01.02.2023
KC(15)

F.A. 60 of 2020
Subhas Chandra Das and Ors.
-versus-
Durga Rani Das and Ors.

Mr. Bhaskar Ghose, Sr. Adv.,
Ms. Shila Sarkar……………….For the appellants.

Mr. Rajnarayan Datta…………For the respondents.

In the suit before the learned court below the plaintiffs sued as the legal heirs of one Harihar Das. The defendants were also Harihar's legal heirs, being the widow and daughters of his son Aloke Chandra. In the suit a declaration as to title to properties and partition were claimed.

Two sets of properties were involved, one described under schedule "A" and the other under the schedule "B" and "B-1". There was no dispute with regard to schedule "A" properties. The preliminary decree passed in respect thereof by the learned court below is unchallenged. The dispute is with regard to the schedule "B" properties.

An interesting point is involved with regard to the schedule "B" properties.

The plaintiffs, who are the appellants before us, claimed that schedule "B" and "B-1"properties were purchased by Harihar, out of his own fund and that Harihar should be treated as having been their owner. The properties were to be divided amongst the appellants/plaintiffs and the respondents/defendants accordingly.

According to the respondents/defendants the schedule "B" properties were purchased by the said son of Harihar, Aloke Chandra Das between 1962 and 1968. The sale deeds are in his name. Harihar died on 25th April, 2003. Aloke Chandra Das died in 2012.

The claim of the appellants/plaintiffs is based on the law of *benami*. They say that the real owner of the properties at all material times was Harihar. Aloke Chandra Das was only the ostensible owner.

In the Prohibition of *Benami* Property Transactions Act, 1988, Section 2(8) defines *benami* properties as follows:

> "2(8):
> '*benami* property' means any property which is the subject-matter of a *Benami* transaction and also includes the proceeds from such property."

Section 2(9) defines *benami* transactions inter alia as follows:

> "2(9):
> (A) '*benami* transaction means, -
> (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

*** *** *** *** ***”

Section 4 of the said Act extinguished the right of a person claiming to be the real owner of the property by providing as follows:

> “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.”

Therefore, by operation of the said Act of 1988 all *benami* transactions through which the person providing consideration attempted to claim legal as well as beneficial rights over a property were regularised so as to vest legal and beneficial ownership on the legal transferees. The concept of real and ostensible ownership was abolished.

We further note that this Act was sought to be amended by the *Benami* Transactions (Prohibition) Amendment Act, 2016. The Supreme Court in Union of India and Anr. –vs- Ganapati Dealcom Pvt. Ltd., reported in AIR 2022 S.C. 4558 declared certain sections of the said amended Act of 1988 as unconstitutional.

We have very carefully examined the impugned judgment and decree of the learned court below.

We have no hesitation in observing that the learned judge has narrated the facts of the case in great detail.

However, we notice that there is a flaw in the discussion and analysis of the facts and evidence.

When an allegation is made by the plaintiff that a property was purchased through a *benami* transaction, no doubt the burden of proof is on him. It is enough that he adduces some evidence to prove this fact. For example, the plaintiff could show that the financial matters of the legal owner of the property was so managed by another or his financial requirement so met by him that it was likely that the consideration for the property was also provided by the other person. In that case, the burden of proof would shift to the legal owner. He had to establish the source of fund for the purchase of the property and further that this fund was provided by him to acquire it.

It is true in this case, the title deeds of the property contained the name of Aloke Chandra Das as the purchaser and owner of the property. If the appellants have been able to furnish some proof that Harihar used to provide financial support to his son Aloke then in spite of possessing the title deeds, his legal heirs, the respondents/defendants would have to show that the fund to purchase it was also provided by Aloke Chandra Das. Unfortunately, there is no discussion of facts and analysis of evidence to the effect. This is not for a moment to suggest that discussion and analysis should have been confined to the above fact. It should have extended to all matters in issue in the suit.

Thereafter the impact of Section 4 of the said Act on the purchase of the property whether funded by Harihar or not had to be discussed.

For all those reasons we set aside the impugned judgment and decree dated 15th September, 2017. We remand the entire matter to the learned court below which on the basis of evidence already produced and recorded by the court shall invite arguments and decree the suit within six months of communication of this order. All questions are kept open.

This appeal (F.A. 60 of 2020) is allowed to the above extent.

(I.P. MUKERJI, J.)

(BISWAROOP CHOWDHURY, J.)