

Mohinder Singh Devyal Vs. Appajeet Devyal W/O Mohinder Singh Devyal and anr.

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Court : Mumbai

Decided On : Nov-29-2002

Reported in : 2003(2)BomCR29

Judge : R.J. Kochar, J.

Acts : Benami Transaction (Prohibition) Act, 1988 - Sections 4 and 4(1); [Specific Relief Act, 1963](#) - Sections 34

Appeal No. : Suit No. 1815 of 1981

Appellant : Mohinder Singh Devyal

Respondent : Appajeet Devyal W/O Mohinder Singh Devyal and anr.

Advocate for Def. : S. Shaikh, Adv. i/b., S.K. Srivastava & Co.

Advocate for Pet/Ap. : Girish Desai, Adv. i/b., G.R. Hegde, Adv.

Judgement :

R.J. Kochar, J.

1. The plaintiff has filed the present suit for declaration that he is the real and beneficial owner of five fully paid up shares held by the 1st defendant in the Suhas

Co-operative Housing Society Ltd. as well the real and beneficial owner of the Flat No. 17 in the said society. He has also prayed for a decree of mandatory injunction and order requiring the 1st defendant to transfer to the plaintiff in the aforesaid flat the fully five paid-up shares held by the defendant No. 1 in the said society and for that purpose the defendant No. 1 should be directed to sign and execute such instruments of transfer and other deeds, documents for effectually transferring the said flat and shares in the name of the plaintiff. This is the main relief which the plaintiff has prayed for in the present suit.

2. The plaintiff was the husband of the defendant No. 1 at the relevant time and he is the father of the defendant No. 2. The dispute is between the plaintiff husband and the defendant No. 1- wife. It appears that the matrimonial home of the plaintiff and the defendant No. 1 has broken down and the matrimonial relationship have been shattered culminating in the decree of divorce by mutual consent on 10-10-1995. The defendant No. 2 is the son of the plaintiff and the defendant No. 1 and he continues to be on record but he appears to be not interested to pursue the litigation as the learned Advocate Smt. Shaikh, who appears for him states that he has taken away the papers from her long back. The learned Advocate has shown me two letters dated 19-9-2002 and 18-10-2002 seeking final discharge as the papers were taken from her and therefore, it was not possible for her to appear before this Court.

3. It is the case of the plaintiff that the suit flat is his personal property purchased by him from his own income though for the sake of convenience the agreement to purchase with the vendor, Shri Lele and the share certificates of the co-operative society were in the name of the defendant No. 1. According to him, since he was employed as a Radio Officer on the ships and he was away from home continuously for quite a long time to facilitate the day to day transactions concerning the flat the relevant documents were entered into in the name of defendant No. 1. It is his case that the defendant No. 1 was employed with the Central Railway as a Clerk and her monthly salary was Rs. 140/- p.m. and that the total monthly pay packet including DA etc. was approximately Rs. 400/- p.m. during the relevant period. According to the plaintiff, his monthly income as Radio Officer employed on the Foreign Ships was approximately 1100 pound p.m. (Rs.

25,000 to Rs. 30,000 p.m.) According to him, he used to remit the amount to the defendant No. 1 and the same was deposited by her in the joint account which was maintained and operated by both of them with the Bank of Baroda. According to the plaintiff, out of the said amount he had made payment for the purchase of the suit flat to Mr. Lele, the owner of the flat on 4-11-1971 Rs. 10,000/-, 29-11-1971 Rs. 9,000/- and 4-1-1972 Rs. 9,000/-. According to the plaintiff, the suit flat therefore belongs to him and not to his wife the defendant No. 1 and he has therefore prayed for the aforesaid decree.

4. The defendant No. 1 has filed her written statement to contest the suit. According to her, the agreement and the share certificates pertaining to the suit flat stand in her name and she has contributed some amount for payment of the purchase price of the flat. She is claiming the ownership of the flat on the basis of the agreement and the share certificates which is stands in her name.

5. On the basis of the pleadings of both the parties the following issues were framed on 7-11-1994 :

ISSUES

1. Whether the suit is not maintainable in law in view of the provisions contained in the Benami Transaction (Prohibition) Act, 1988 i.e. Act No. 45 of 1988?

2. Whether the plaintiff acquired the suit flat and the suit shares benami in name of defendant No. 1 merely for sake of convenience as alleged in paras 7 and 8 of the plaint?

3. Whether the plaintiff paid all the amounts required for purchase of the suit flat and the suit shares as alleged in paras 5 and 6 of the plaint?

3-A. Whether the defendant No. 1 holds the suit flat and the suit shares as a trustee for the plaintiff in a fiduciary capacity and the plaintiff is entitled to avail of the exclusionary clause contained in section 4(3)(b) of Act No. 45 of 1988?

