

Ashok Vs. Arun and Others

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Court : Mumbai Nagpur

Decided On : Sep-26-2016

Judge : R.K. Deshpande

Appeal No. : Second Appeal No. 409 of 2003

Appellant : Ashok

Respondent : Arun and Others

Judgement :

Oral Judgment:

1. In Regular Civil Suit No.836 of 1990, styled as one for partition, possession and mesne profits, the Trial Court passed a decree for possession on 17-2-1994 holding that the respondent-plaintiff shall be entitled to possession of the suit property consisting of southern side of three rooms totally admeasuring 32' x 10' out of Municipal House No.1446 on Plot No.9, situated at Subhash Nagar, Nagpur, from the appellant-defendant. The defendant was directed to deliver the possession of the suit property to the plaintiff and the enquiry was also ordered into the mesne profits. In Regular Civil Appeal No.212 of 1994, decided on 17-7-2003, the decree passed by the Trial Court has been maintained by dismissing the appeal. Hence, the original defendant is before this Court.

2. The dispute in the suit is between the two real brothers, and 15-9-2016: the plaintiff claims that the suit plot No.9, situated at Subhash Nagar, Nagpur, was

purchased jointly in the name of the defendant on 19-3-1981 for a total consideration of Rs.12,000/-, and the three brothers have contributed Rs.4,000/- each. The plaintiff also claims that in the year 1983, the defendant himself proposed to effect the partition of the suit house in three equal parts, to which the plaintiff and his another brother Vinayak agreed, and accordingly the house was divided into three portions. In order to avoid any future dispute, the partition was reduced in writing by way of memorandum of partition dated 26-12-1983 and the southern portion of the house consisting of three rooms, admeasuring 32' x 10', came to be allotted to the share of the plaintiff. The defendant denied the claim of the plaintiff for ownership of 1/3rd portion of the plot along with construction standing thereon. A plea was raised that the document dated 26-12-1983 was a nominal one executed for the purpose of taxation and it was never intended to be acted upon.

3. The Trial Court recorded the finding that the plaintiff has established his title over 1/3rd share in the suit property. The Trial Court relied upon the oral evidence led by the plaintiff, and the document at Exhibit 53, which was a sale-deed dated 9-5-1988, said to have been executed by the defendant in favour of another brother Vinayak in respect of 1/3rd portion of the suit property, and the contents of the document of partition dated 26-12-1983 at Exhibit 26. The Trial Court holds that the contents of both these documents at Exhibits 53 and 26 clearly support the case of the plaintiff that each of the three brothers must have contributed Rs.4,000/- each for the purchase of the suit property. On the aspect of construction of nine rooms, the Trial Court rejected the oral evidence of the mother and father of the plaintiff and defendant, who stated that they have not contributed for construction over the suit plot. The Court holds that the preponderance of probabilities is in favour of the plaintiff to hold that the suit plot was purchased and the construction was made jointly by all the three brothers.

4. The lower Appellate Court concurs with the findings of the Trial Court and holds that there was no propriety in mentioning in Exhibit 53, the sale-deed, and the memorandum of partition at Exhibit 26, that the suit plot was purchased from the joint family property. The lower Appellate Court further holds that the defendant was doing a tailoring business at the time of purchase of the plot, and looking to

the income of the defendant, it does not appear that he could have spent an amount of Rs.82,000/- within a span of one year from the date of purchasing the plot for making construction thereon. The lower Appellate Court also holds that mere title of the suit for partition would be a misnomer, and on reading the pleadings as a whole, it can be said that the suit is not for partition, but for possession of the plaintiff's 1/3rd share in the suit house.

5. None of the Courts below have addressed the issue of benami transaction, nor it was raised in the pleadings of the parties. The Courts below have addressed the question of admissibility of Exhibit 26, the memorandum of partition dated 26-12-1983, to hold that it is not the deed of partition, which would attract the provisions of Sections 17 and 49 of the Registration Act, 1908 so as to make it inadmissible in evidence on account of its non-registration.

6. The second appeal was admitted on 17-9-2003 on the substantial questions of law at serial Nos.1 and 2 in the memorandum of appeal, which are reproduced below:

1) It is not that the plaint filed by the respondent is not maintainable in view of Section 4 of the Benami Transactions (Prohibition) act, 1988, particularly when the case of the respondent is not covered by any exception to the said section and particularly when there are no pleadings and/or evidence which can cover the case of the respondent under any exceptions to the said section and its effects thereto?

2) Is it not that the suit is not maintainable in absence of registration of a document i.e. Deed of partition at ext. 26 and that the same cannot be looked into for any purpose and is inadmissible under section 49 of the said act and as such no relief can be granted on the basis of the document at Ext. 26?

7. Shri Shrivastava, the learned counsel appearing for the appellant, has invited my attention to the pleadings in the plaint and also to the notice dated 8-3-1990 issued by the plaintiff to the defendant to point out the inconsistent stand. He submits that in the notice, it was not the claim made that the suit plot was jointly purchased by the plaintiff and his two brothers, viz. the defendant Ashok, and

Vinayak, in the name of the defendant, and that all the three brothers have equally contributed for purchase of the suit plot. He further submits that reading of the notice shows that the claim was that it was a joint family property and, therefore, 1/3rd share was claimed by the plaintiff. He submits that in the plaint, the claim is based on title over 1/3rd portion of the plot on the ground that the plaintiff has contributed Rs.4,000/- each of the total consideration of Rs.12,000/- paid for the purchase of the suit plot. The plaint alleges that the construction was made with the contribution of Rs.25,000/- by the mother of the plaintiff and the defendant, and the claim for 1/3rd share is also based upon the memorandum of partition.

