

HIGH COURT OF CHHATTISGARH AT BILASPUR**Second Appeal No. 465 of 2012****Judgment reserved on 02/02/2021****Judgment delivered on 18/02/2021**

Smt. Devanti @ Jamwanti Dubey Wd/o Late Balram Dubey, Aged about 55 years, R/o B-12, Adarsh Nagar, Ward No. 41, Durg, P.S. and P.O. Kasaridih, Tahsil and Distt. Durg, Chhattisgarh.

---Appellant/Plaintiff**Versus**

1. Goutam @ Ganesh Datt Dubey S/o Late Shri Balram Dubey, Aged about 35 years, R/o B-12, Adarsh Nagar, Ward No. 41, Durg, P.S. & P.O. Kasaridih, Tahsil and District Durg, Chhattisgarh.
2. Chairman, Grih Nirman Sahkari Samiti, Durg, Potiyakala Adarsh Nagar, Ward No. 41, Durg P.O. & P.S. Kasaridih, Tahsil and Distt. Durg, Chhattisgarh.
3. State of Chhattisgarh, Through Collector, Durg, P.S. and P.O. Tahsil and Distt. Durg, Chhattisgarh.

--- Respondents/Defendants

For Appellant :- Mr. H.B. Agrawal, Senior Advocate
with Ms. Deepti Yadav, Advocate

For Respondent No. 1 :- Mr. Siddharth Rathore, Advocate

For Respondent No. 2 :- None

For State :- Mr. Ravi Bhagat, Dy. G.A.

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Judgment

1. This second appeal preferred by the appellant/plaintiff was admitted for hearing on 25/09/2013 by formulating the following three substantial questions of law :-

"1. Whether in the absence of any challenge to the registered Will Deed dated 12.9.01, within three years as per Section 19 of Contract Act, the same having become final, could it now be challenged. Whether the finding of the Lower Appellate Court is perverse on this ground ?

2. Whether the property purchased by deceased Balram Dubey is from his professional income. Therefore can anybody question the disposal of the said property by will ?

3. Whether the finding of the Lower Appellate Court reversing the judgment and decree of the trial Court is perverse ?"

[The parties will hereinafter be referred to as per their status given and ranking shown in the plaint before the trial Court.]

2. The sole plaintiff/appellant herein filed a suit for declaration of title and permanent injunction stating inter alia that though the suit property was purchased by her husband Balram Dubey from defendant No. 2 Society by registered sale deed dated (Ex. P/1) in the name

of his son born out of his wedlock with his first wife Foolbadan i.e. defendant No. 1 herein during his minority, but it was the property of her husband namely Balram Dubey who has executed a Will deed dated 12/09/2001 (Ex. P/4) in her favour in the presence of two witnesses, therefore, decree be granted in her favour as she has become the title-holder of the said suit property on the basis of the Will (Ex. P/4) executed by her husband Balram Dubey in her favour and appropriate direction be given to defendant No. 2 Society for registering her name as the title-holder of the suit property.

3. Resisting the suit, defendant No. 1 filed his written statement stating inter alia that his mother Foolbadan was the legally wedded wife of his father Balram Dubey, whereas plaintiff is not the legally wedded wife of his father Balram Dubey and since the suit property was the self-acquired property of his father, defendant No. 1 has inherited the suit property being his father's property in which plaintiff has no right or title and as such, suit deserves to be dismissed.

4. The trial Court, upon appreciation of oral and documentary evidence on record, decreed the suit vide judgment and decree dated 23/04/2011, holding that the suit property was the self-acquired property of Balram Dubey and he has executed a Will deed dated 12/09/2001 (Ex. P/4) in favour of the plaintiff and by which the plaintiff has become the title holder of suit property.
5. On appeal being preferred, learned first appellate Court reversed the judgment and decree of the trial Court by relying upon Section 4(1) of the Benami Transactions (Prohibition) Act, 1988 (in short, the Act of 1988) holding that plea of benami could not have been permitted to be raised by the plaintiff in view of bar contained in Section 4(1) of the Act of 1988 and allowed the appeal, and consequently dismissed the suit vide impugned judgment and decree dated 25/08/2012, against which this second appeal has been preferred by the appellant/plaintiff under Section 100 of CPC in which three substantial questions of law have been framed and set out in the opening paragraph of the judgment.

6. Mr. H.B. Agrawal, learned senior counsel appearing for the appellant/plaintiff, would submit that once the Will has been proved in accordance with Section 63(c) of the Indian Succession Act, 1925 read with Section 68 of the Indian Evidence Act, 1872, then it has become final and the suit property being the self-acquired property of Balram Dubey, learned first appellate Court could not have reversed the judgment and decree of the trial Court relying upon alleged bar contained in Section 4(1) of the Act of 1988, as such, the impugned judgment and decree passed by the first appellate Court deserves to be set aside. He would also submit that the judgment of the first appellate Court is very cryptic and in four paragraphs without following the principles of law laid down for reversal of judgment by Supreme Court in the matter of Santosh Hazari v. Purushottam Tiwari¹, the first appellate Court reversed the decree of the trial Court, as such, it deserves to be set aside.

