No.2 and late Shri Piara Lal Seth being the joint owners would be entitled to 1/4th share each in the Kalkaji property. On the demise of late Piara Lal Seth, who died intestate, leaving behind five legal heirs, that is, plaintiff Nos.1 and 2, defendant No.1, being his sons, defendant No.3 being his widow and defendant No.4 being his daughter, the five legal heirs would be each entitled to 1/20th share each in the Kalkaji property.

26. Consequently, a decree of declaration and partition is passed declaring that the plaintiff Nos.3 and 4 and defendant No.2 were owners of 1/4th share each of the Kalkaji property whereas plaintiff Nos.1 and 2 and defendant Nos.1, 3 and 4 are owners of 1/20th share each in Kalkaji property.

27. Supreme Court in the decision reported as Mangathai Ammal (died) through LRs. & Ors. vs. Rajeswari & Ors., 2019 (7) Scale 811 laid down the six tests for determining whether a particular sale was benami or not as under:

8. While considering the issue involved in the present appeal viz. whether the transactions/Sale Deeds in favour of defendant no. 1 can be said to be benami transactions or not, the law on the benami transactions is required to be considered and few decisions of this Court on the aforesaid are required to be referred to.

8.1. In the case of Jaydayal Poddar (Supra) it is specifically observed and held by this Court that the burden of proving that a particular sale is benami and the apparent purchaser is not the real owner, always rests on the person asserting it to be sold. It is further observed that this burden has to be strictly discharged by adducing legal evidence of a definite character which would either directly prove the fact of the benami transaction or establish circumstances unerringly and reasonably raising an inference of that fact. In paragraph 6 of the aforesaid decision, this Court has observed and held as under:

“6. “It is well-settled that the burden of proving that a particular sale is benami and the apparent purchaser is not the real owner, always rests on the person asserting it to be so. This burden has to be strictly discharged by adducing legal evidence of a definite character which would either directly prove the fact of benami or establish circumstances unerringly and reasonably raising an inference of that fact. The essence of a benami is the intention of the party or parties concerned; and not unoften, such intention is shrouded in a thick veil which cannot be easily pierced through. But such difficulties do not relieve the person asserting the transaction to be benami of any part of the serious onus that rests on him; nor justify the acceptance of mere conjectures or surmises, as a substitute for proof. The reason is that a deed is a solemn document prepared and executed after considerable deliberation, and the person expressly shown as the purchaser or transferee in the deed, starts with the initial presumption in his favour that the apparent state of affairs is the real state of affairs. Though the question whether a particular sale is benami or not, is largely one of fact, and for determining this question, no absolute formulae or acid tests, uniformly applicable in all situations, can be laid down; yet in weighing the probabilities and for gathering the relevant indicia, the courts are usually guided by these 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 and (6) the conduct of the parties concerned in dealing with the property after the sale.

In the case of Thakur Bhim Singh (Supra) this Court in paragraph 18 observed and held as under:

“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.”

8.2. *In the case of P. Leelavathi (Supra) this Court held as under:*

“9.2 In Binapani Paul case (Supra), this Court again had an occasion to consider the nature of benami transactions. After considering a catena of decisions of this Court on the point, this Court in that judgment observed and held that the source of money had never been the sole consideration. It is merely one of the relevant considerations but not determinative in character. This Court ultimately concluded after considering its earlier judgment in the case of Valliammal v. Subramaniam (2004)7SCC 233 that while considering whether a particular transaction is benami in nature, the following six circumstances can be taken as a guide:

“(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; and

(6) the conduct of the parties concerned in dealing with the property after the sale. (Jaydayal Poddar v. Bibi Hazra (supra), SCC p. 7, para6)”

8.3. After considering the aforesaid decision in the recent decision of this Court in the case of P. Leelavathi (Supra), this Court has again reiterated that to hold that a particular transaction is benami in nature the aforesaid six circumstances can be taken as a guide.

8.4. Applying law laid down by this Court in the aforesaid decisions to the facts of the case on hand and the reasoning given by the Trial Court confirmed by the High Court, it appears that both, the learned Trial Court and the High Court have erred in shifting the burden on the defendants to prove that the sale transactions were not benami transactions. As held hereinabove in fact when the plaintiffs' claim, though not specifically pleaded in the plaint, that the Sale Deeds in respect of suit properties, which are in the name of defendant no. 1, were benami transactions, the plaintiffs have failed to prove, by adducing cogent evidence, the intention of the Narayanasamy Mudaliar to purchase the suit properties in the name of defendant no. 1 - his wife.

28. The Greater Noida property was applied for and purchased in the name of defendant No.2 however, the plaintiffs have succeeded in proving the requirements to show that source of purchase money, the nature and possession of the property, the motive with which it was purchased, custody of the title deeds, conduct of the parties showed that the same was a joint property of plaintiff Nos.1, 2, 3 and 4 and defendant Nos.1 and 2. Consequently, a decree of declaration and partition is passed declaring that each of the plaintiffs and defendant Nos.1 and 2 are owners of 1/6th share each in the suit property at Greater Noida.

29. Suit is decreed accordingly.

30. No order as to costs.

(MUKTA GUPTA)
JUDGE

FEBRUARY 18, 2020

‘sk’/‘vn’