

Mohan J. Pawar Vs. Arjuna N. Dighade (D) by Lr and anr.

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SooperKanoon Citation : sooperkanoon.com/369663

Court : Mumbai

Decided On : Oct-17-2003

Reported in : AIR2004Bom406; 2004(3)ALLMR171

Judge : S.T. Kharche, J.

Acts : [Specific Relief Act, 1963](#) - Sections 20; Benami Transactions (Prohibition) Act, 1988 - Sections 4 and 4(1)

Appeal No. : S.A. No. 102 of 1990

Appellant : Mohan J. Pawar

Respondent : Arjuna N. Dighade (D) by Lr and anr.

Advocate for Def. : N.R. Saboo, Adv.

Advocate for Pet/Ap. : P.A. Deshmukh, Adv.

Disposition : Appeal allowed

Judgement :

S.T. Kharche, J.

1. By invoking the jurisdiction of this Court under Section 100 of the Code of Civil Procedure, this second appeal is directed against the judgment and decree dated 2-3-1990 passed by the learned Additional District Judge in Regular Civil Appeal

No. 75 of 1989, who allowed the appeal and set aside the judgment and decree passed by the trial Court on 24-2-1986 in Special Civil Suit No. 3 of 1983 by which the trial Court decreed the suit of appellant/ plaintiff for specific performance of the contract with costs and dismissed the counterclaim and directed the respondent/defendant No. 1 Arjuna (now deceased) to execute the sale deed in favour of the appellant/ plaintiff on receiving a sum of Rs. 20.425/- within two months from the date of judgment and in case of failure to execute the sale deed, the appellant/plaintiff was directed to deposit the amount in the Court within one month and get the sale deed executed through the Court.

2. The short and substantial question of law that arises for consideration in this appeal is, whether a decree for specific performance of the contract can be refused on the ground that defendant No. 1 who purchased the suit held in the name of his wife Bhagirathibai is hit by the provisions of Section 4 of the Benami Transaction (Prohibition) Act. 1988 (for short the Act).

3. Brief facts are as under :

Bhagirathibai is the wife of defendant No. 1 Arjuna. Bhagirathibai died on 2-12-1976. However, defendant No. 1 Arjuna died during the pendency of this appeal and his legal heir, i.e. Yashodabai, has been brought on record. On 26-4-1971, 20-3-1972 and 15-5-1973 respectively the defendant No. 1 had purchased the agricultural lands bearing Survey No. 63/1 to the extent of 6 acres 16 gunthas and Survey No. 66/1 to the extent of 2 acres 3 gunthas by virtue of three different sale deeds and these, lands were purchased in the name of Bhagirathibai. The defendant No. 1 had two wives, namely Bhagirathibai and Kasabai. The latter used to live at village Lmbarda while the former used to live at Inzori. At both the places, the defendant No. 1 had his houses and both the wives were living with him. Defendant No. 2 Jijabai is the daughter of defendant No. 1. The latter had no issue except defendant No. 2, it is contended that on 27-5-1979 defendant No. 1 executed agreement of sale (Ex. 44) of the suit fields in favour of the plaintiff for the consideration at the rate of Rs. 3.000/- per acre on receiving the earnest amount, of Rs. 5.000/-. It was agreed between the parties that the balance amount of consideration would be paid on or before 31-3-1988 at the time of execution and

registration of the sale deed. The possession of the land was delivered to the plaintiff on the date of execution of the agreement of sale. The plaintiff was ready and willing to perform his part of contract, but it was defendant No. 1 Arjuna who avoided to execute the sale deed on one pretext or the other, though called upon to do so by exchange of notices and, therefore, the plaintiff was constrained to file the suit for specific performance of the contract.

4. The defendant combated the pleadings and had taken a stand in defence that after the death of Bhagirathibai defendant Nos. 1 and 2 are her heirs and the defendant No. 2 was not a party to the agreement of sale and, therefore, plaintiff is not entitled for the decree of specific performance of the contract. It is contended by defendant No. 1 that he had obtained a loan of Rs. 2,500/- from the plaintiff and by way of security for that loan he had executed the agreement of sale. The said document is a bogus document and was not intended to be acted upon. He contended that he parted with the possession only to satisfy the loan amount out of the income of the suit fields which was to be taken by him. Plaintiff further contended that the plaintiff continued to be in possession of the suit for the years 1979-80 and 1980-81 and he was not deliver the possession of the suit fields to him after taking the income from the suit fields which was to be adjusted against the loan amount.