7. Mr. Siddharth Rathore, learned counsel for respondent/defendant No. 1, would submit that

¹ (2001) 3 SCC 179

after coming into force of the Act of 1988 w.e.f. 19/05/1988, the plea of benami cannot be permitted to be raised, therefore, learned trial Court could not have held that though the suit property has allegedly been purchased by his father Balram Dubey in his name during his minority, yet it is property owned by Balram Dubey and he has bequeathed the said suit property in favour of the plaintiff by way of Will (Ex. P/4) as such a plea is hit by bar contained in Section 4(1) of the Act of 1988 which has rightly been noticed by the first appellate Court and plaintiff's suit has rightly been dismissed by granting the appeal, as such, no exception can be taken to the findings recorded by learned first appellate Court holding that the suit is barred by Section 4(1) of the Act of 1988, as such, the instant appeal deserves to be dismissed.

8. None for respondent No. 2, though served. However, respondent No. 3/State is a formal party.
9. I have heard learned counsel for the parties, considered their rival submissions made herein

and went through the records with utmost circumspection.

10. A careful perusal of Exhibit P/1 sale deed would show that the suit property has been purchased in the name of Goutam @ Ganesh Datt Dubey/defendant No.1 by his father namely Balram Dubey on 31/05/1979, thereafter, the legally wedded wife of Balram Dubey and the mother of defendant No. 1 namely Foolbadan died in the year 1984 and it is also the finding recorded by the trial Court that plaintiff has never entered into any marriage with Balram Dubey after the death of his first wife Foolbadan. Balram Dubey died on 03/07/1983 and thereafter, dispute arose qua the suit property left by Balram Dubey. The plaintiff filed the suit on 06/02/2004 claiming declaration of title and permanent injunction over the suit property on the strength of the Will deed dated 12/09/2001 (Ex. P/4). Learned trial Court decreed the suit of the plaintiff, but the first appellate Court reversed the decree of the trial Court based on Section 4(1) of the Act of 1988.

11. At this stage, it would be appropriate to notice Section 4(1) of the Act of 1988 which came into force w.e.f. 19/05/1988 and states 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."

12. A careful perusal of Section 4(1) of the Act of 1988 would show that in the opening word there is a clear legislative intention that no such claim, suit or action to enforce any right in respect of any property held *benami* would be maintainable. So what has been barred is bringing and institution of suit to make a claim and not that a particular transaction is *benami* or not, meaning thereby, if a suit is instituted after coming into force of the Act of 1988 claiming any right, title or interest on the basis of any *benami* transaction whether it has been entered into prior to coming into force of the Act of 1988 or after coming into force of the Act of 1988, such suit would be barred by virtue of the provisions contained in Section 4(1) of the Act of 1988.

13. The question is whether the purchase of suit house by Balram Dubey in the name of his son defendant No. 1 can be said to be benami, barring the plea in the suit under Section 4(1) of the Act of 1988 ?

14. The legal character and incidents of benami and two classes of benami was laid down by the Supreme Court in the matter of Sree Meenakshi Mills Ltd. Madurai v. Commissioner of Income-tax, Madras². It was held as under :-

"30.... In this connection, it is necessary to note that the word 'benami' is used to denote two classes of transactions which differ from each other in their legal character and incidents. In one sense, it signifies a transaction which is real, as for example, when A sells properties to B but the sale deed mentions X as the purchaser. Here the sale itself is genuine, but the real purchaser is B, X being his benamidar. This is the class of transactions which is usually termed as benami. But the word 'benami' is also occasionally used, perhaps not quite accurately, to refer to a sham transaction, as for example, when A purports to sell his property to B without intending that his title should cease or pass to B. The fundamental difference between these two classes of transactions is that whereas in the former there is an operative transfer resulting in the vesting of title in the transferee, in the latter there is none such, the transferor continuing to retain the title notwithstanding the execution of the transfer deed. It is only the former class of cases that it would be

necessary, when a dispute arises as to whether the person named in the deed is the real transferee or B, to enquire into the question as to who paid the consideration for the transfer, X or B. But in the latter class of cases, when the question is whether the transfer is genuine or sham, the point for decision would be, not who paid the consideration but whether any consideration was paid."