4. Whether the plaintiff is the real and beneficial owner of suit shares and the suit flat referred to in prayer (a) of the plaint?5. Whether the defendant No. 1 is the

owner of the suit flat and the suit shares as contended in paras 5 and 6 of her written statement?6(a). Whether the plaintiff is entitled to exclusive possession of the suit flat and the transfer of suit shares in his name?

(b). Whether the defendant No. 1 is entitled to exclusive possession of the suit flat and exclusive title in respect of the suit shares?

(c). Whether defendant No. 2 is entitled to reside in the suit flat or any part thereof alongwith defendant No. 1?

(d). Whether the plaintiff and the defendants are entitled to use the suit flat in common as done at present?

7. Whether the plaintiff is entitled to obtain any other reliefs as prayed for in the plaint?

8. Generally.

6. Both the parties adduced their respective documentary and oral evidence. The plaintiff examined himself to substantiate his claim of ownership of the suit flat. He has relied on the documentary evidence to the effect to prove his monthly income and also to prove the fact that he had remitted a substantial part of his income to his wife the defendant No. 1 to be deposited in their joint bank account. He has also proved the receipt issued by the vendor of the flat Shri Lele to establish the payments made to the said Shri Lele. He was subjected to a searching cross-examination on behalf of the defendants. The defendant No. 1 examined herself to rebut the case of the plaintiff and to establish her own case of ownership of the flat. She was thoroughly cross-examined on behalf of the plaintiff. The defendant No. 1 the son of both the plaintiff and the defendant No. 1 did not step in the witness box as it was not necessary in the given circumstances. It would be relevant to mention at this stage that by an oral judgment dated 20-3-1995 my learned Brother Shri M.S. Rane, J., as then he was, was pleased to decide the first issue in respect of maintainability of the suit in view of the provisions contained in the Benami Transaction (Prohibition) Act, 1988. The learned Judge answered the issue affirmatively in favour of the defendants and held the suit not maintainable.

In view of the said findings recorded by the learned Judge he did not decide the other issues.

7. The plaintiff carried the judgment in appeal before the Appeal Court of the High Court. The learned Judges of the Appeal Court (A.P. Shah and Smt. V.K. Tahilramani, JJ.) by their order dated April 11, 2002 quashed and set aside the judgment of the learned Single Judge and remanded the suit back to the trial Court to consider the issues in the said suit. The learned Judges have held that the suit flat was purchased in the year 1971 and the suit was filed in 1981. The provisions of the Benami Transaction (Prohibition) Act, 1988 did not apply retrospectively to the transactions which took place prior to the said Act came into force in year 1988. Following the ratio of the Supreme Court in A.I.R.1995 S.C.W. 1422 (R.Rajagopal Reddy (Dead) by L.Rs. and ors. v. Padmini Chandrashekharan (dead) by L.Rs.), the Appeal Court held that in respect of the litigation which was filed by the parties prior to the said Act coming into force the parties would be governed by the then existing law which held the field at the time of initiation of such proceedings and that there is nothing under the Act to indicate that any of the provisions of Act including section 4(1) has retrospective effect. The appeal of the original plaintiff was allowed and the matter was remanded back for decision on the other issues. In view of the judgment of the Appeal Court on the issues of maintainability of the suit (Issue No. 1 and Issue No. 2) do not survive. I therefore, proceed to answer the other issues.

8. The plaintiff has examined himself and has also produced documentary evidence to establish his case that he was employed as a Radio Officer on the Foreign Ships prior to purchase of the suit flat and that he was earning by way of his salary approximately Rs. 25,000/- to Rs. 30,000/- p.m. There is hardly any challenge to this fact in respect of his monthly income. The plaintiff has further proved from the joint bank account that he was sending part of his salary to the defendant No. 1 who was depositing the same in their joint bank account. The original passbooks are produced and there is no dispute about the said documents and the entries incorporated by the bank in the ordinary course of business. In the searching cross-examination of the plaintiff I do not find anything to consider that the financial capacity of the plaintiff could be considered as doubtful. I, therefore,

