2024:BHC-NAG:4870

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

SECOND APPEAL NO. 616/2007

Smt. Badrunisa w/o Kallu Khan,
aged about 32 years, Occ. Household,
r/o Sagar Nagar, Near Chaprasipura,
Amravati, Tq. Dist. Amravati. .....**APPELLANT**

...V E R S U S...

1. Sabdar Khan s/o Nasib Khan Pathan,
aged 35 years, Occ. Daily Wages Labourer.

2. Smt. Halimabi w/o Sabdar Khan,
aged about 34 years, Occ. Household.

Both r/o Sagar Nagar, Near Chaprasipura,
Amravati, Tq. Dist. Amravati. ...**RESPONDENTS**

Ms Astha Sharma, Advocate instructed by Mr. P. R. Agrawal, Advocate for appellant.
Ms Archana Lanjewar, Advocate instructed by Mr. N. R. Saboo, Advocate for respondents.

CORAM:- ANIL L. PANSARE, J.

DATE OF RESERVING THE JUDGMENT : 17.04.2024
DATE OF PRONOUNCING THE JUDGMENT : 26.04.2024

Heard Ms Astha Sharma, learned counsel instructed by Mr. P. R. Agrawal, learned counsel for the appellant and Ms Archana Lanjewar, learned counsel instructed by Mr. N. R. Saboo, learned counsel for the respondents.

2. The appeal has been admitted on the following substantial question of law.

> *"Whether agreement dated 07.07.1995 stands proved and whether the said agreement is binding upon the appellant/original plaintiff?"*

3. Having heard both sides and having gone through the record, it appears that the agreement dated 07.07.1995 is a unilateral document executed by the husband of plaintiff in favour of defendant No.1, stating therein that he has sold the suit plot for Rs.25,000/-. The plaintiff is the owner of the suit plot. The document, however, does not bear signature of the plaintiff and/or the defendant No.1.

4. The case of the appellant-plaintiff will have to be understood in the light of the above. The appellant, who is wife of Kallu Khan, had filed a suit against the respondents-defendants for possession and damages. Admittedly, the suit plot is in the name of the appellant. The respondents, claiming document Exh. 78 dated 07.07.1995 as contract, have come up with a defence that the suit plot has been sold by the real owner i.e. appellant's husband to respondent no.1, for Rs.25,000/-. The respondent No.1 then pleaded that he was put in possession of the suit plot and has incurred expenses for construction of house and, therefore, is entitled for protection under Section 53-A of the Transfer of Property Act, 1882 (hereinafter referred to as the, "Act").

5. The plea of respondents was found to be meritorious by the Courts below. They, however, have failed to consider the ingredients of a valid contract. To have a valid contract, there has to be 'proposal and acceptance' and for that the agreement/contract must be singed by both the parties and if the agreement/contract is not signed, an evidence ought to be led viz. the documents, approved and signed by the parties in the form of e-mail, letters, talex, telegram and other means of telecommunication to prove the agreement/contract

6. In the present case, the contract is not signed by the appellant and respondent No.1. The document, which is said to be a contract, has been signed by the appellant's husband. In the circumstances, the respondent No.1 could not have taken a plea of a concluded contract between him and the appellant, neither being signatory to the document. He is further not entitled to seek protection in terms of Section 53-A of the Act because the execution of the contract between the parties itself has been not established and, therefore, there arises no question of handing over possession of the suit plot in terms of agreement/contract between the parties.

7. Learned counsel for the respondents has relied upon judgment in the case of ***Labhchand Shankarlal and Others .Vs. Mst. Sharifabi, AIR 1961 BOMBAY 215,*** to contend that the respondents will be entitled to protection under Section 53-A of the Act. However, the facts were altogether different. In the said case, the contract was signed on behalf of the vendor, the draft sale deed was prepared, the entire consideration amount was paid, the possession of land was delivered to the purchaser, the sale deed was not registered on account of sudden death of the vendor. The vendor's son instituted a suit for possession stating therein that they were not parties to the contract. It is, in this context, the Division Bench of this Court noted that the contract was signed by the then vendor who was Karta of the family and thus has signed it on behalf of the family members as well.

8. Such is not the case here. Firstly, the contract itself is not complete. The appellant is not signatory to the contract. Secondly, the appellant's husband, and not the appellant, has signed the contract. The Courts below and particularly, the First Appellate Court has validated the contract on the ground that the appellant held the property Benami and that the real owner was appellant's husband and, therefore, was empowered to enter into

agreement to sell. This finding, in my view, is not consistent with the provisions of the law for the following reasons.