15. Similarly, the Supreme Court again in the matter of Bhim Singh (dead) by LRs. v. Kan Singh³

identified and indicated the two kinds of benami transactions in India by holding as under :-

"14.... Two kinds of benami transactions are generally recognized in India. Where a person buys a property with his own money but in the name of another person without any intention to benefit such other person, the transaction is called benami. In that case, the transferee holds the property for the benefit of the person who has contributed the purchase money, and he is the real owner. The second case which is loosely termed as a benami transaction is a case where a person who is the owner of the property executes a conveyance in favour of another without the intention of transferring the title to the property thereunder. In this case, the transferor continues to be the real owner. The difference between the two kinds of benami transactions referred to above lies in the fact that whereas in the former case there is an operative transfer from the transferor to the transferee though the transferee holds the property for the benefit of the person who has contributed the purchase money, in the latter case, there is no operative transfer at all and the title rests with the transferor notwithstanding

the execution of the conveyance. One common feature, however, in both these cases is that the real title is divorced from the ostensible title and they are vested in different persons. The question whether a transaction is a benami transaction or not mainly depends upon the intention of the person who has contributed the purchase money in the former case and upon the intention of the person who has executed the conveyance in the latter case. The principle underlying the former case is also statutorily recognized in Section 82 of the Indian Trusts Act 1882, which provides that where property is transferred to one person for a consideration paid or provided by another person and it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration."

16. The principle of law laid down in Bhim Singh (supra) was also followed by this Court in the matter of Omprakash Dubey v. Kapuri Bai & Ors.⁴.

17. The question as to whether bar would be applicable in suits which are filed after coming into force of the Act of 1988 has been considered by the Supreme Court in the matter of Duvuru Jaya Mohana Reddy and another v. Alluru Nagi Reddy and others⁵ and it has been held that Section 4(1) of the Act of 1988 would apply to proceedings pending on the date of the

⁴ (2012) 1 CGBLCJ (HC) 136
⁵ AIR 1994 SC 1647

commencement of the Act and the provisions were held applicable to an appeal that was pending. Similar is the proposition laid down by the Supreme Court in the matter of **Prabodh Chandra Ghosh v. Urmila Dassi**⁶. Thereafter, in the matter of **G. Mahalingappa v. G.M. Savitha**⁷, the Supreme Court has again considered nature and applicability of Section 4(1) of the Act of 1988 and held that the Act of 1988 is prospective except to a certain extent.

18. In the matter of **R. Rajagopal Reddy (Dead) by LRs and others v. Padmini Chandrasekharan (Dead) by LRs**⁸ the Supreme Court in paragraph 11 of its judgment has clearly held that 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) of the Act of 1988.

The Supreme Court further held as follows: -

"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)."

6AIR 2000 SC 2534

7(2005) 6 SCC 441

8(1995) 2 SCC 630

The Supreme Court in the same paragraph observed as under: -

"With respect, the view taken that Section 4(1) would apply even to such pending suits which were already filed and entertained prior to the date when the section came into force and which has the effect of destroying the then existing right of plaintiff in connection with the suit property cannot be sustained in the face of the clear language of Section 4(1). It has to be visualised that the legislature in its wisdom has not expressly made Section 4 retrospective. Then to imply by necessary implication that Section 4 would have retrospective effect and would cover pending litigations filed prior to coming into force of the section would amount to taking a view which would run counter to the legislative scheme and intent projected by various provisions of the Act to which we have referred earlier. 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."

(emphasis supplied)

19. Thereafter, in G. Mahalingappa (supra), R.

Rajagopal Reddy's case (supra) was followed with approval.

20. Reverting to the facts of the present case in light of aforesaid legal position, it is quite vivid that plaintiff claimed that Balram Dubey

purchased the suit house in the name of his son i.e. defendant No. 1, but he (Balram Dubey) paid the purchase money and therefore, he was the owner and title-holder of the suit property and has rightly executed Will dated 12/09/2001 (Ex. P/4) in favour of the plaintiff, which was accepted by learned trial Court, but reversed by the first appellate Court. Going by the principle of law laid down by the Supreme Court in Bhim Singh (supra), the suit property purchased by Balram Dubey in the name of his son defendant No. 1 was benami property and defendant No. 1 was only benamidar, as such, after coming into force of the Act of 1988, plaintiff is not entitled to claim that the suit property was of Balram Dubey (father of defendant No. 1) and defendant No. 1 is only benamidar, as such, the plea is fully barred by Section 4(1) of the Act of 1988 and as such, the plaintiff cannot claim the suit property on the strength of Will executed by Balram Dubey as the said Will dated 12/9/2001 (Ex-P/4) will not confer any title to her and she will not be entitled to decree for declaration of title based on Will. Consequently, the judgment and

decree passed by the first appellate Court warrants no interference in appellate jurisdiction under Section 100 of the CPC.

21. The instant second appeal deserves to be and is accordingly dismissed. No cost(s).

22. Decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge

Harneet