hold that the plaintiff has proved beyond any pale of doubt that he was earning a monthly salary of Rs. 25,000-30,000 as a Radio Officer employed on the foreign ships at the relevant time. The remittance which are reflected in the pass book of the joint bank account of the parties are also proved. The case of the defendant No. 1 that she had purchased the flat from her own income and that she had contributed for purchase of the said flat stands on a very weak evidence. She has totally failed to prove her financial capacity to have made contribution to the purchase of the flat. Considering her monthly pay packet to the tune of Rs. 400/- it cannot be believed that she would contribute any amount for the purchase of the flat. To make up this deficiency she has very vaguely stated that she had an additional income of giving tuitions and that she was receiving Rs. 30/- p.m. per student as tuition fee. Beyond this bare statement there is absolutely nothing on record to accept her version that she was earning extra and additional income by way of tuition fees. We cannot forget that she was a full time Railway servant and she had two children to be looked after. In the City of Bombay people have to commute from one point to other by local train or by bus. Not less than two to three hours are required to be spent on transport to and fro. In such conditions of the Bombay life it cannot be believed that the defendant No. 1, a working woman, could spare any time to spend for tuitions at home in addition to the time to be spent to look after her two children who also perhaps needed her mother's help in their studies. Even taking a charitable view in her favour that she was giving tuitions it could not be for more than one hour to one or two students, who could pay Rs. 30/- or so monthly. At the most she could have earned Rupees not more than Rs. 100 from the tuition fees. She has not explained what tuitions she was giving and to how many students, no details are given to substantiate her case to establish her income from the tuition fees. She has also not given the breakup of the average monthly expenditure for house hold matters including the tuition fees of her own children. As against this feeble evidence adduced by the defendant No. 1 the plaintiff has proved his monthly income Rs. 25,000/- to Rs. 30,000/- and he has also proved remittance made by him to his wife to be deposited in the bank account. From the evidence of defendant No. 1 it cannot be accepted that she had deposited such large amount in the joint bank account. Her own income per month never exceeded Rs. 1,000/-. I am therefore not able to accept the case of the

defendant No. 1 that she had made any contribution for purchase of the flat. Her contribution was restricted in maintaining the day to day expenses all the three in the family. A very weak attempt was made on behalf of the defendant No. 1 to challenge the case of the plaintiff that at home he was over spending and he was giving lavish parties to his friends and therefore, he could not have saved any amount for purchase of the flat. Apart from putting up such a feeble case to the plaintiff in cross-examination and apart from making a bare statement in her evidence there is absolutely nothing on record to accept this story of the defendant No. 1 that the plaintiff was throwing lavish parties on his friends and was wasting his earned income. There is not even an iota of evidence to pad-up this version of the defendant No. 1. I, therefore, conclude that the plaintiff has proved beyond any pale of doubt that he was earning a monthly income of Rs. 25,000-30,000 and that he was remitting substantial amount to his wife at home to be deposited in the joint bank account and out of the said income which belonged to the plaintiff exclusively the plaintiff has purchased the flat. There is hardly any evidence to accept the version of the defendant No. 1 that she had contributed any amount towards the purchase of the flat. Her own income never exceeded even Rs. 1,000/- p.m. which perhaps might be enough to meet the household expenses. I have stretched the figure of Rs. 1,000/- by taking a charitable view of her case that she was earning from tuitions in addition to Rs. 400/- p.m. from her monthly salary paid by the Central Railways, where she was employed as a Clerk. The plaintiff has further proved that he had given three cheques to the vendor of the flat Shri Lele as stated hereinabove. Shri Lele has passed a consolidated receipt for having received the aforesaid amounts. There is no dispute about this payment by the plaintiff and received by Shri Lele. I have gone through the oral and documentary evidence adduced by both the parties carefully and I do not find anything on record to accept the case of the defendant No. 1 that the plaintiff had no right to claim ownership of the flat.

9. The whole case of the defendant No. 1 is on the circumstance that the agreement for sale and the share certificates were in her name. The plaintiff does not deny this fact, on the contrary he stated, in the given circumstances of his employment on the foreign ships he was required to be away from his home for a substantial part of the year. It was to facilitate the day to day affairs and the

maintenance of the family and the flat he had caused the agreement to be in her name and also the share certificates to be issued by the society in her name. Merely because the agreement is entered in to in the name of the defendant No. 1 and merely because the share certificates stand in her name it cannot be conclusively held that she is the exclusive owner of the flat. Her right to claim such ownership has been demolished by the plaintiff who has proved his own income and who had proved his financial capacity to purchase the flat and who has also proved the disability of the defendant No. 1 to purchase the flat from her own income. The plaintiff has proved that the flat was purchased by him with his own income though in the name of the defendant No. 1 as a matter of convenience for day to day affairs. There is nothing abnormal or unusual in the conduct of the plaintiff in getting the agreement in the name of his wife and in getting the share certificates in her name as the entire affair was between the husband and the wife. At the relevant time the couple was living peacefully without any quarrel or clashes between them. From the fact that the plaintiff had purchased the flat in the name of the defendant No. 1 indicates that both had good relations of husband and wife at that time. The unfortunate rift between them is of a subsequent event. I therefore, answer all the issues whether that the plaintiff is the owner of the flat though the agreement and the share certificates stood in the name of the defendant No. 1 for the sake of convenience. I have also gone through the evidence that the defendant No. 1 had no financial ability to contribute anything towards the purchase of the flat exclusively. Her contribution appears to be confined to the maintenance of the family with the help of the income of the plaintiff which he was remitting from time to time to the defendant No. 1 who in turn was depositing the same in their joint bank account. The defendant No. 1 has totally failed to prove that she had equal financial ability to contribute towards the purchase flat.

10. In the aforesaid circumstances the plaintiff succeeds and the suit is decreed as prayed for by him in terms of prayer Clauses (a), (b) and (c). No order as to costs.