5. The trial Court framed the issues and after considering the oral and documentary evidence adduced by the parties on record and on hearing the learned counsel decreed the suit for specific performance and dismissed the counter claim of possession put forth by the defendant. The trial Court held that the three sale deeds in favour of Bhagirathibai were in the nature of Benami transaction and that the real owner was her husband defendant No. 1 Arjuna. The trial Court also negated the contention of the defendant that the transaction of agreement of sale was in the nature of loan transaction. Consequently, the trial Court decreed the suit. The defendant being aggrieved by the said judgment and decree had preferred an appeal to, the District Court. The appellate Court on consideration of the evidence and on hearing the learned counsel for the parties, had allowed the appeal and set aside the judgment and decree passed by the trial Court and instead directed the defendant No. 1 to return the earnest amount of Rs.

5.000/- to the plaintiff with interest at 6% per annum and also directed the plaintiff to deliver the possession of the suit fields to the defendant with further direction regarding enquiry into future mesne profits. It is this judgment and decree that is under challenge in this appeal.

6. Mr. P. A. Deshmukh, learned counsel for the plaintiff contended that the appellate Court allowed the appeal on a technical ground raised under the Act. He contended that the defendant No. 1 executed the agreement of sale wherein it has been mentioned that he was the exclusive owner of the suit field and he had sold it for consideration and also delivered the possession on the date of execution of the agreement of sale. He further contended that this agreement of sale was enforceable in law but the appellate Court wrongly held that the plaintiff is not entitled to the decree for specific performance of the contract by holding that as per the provisions of S. 4(l) of the Act. the transaction of purchase of the field by defendant No. 1 in the name of Bhagirathibai, being a Benami transaction, no action or suit would be tenable against defendant No. 1 for claiming specific performance of the contract. Mr. Deshmukh contended that there is a concurrent finding by both the Courts below that the defendant No. 1 was the real owner of the suit field though the said field was purchased in the name of Bhagirathibai and hence the trial Court was perfectly justified in passing the decree for specific performance. He contended that in these circumstances, the impugned judgment and decree passed by the appellate Court cannot be sustained in law and deserves to be set aside by restoring the judgment and decree passed by the trial Court; in support of this submission, he relied on the Full Bench decision of the Apex Court in R. Rajgopal Reddy (dead) by L.Rs. v. Padmini Chandrasekharan (dead) by L.Rs., : (1995)124CTR(SC)311 .

7. Mr. Saboo, learned counsel, for the defendant contended that the suit field was purchased by defendant No. 1 in the name of Bhagirathibai and the latter died on 2-12-1976 and, therefore, the property would devolve on her heir, i.e. her husband - defendant No. 1 and her daughter defendant No. 2. Mr. Saboo further contended that the consideration was paid by Bhagirathibai in whose name the three sale-deeds were executed by the vendor and Bhagirathibai was the exclusive owner of the suit field. Therefore, according to Mr. Saboo, the transaction of the three sale-

deeds was not a Benami transaction. He contended that there was no evidence to show that the transaction in the name of Bhagirathibai was a Benami transaction and, therefore, the wife Bhagirathibai alone was the owner of the suit field. He further contended that the plaintiff did not seek any declaration in the suit for declaration that the transaction is a Benami transaction and the burden would lie on the shoulder of the plaintiff to prove that the said transaction was a Benami transaction and it was the defendant No. 1 who was the real owner of the property. In support of these submissions he relied on the decision of the Supreme Court in *Bhim Singh v. Kan Singh*, : [1980]2SCR628 .

8. However, Mr. Saboo fairly conceded that the provisions of Section 4(1) & (2) of the Benami Act would be prospective in application as laid down by the Full Bench of the Apex Court in *R. Rajgopal Reddy's* case, cited *supra*. But this is a case where the plaintiff has miserably failed to establish by cogent evidence that the transaction in question was Benami and, therefore, the impugned order is legal and valid.

