

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.196 OF 2017
WITH CA/8155/2021 IN SA/SA/196/2017
WITH CA/3345/2017 IN SA/196/2017

RAMDAS S/O SHRIPAT CHAUDHARY
VERSUS
SUNIL RAGHUNATH CHAUDHARY (DECEASED) THR. LRS. SMT.
KALPANA SUNIL CHAUDHARY AND OTHERS

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Mr. P. V. Mandlik, Senior Counsel i/b Mr. K. C. Sant, Advocate for
appellant.

Mr. M. S. Kulkarni, Advocate for respondent Nos.1 to 3.

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CORAM : SMT. VIBHA KANKANWADI, J.

Reserved on : 21.09.2021

Pronounced on : 07.12.2021

ORDER :-

1. Present appeal has been filed by the original defendant challenging the concurrent judgment and decree passed by the Courts below.

2. Present respondent No.1 was the original plaintiff, who had filed Special Civil Suit No.46 of 2011 before the learned IInd Joint Civil Judge Senior Division, Dhule for partition, possession and perpetual injunction. The said suit came to be decreed on 13.12.2012. The said decree was challenged by original defendant by filing Civil Appeal No.9 of 2013. The said appeal was dismissed by learned Adhoc District Judge-1, Dhule

on 02.02.2017. Hence, this second appeal. Both the civil applications have been filed for stay to the impugned decrees. In fact, when Civil Application No.3345 of 2017 was filed, it appears that the matter was not taken up for even circulation by the appellant, but then during the pendency of the appeal and the application, final decree proceedings were taken up before the Executing Court and, therefore, Civil Application No.8155 of 2021 has been filed.

3. Heard learned Senior Counsel Mr. P. V. Mandlik for the appellant and learned Advocate Mr. Mukul S. Kulkarni for respondent Nos.1 to 3.

4. The learned Senior Counsel appearing for the appellant – original defendant vehemently submitted that both the Courts below have not considered the evidence properly. The plaintiff had come with the case that the suit property was the ancestral property of the plaintiff and defendant. Plaintiff and defendant are nephew and uncle. Plaintiff's father and defendant were real brothers. They had no sister. Suit property was purchased in the name of grandmother of the plaintiff by grandfather, however, since plaintiff's father was serving in Police Department at different place and the parents of the plaintiff are no more; this situation was encashed by the defendant and in collusion with revenue authority, he got the heirship certificate contending that he is the sole heir of Kasturabai - grandmother. Defendant himself was

working in Collector office. With this story, the plaintiff had prayed for partition and separate possession. However, the defendant had come with the defence that he is the exclusive owner of the suit property. He denied that it was purchased by his father in the name of his mother. He contended that the income of his father was not so that he could purchase a property. In fact, defendant himself was serving in revenue department and was residing adjacent to the suit property in the rented premises. His father-in-law extended financial aid in the year 1982 to purchase the open space of the suit property and then defendant purchased the suit property from one Hanumantrao in the name of his mother, as she was elder in the family. His father had not given a single pai since he had died prior to the transaction itself. Thereafter, the defendant has made construction out of his own funds. Plaintiff cannot get any share in the suit property.

5. The learned Senior Counsel appearing for the appellant submitted that both the Courts have held that the suit property is ancestral property. The evidence adduced by the defendant has been unnecessarily discarded. Defendant had produced on record the application for loan, promissory note, receipt of loan, loan bond, consent of Kasturbai, etc. It has come on record that father of the appellant expired in the year 1967 and the property was, in fact, purchased in the year 1982. No

documentary evidence was produced by the plaintiff to show that Kasturabai was having sufficient funds to purchase the said property in the year 1982. Both the Courts have not considered that the defendant, who was already in revenue department, could have raised amount. So also, he has stated that he had borrowed some amount from his father-in-law in the year 1982. He had also raised loan from Credit Cooperative Society for construction of the plot. When it has not been proved by the plaintiff that Kasturabai had purchased the said property out of her own income, the evidence that has been led by the defendant ought to have been appreciated by both the Courts and, therefore, the substantial question of law is arising in this case, as to what was the nature of the property.

6. It will not be out of place to mention here that when specific query was made that as to what was the reason for the defendant to purchase the property in the name of mother and not in his own name and why it cannot be considered that the defence raised by the defendant that though the property stood in the name of mother, it was purchased out of his own income; should not be taken as barred under Section 4 of the Benami Transactions (Prohibition) Act, 1988. Thereupon, the learned Senior Counsel relied on the decision in ***Sri. Marcel Martins Vs. M. Printer & Ors., [AIR 2012 SC 1987]***, wherein it

has been held “when the relationship between the parties is fiduciary relationship, then such transaction is completely saved from the mischief of Section 4 of the Benami Transactions (Prohibition) Act, 1988 by reason of the same falling under Sub-section 3(b) of Section 4. Further, reliance has been placed on the decision in ***Sankara Hali and Sankara Institute of Philosophy and Culture Vs. Kishori Lal Goenka, [1996 (7) SCC 55]***, which was the three Judge Bench decision of the Hon’ble Supreme Court, wherein it has been held :-

“5. The Act prohibits entering into benami transactions and says that no person shall enter into any benami transaction and further provides that whoever enters into such a transaction, shall be punishable with imprisonment for a term which may extend to three years or with fine or with both. Section 4 bars a suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is so held or against any other person by or on behalf of a person claiming to be the real owner of such property. Similarly, 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. Section 5 deals with the question of property held benami being liable to acquisition and

Section 6 lays down that nothing in the Act shall affect the provisions of Section 53 of the Transfer of Property Act or any law relating to transactions for an illegal purpose. A reading of Section 4 of the Act shows that the real owner is precluded from claiming title to the property against the person holding the same benami either by way of assertion of defence. Under the Act any transaction entered into prior to the coming into force of the Act, between the ostensible owner and the real owner is not voided by any provision, whatsoever.”