9. Section 4 of the Prohibition of Benami Property Transactions Act, 1988 (hereinafter referred to as the "Benami Transactions Act"), as it stood before implementation of The Benami Transactions (Prohibition) Amendment Act, 2016, reads thus:

> *"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) Nothing in this section shall apply,-*
>
> *(a) where the person in whose name the property is held is a coparcener in a Hindu undivided family and the property is held for the benefit of the coparceners in the family; or*
>
> (b) where the person in whose name the property is held is a trustee or other person standing in a fiduciary capacity, and the property is held for the benefit of another person for whom he is a trustee or towards whom he stands in such capacity.

10. Thus, Section 4 prohibits the real owner to file suit to enforce any right in respect of the property held Benami against the person in whose name the property is held and also to raise the defence based on any right in respect of such property. This prohibition, however, was not applicable where the person, in whose name the property is held, is a trustee or other person standing in a fiduciary capacity and further the property is held for the benefit of any other person for whom he is a trustee or towards whom he stands in such a capacity.

11. In the present case, the respondent, who is neither real owner nor is a person standing in fiduciary capacity, has raised a defence of Benami transaction. He claims that the husband of appellant was real owner and was empowered to enter into the contract. The Courts below have found merit in the said contention.

12. It is, therefore, necessary to understand whether the evidence is sufficient to prove that the appellant was holding property Benami. The appellant's husband is not party to the suit and, therefore, he has not claimed himself to be the real owner of the property. To my mind and in terms of Section 4 of the Benami Transactions Act, the question, whether the property held Benami

was for the benefit of real owner, can only be answered when the real owner either files a suit or raises a defence on this count. It is so because the intention behind the Benami transaction is known to the person in whose name the property has been purchased or the person who has purchased the property in the name of other. A third party has no locus to plead on behalf of the real owner that it is he (real owner), who was to be benefited by the Benami transaction, unless third party otherwise proves.

13. The concept and kinds of the Benami transactions has been explained by the Supreme Court in the case of ***Thakur Bhim Singh (dead) by LRs and another .Vs. Thakur Kan Singh; (1980) 3 SCC 72,*** in following terms;

> *"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."*

14. Thus, the Supreme Court has held that 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. However, when a person buys a property in the name of another person with an intention to benefit such person, the transaction will not be called Benami.

15. Thus, merely because the plaintiff's husband has paid consideration amount, will not be sufficient to term the transaction as Benami. The intention of purchasing the property in wife's name must be proved. The appellant's husband has not questioned the transaction and, therefore, it is nobody's case, as cannot be, that the appellant's husband has purchased the property in his wife's name without any intention to benefit her. The appellant or her husband would only be in a position to disclose the intention for such a transaction. Thus, in absence of any pleadings at the hands of the appellant's husband describing the transaction under question as Benami, the parties could not have led evidence to prove the intention of the appellant's husband to purchase property in the name of his wife.

16. It is not the case of the respondents that he had knowledge and further was aware of execution of sale deed in the name of the appellant and that the appellant's husband has purchased the property with an intention to not transfer any benefit to his wife i.e. the appellant. In absence thereof, there was no reason for the Courts below to go into the nature of transaction that occurred between the appellant and her husband.

17. The respondents have placed on record a document Exh.-78, allegedly signed by the plaintiff's husband stating therein that the suit property is agreed to be sold to the respondent No.1. As such, the husband has denied execution of document and even if the document is presumed to be signed by the appellant's husband, it does not satisfy the ingredients of the concluded contract, at least, not against the appellant and, therefore, the question of granting protection under Section 53-A of the Act does not arise at all.

18. Both the Courts below have thus committed serious error of law in holding that the transaction under question was Benami and secondly that there was valid contract between the appellant and the respondents.

19. Put all together, it cannot be said that agreement dated 07.07.1995 is binding upon the appellant-plaintiff inasmuch as the document is the unilateral document, signed by the appellant's husband. The respondents failed to establish a concluded contract with the plaintiff. The substantial question of law is answered accordingly.

20. Consequently, the judgment and decree passed by the Courts below is unsustainable in law. Hence, the following order.

ORDER

(i) The appeal is allowed.

(ii) Judgment and order dated 22.08.2007, passed by District Judge-1, Amravati in Regular Civil Appeal No.147/2003 and judgment and order dated 28.03.2003 passed by 2nd Jt. Civil Judge (Junior Division), Amravati in Regular Civil Suit No.971/2000 are quashed and set aside.

(iii) Regular Civil Suit No.971/2000 is partly decreed. The appellant is entitled to possession of the suit plot. The respondents-defendants shall hand over to the appellant-plaintiff, the possession of the suit plot, within twelve weeks from today.

(iv) The respondents are at liberty to recover from the appellant the amount incurred by them for construction of house on the suit plot, subject to proof and also set off against occupational charges.

(v) Decree be drawn up accordingly.

(vi) Parties to bear their own costs.

(Anil L. Pansare, J.)

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