9. I have given thoughtful consideration to the contentions canvassed by the learned counsel for the parties. It is not disputed that both the Courts-below have held that the transaction of purchase of field by defendant No. 1 in the name of Bhagirathibai was in the nature of Benami transaction. It is not disputed that the suit fields were purchased by three different registered sale deeds dated 26-4-1971, 20-3-1972 and 15-5-1973 in the name of Bhagirathibai wife of defendant No. 1 and mother of defendant No. 2. Bhagirathibai died on 2-12-1976 and on 27-5-1979 he had executed the *Isar Chiththi* (Ex. 44), agreement of sale of the suit, for consideration at the rate of Rs. 3.000/- per acre on receiving the earnest amount of Rs. 5.000/- and the possession of the suit field was also delivered by him to the plaintiff.

10. The Judgment of the trial Court is well reasoned and, therefore, the findings recorded by the trial Court could not have been disturbed by the appellate Court. The appellate Court observed in the latter part of Para 8 of the judgment that 'In the villages the things have not much changed in spite of lapse of long time and that the conditions of women in village continues to be same as it used to be in old

times. 1 fully agree with him on this count, but in view of' the pleadings of the parties and their conduct and the available evidence I am not ready to accept the contention of the defendant that the consideration amount was paid out of the money received from mother of Bhagirathibai. I am also not ready to accept that defendant No. 1 might have paid the consideration amount for the benefit of his wife or that he wanted to make gift of this property to his wife taking into consideration all these circumstances in the. present matter. I do not find any mistake in the finding of the learned trial Court that the sale-deeds in the name of Bhagirathibai were only benami and defendant No. 1 was the real owner.'

11. Thus, there is a concurrent finding of both the Courts-below that the three sale-deeds in the name of Bhagirathibai were only Benami and defendant No. 1 was the ostensible owner of the suit field. Having held that the said transaction was Benami transaction, the appellate Court proceeded to consider the scope and applicability of Section 4(1) of the Act and held in Para 11 that, 'In view of the provisions of said Act as discussed above the suit property cannot be recovered from Bhagirathi or from her daughter on the ground that it is held benami. In such circumstances the title over this property cannot be passed to the plaintiff by the defendant No. 1 alone by executing any sale-deed. In such circumstances, even though originally the decree passed by learned trial Court was perfectly correct now such decree cannot be passed and, therefore, in view of this changed position of law it has become necessary to set aside the decree passed in favour of plaintiff for specific performance of contract.'

12. At this juncture, it may be usefully mentioned that the earlier decision of Division Bench of Supreme Court in the case of Mithilesh Kumari v. Prem Behari Khare, : [1989]177ITR97(SC) has been overruled by the Full Bench decision of Apex Court in the case of R. Rajgopal Reddy, cited supra, and it has been held in Para Nos. 7 and 13 as under :

'Having given our anxious consideration to these rival contentions, we have reached the conclusion that the question has to be answered in the negative and it must be held that the decision of the Division Bench taking a contrary view does not lay down correct law.'

'So far as Section 4(2) is concerned, all that is provided is that if a suit is filed by a plaintiff who claims to be the owner of the property under the document in his favour and holds the property in his name, once Section 4(2) applies, no defence will be permitted or allowed in any such suit. claim or action by or on behalf of a person claiming to be the real owner of such property held Benami. The disallowing of such a defence which earlier was available itself suggests that a new liability or restriction is imposed by Section 4(2) on a pre-existing right of the defendant. Such a provision also cannot be said to be retrospective or retroactive by necessary implication. It is also pertinent to note that Section 4(2) does not expressly seek to apply retrospectively. So far as such a suit which is covered by the sweep of Section 4(2) is concerned, the prohibition of Section 4(2) cannot apply to it as it is not a claim or action filed by the plaintiff to enforce right in respect of any property held Benami. On the contrary, it is a suit claim or action flowing from the sale-deed or title deed in the name of the plaintiff. Even though a suit might have been filed prior to 19-5-1988, if before the stage of filing of defence by the real owner is reached, Section 4(2) becomes operative from 19th May. 1988, then such a defence, as laid down by Section 4(2) will not be allowed to such a defendant. However, that would not mean that Sections (1) and 4(2) only on that score can be treated to be impliedly retrospective so as to cover all the pending litigations in connection with enforcement of such rights of real 'owners who are parties to Benami transactions entered into prior to the coming into operation of the Act and specially; Section 4 thereof. It is also pertinent to note that Section 4(2) enjoins that no such defence 'shall be allowed' in any claim, suit or action by or on behalf of a person claiming to be the real owner of such property. That is to say no such defence shall be allowed for the first time after coming into operation of Section 4(2), enabling an issue to be raised on such a defence, then the Court is bound to decide the issue arising from such an already allowed defence as at the relevant time when such defence was allowed, Section 4(2) was out of picture. Section 4(2) nowhere uses the words '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 to be raised or continued to be raised in any suit.' With respect, it was wrongly assumed by the Division Bench that such an already allowed defence in a pending suit