7. Further, reliance has been placed on the decision in ***Nand Kishore Mehra Vs. Sushila Mehra, [AIR 1995 SC 2145]***, wherein it has been held that “Bar of plea of Benami is not applicable to purchase of property by a person in the name of his wife or unmarried daughter, provided it is proved that the property was not purchased for the benefit of his wife or unmarried daughter, because of statutory presumption contained in Sub-Section (I) of Section III that unless a contrary is proved that purchase of property by the person in the name of his wife or unmarried daughter was for benefit.” Further, reliance has been placed on the decision in ***R. Rajagopal Reddy (Dead) by LRs. and others Vs. Padmini Chandrasekharan (Dead) by LRs., [(1995) 2 SCC 630]***, wherein it has been held that “Section 4(1) of Benami Transactions (Prohibition) Act, 1988 is not retrospective in operation. It does not apply to pending suits already filed and entertained prior to coming into force of Section 4. It

provides only from the date of its coming into operation, no suit, claim or action preferred by the real owner, to enforce any right in respect of any property held benami would lie in any Court. Further, as regards the defendant it is held, even if suit, claim or action filed by ostensible owner on the basis of sale deed or title deed in his name prior to coming into force of Sub-section (2), defendant – real owner cannot be allowed to raise defence based on any right in respect of property held benami.”

8. Learned Advocate appearing for respondent Nos.1 to 3 submitted that both the Courts below have considered the entire evidence that was adduced before the Trial Court and have come to the conclusion that defendant had failed to prove that the amount of consideration was paid by the present appellant. The property was belonging to Kasturabai - grandmother of plaintiff and mother of defendant and, therefore, after her demise, both are entitled to inherit the same. He relied on the decision in *Mangathai Ammal (Died) Through LRs and others Vs. Rajeswari and others*, [2019 SCC Online SC 717], wherein it has been held, “while considering a particular transaction as benami, intention of the person who attributed the purchase money is determinative of the nature of transaction. Intention of the person, who contributed the purchase money, 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.”

9. At the outset, it is to be noted that as regards the point as to whether the transaction in question was a Benami and whether the defence of the defendant that in fact he is the exclusive owner and not his mother, though the property was standing in her name, could have been allowed to be raised in view of Section 4 of Benami Transactions (Prohibition) Act, 1988, was not considered by both the Courts below. But, definitely, that point which is the law point, which can be framed here, will have to be gone into because if the defendant could not have been allowed to raise that defence, then his entire defence fails. The transaction that is purchased was of the year 1982 i.e. prior to the coming into force of the Benami Transactions (Prohibition) Act, 1988, but the suit was filed on 08.03.2011. Under such circumstance, it will have to be decided whether on the date of the suit such defence can be allowed to be raised. As aforesaid, in ***R. Rajagopal Reddy (Supra)*** it has been held that it is not retrospective in operation, however, the point as to whether even if transaction had taken place earlier but that transaction is questioned or is in dispute after coming into force of the Act has been dealt with. Here, we are concerned with whether defendant can take such defence and to that extent, the observations in

paragraph No.13 would be required to be considered. However, since the categories have been made, we will have to consider its interpretation. Further, the real intention whether was brought on record is also a question. Another fact to be appreciated on the basis of the same is, if the property was in the name of mother, then whether defendant could have raised any loan from any institution/bank/Patsanstha is also required to be considered. On this point, in fact, the Courts below have considered that the said construction would have been made by the defendant as per his choice and will. It does not deprive the plaintiff of his right. The documents on record were considered by both the Courts below and it was observed that those documents appear to be fabricated. The defendant was the Secretary of the Patpedhi, from whom it was shown that he had raised loan. Therefore, as regards factual aspect is concerned, it is not giving any rise to a substantial question of law, however, the nature of the property and whether the defendant could have raised defence of exclusive ownership, though the property stood in the name of his mother, deserve to be resolved/adjudicated in this case. Hence, the second appeal stands **admitted**. Following are the substantial questions of law :-

- I) What was the nature of the suit property i.e. as to whether ancestral or of exclusive ownership of defendant No.1?

II) Whether the defendant could have been allowed to take defence that though the suit property was purchased in the name of his mother but he was in fact the real owner (Benami Transactions) in view of Bar under Section 4 of the Benami Transactions (Prohibition) Act, 1988?

10. Issue notice to the respondents. Mr. M. S. Kulkarni waives notice for respondent Nos.1 to 3.

11. In view of the point that is limited to be decided in this case, the appeal stands expedited.

12. Call record and proceedings. Printing of paperbook is dispensed with.

13. Liberty is granted to the respondents to file an application for early hearing of the second appeal.

14. Therefore, till the hearing and final disposal of the second appeal, there shall be stay in terms of prayer clause 'A' of Civil Application No.3345 of 2017 and prayer clause 'B' of Civil Application No.8155 of 2021. Accordingly, Civil Application Nos.3345 of 2017 and 8155 of 2021 stand disposed of.

[SMT. VIBHA KANKANWADI, J.]

scm