8. The lower Appellate Court records the finding that the title of the suit for partition would be merely a misnomer and the suit is for title over 1/3rd share of the plaintiff in the suit plot. The Court, therefore, holds that the suit was maintainable for a decree for possession of 1/3rd share of the plaintiff based on his title. The inconsistency between the stand in the notice and the pleadings in the plaint has been taken into consideration and adjudicated. This Court has not framed any substantial question of law on this aspect of the matter, and I do not find any reason to reopen the findings recorded by the Courts below on this aspect of the matter. The suit has, therefore, to be treated as per possession based upon the claim of the plaintiff for title in respect of 1/3rd share.

9. The undisputed factual position is that the property was owned by one Society, from which the registered sale-deed dated 19-3-1981 is in the name of the defendant. It was purchased for a total consideration of Rs.12,000/-. At the time of purchase of the property, all the three brothers were residing jointly. The construction of nine rooms over the suit plot was carried out between the year 1981 and 1984. In the year 1983, three rooms were let out to the tenant. It is during this period that the memorandum of partition dated 26-12-1983 at Exhibit 26 was executed. On 9-5-1988, the defendant executed the registered sale-deed at Exhibit 53 in respect of 1/3rd portion of the suit plot along with construction in favour of another brother Vinayak for a total consideration of Rs.20,000/-. In the revenue record, the property always stood in the name of the defendant. The plaintiff started residing separately since the year 1984, and it was the defendant, who used to receive the rent from the defendant.

10. Now coming to the substantial question of law at serial No.(1) framed by this Court as to the maintainability of the suit in view of Section 4 of the Benami Transactions (Prohibition) Act, 1988, the undisputed factual position is that the plaintiff claimed 1/3rd share in the suit property on the ground that he has contributed an amount 26-9-2016: of Rs.4,000/- in the total consideration of Rs.12,000/- for which the property was purchased in the name of the defendant. The registered sale-deed dated 19-3-1981 is in the name of the appellant-defendant. The Benami Transactions (Prohibition) Act was brought into force with effect from 19-5-1988. The preamble to the Act shows that it is to prohibit benami transactions and the right to recover property held benami and for matters connected therewith or incidental thereto.

11. Section 4 of the said Act being relevant, is reproduced below:

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.

In terms of sub-section (1) of Section 4 of the said Act, 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. The suit in question was filed on 11-4-1990, i.e. after coming into force of the said Act on 19-5-1988. It is not the case of the plaintiff that the property was covered by any of the exceptions under clause (a) or (b) of sub-section (3) of Section 4. The suit was, therefore, clearly covered by the prohibition contained in sub-section (1) of Section 4, reproduced above. The suit was, therefore, not maintainable. No doubt, this question was not raised before the Trial Court, but it was raised before the lower Appellate Court, which has not considered it. The question of maintainability of the suit on the basis of sub-section (1) of Section 4 of the said Act is purely a question of law, which can be decided by this Court in the second appeal. It is, therefore, held that the suit, as framed, was not maintainable in view of sub-section (1) of Section 4 of the said Act. The substantial question of law at serial No.(1), framed by this Court, is, therefore, answered accordingly.

13. The lower Appellate Court has recorded the finding that the title of the suit for partition would be merely a misnomer and the suit is for title and possession over 1/3rd share of the plaintiff in the suit plot. Once the theory of title to the 1/3rd portion of the property on the basis of joint purchase cannot be entertained in view of prohibition contained in sub-section (1) of Section 4 of the said Act, the question of accepting the deed of partition at Exhibit 26, would not arise. Be that as it may, if the partition was effected on 26-12-1983, then there was no question of sale of 1/3rd portion of property by the defendant on 9-5-1988 in favour of his another brother Vinayak for total consideration of Rs.20,000/-. Hence, the substantial question of law at serial No.(2), framed by this Court, does not at all survive.

14. On the aspect of contribution of Rs.25,000/-, said to have been made by the mother of the plaintiff and the defendant for construction of nine rooms, it is apparent that the mother and the father of the plaintiff have deposed against the claim of the plaintiff. In fact, the mother and father of the plaintiff and the defendant have deposed that the defendant purchased the suit plot with his own funds and

both of them have not provided any financial aid to the defendant. Hence, the said fact has also not been established. The Courts below have, therefore, committed an error in passing a decree for possession in favour of the plaintiff. Thus, the judgment and decree passed by the Trial Court and confirmed by the lower Appellate Court will have to be set aside and the suit will have to be dismissed.

15. In the result, the second appeal is allowed. The judgment and decree passed by the Trial Court on 17-2-1994 in Regular Civil Suit No.836 of 1990 as well as the judgment and order passed by the lower Appellate Court on 17-7-2003 in Regular Civil Appeal No.212 of 1994, are hereby quashed and set aside. Regular Civil Suit No.836 of 1990 is dismissed. No order as to costs.

If the appellant-defendant has deposited any amount pursuant to the orders passed by this Court, the same shall be permitted to be withdrawn by him along with interest, if any accrued thereon.

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