would also get destroyed after coming into operation of S. 4(2). We may at this stage refer to one difficulty projected by learned Advocate for the respondents in his written submissions, on the applicability of S. 4(2). These submissions read as under :-'Section 4(2) places a bar on a plaintiff pleading 'benami', while Section 4(2) places a bar on a defendant pleading 'benami'. after the coming into force of the Act. In this context it would be anomalous if the bar in Section 4 is not applicable if a suit pleading 'benami' is already filed prior to the prescribed date. and it is treated as applicable only to suit which he filed thereafter, it would have the effect of classifying the so-called 'real' owners into two classes - those who stand in the position of plaintiffs and those who stand in the position of defendants. This maybe clarified by means of an illustration. A and B are 'real' owners who have both purchased properties in say 1970, in the name of C and D respectively who are ostensible owners viz. benamidars. A files a suit in February 1988. i.e. before the coming into force of the Act against C. for a declaration of his title saying that C is actually, holding it as his Benamidar. According to the petitioner's argument, such a plea would be -open to A even after coming into force of the Act, since the suit has already been laid. On the other hand, if D files a suit against B at the same for declaration and injunction. claiming himself to be the owner but B's opportunity to file a written statement comes in say November 1988 when the Act has' already come into force, he in his written statement cannot plead that D is a Benamidar and that he, B is the real owner. Thus A and B, both 'real owners' would stand on a different footing, depending upon whether they would stand in the position of plaintiff or defendant, it is respectfully submitted that such a differential treatment would not be rational or logical.'

13. The ratio laid down by the Supreme Court is squarely applicable to the facts and circumstances of the present case. Defendant No. 1 purchased the suit fields by virtue of three sale-deeds dated 26-4-1971, 20-3-1972 and 15-5-1973 in the name of Bhagirathibai and, therefore, he was the ostensible owner of those fields. The Act came into force on 19-5-1988 from which date Section 4(2) becomes operative and, therefore, no defence is available to defendant No. 1 that since the fields were purchased in the name of Bhagirathibai, he being the husband and defendant No. 2 being the daughter, are entitled to have a share in the property as per Section 15 of the Hindu Succession Act, 1955 and. that therefore, the

agreement of sale executed by him in favour of the plaintiff is not enforceable in law so far as the half share of defendant No. 2 is concerned. On the contrary, it is obvious that the decree for specific performance of contract cannot be refused especially when Section 4(2) of the Act is not at all attracted and cannot be made retrospective or retroactive in operation to show that the transaction is hit by this provision of law.

14. Once it is held that defendant No. 1 was the real owner of the suit field and that he had obtained the three sale-deeds in the name of his wife Bhagirathibai, which was a Benami transaction, it follows that there is no legal obstacle in the way of granting decree for specific performance in favour of the plaintiff and hence I am of the considered view that the judgment and decree passed by the trial Court was perfectly legal and correct. The appellate Court has committed patent error of law by holding that the transaction of sale in the name of Bhagirathibai was hit by the provision of Section 4(2) and (2) of the Act and, as such. The impugned Judgment cannot be sustained in law. Therefore, it is obvious that the appellate Court ought not to have interfered into the findings recorded by the trial Court. In such circumstances, the Appeal is allowed with costs throughout. The impugned judgment and decree passed by the appellate Court is set aside and that of the trial Court is restored.