SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com

inder Pal Vs. Des Raj

inder Pal Vs. Des Raj

SooperKanoon Citation : sooperkanoon.com/629382

Court : Punjab and Haryana

Decided On : Dec-15-1999

Reported in : (2000)125PLR637

Judge : R.L. Anand, J.

Acts : Benami Transactions (Prohibition) Act, 1988 - Sections 4

Appeal No. : Regular Second Appeal No. 2437 of 1999

Appellant : inder Pal

Respondent : Des Raj

Advocate for Pet/Ap. : A.K. Chopra, Adv.

Disposition : Appeal dismissed

Judgement :

R.L. Anand, J.

1. Unsuccessful plaintiff Inder Pal has filed the present Regular Second Appeal and it has been directed against the judgment and decree dated 15.1.1998 passed by Addl. District Judge, Gurdaspur, who affirmed the judgment and decree dated 9.3.1994 passed by the Sub Judge, 1st Class, Batala, who dismissed the suit of the plaintiff-appellant for mandatory injunction against his father Des Raj and

brother Romesh.

2. The pleadings of the parties can be summarised in the following manner:-

Inder Pal plaintiff filed a suit for mandatory injunction directing the defendants Des Raj (father) and Romesh (brother) to deliver the vacant possession of the Ahata bearing No. 22 forming part of Nazool land situated at Batala and detailed and described in the head-note of the plaint. The case set up by the plaintiff was that the suit property was a Nazool property belonging to the State Government. It was leased out to the plaintiff by the Government and the plaintiff is in possession of the same as a lessee for the last several years. It is further alleged that the plaintiff had given permissive possession to the defendants as licensees with the condition that the defendants would vacate and deliver the possession to the plaintiffs as and when he would ask them to do so. It is also alleged that the defendants are carrying on the business of the sale of trunks etc. under the name and style of Des Raj Inder Pal. City Road Batala in the shop in dispute. It is further alleged that the plaintiff has revoked, cancelled and terminated the licence in favour of the defendants but in spite of that they have not delivered the possession of the shop to the plaintiff. Hence, this suit.

3. Notice of the suit was given to the defendants. Defendant No. 2 did not appear in the trial Court. However, the suit was contested by defendant No. 1 and he took the objections that the suit for mandatory injunction was not maintainable because there is no relationship of licenser and licensee between the parties; that the suit is not within limitation and that the suit is not property valued for the purposes of Court fee and jurisdiction. On merits, the stand of defendant No. 1 was that the site underneath the suit property is a Nazool property but the property in dispute has been got constructed by him and he is in possession of the same for the last 35 years. It is further pleaded that the plaintiff was never in possession of the property in dispute and the plaintiff never delivered the possession of the shop in dispute to him. The plaintiff was deputed by the defendant No. 1 to give bid for the shop in dispute in the auction proceedings for taking the same on rent and the plaintiff made a bid regarding the shop in dispute in his own name though the same was for and on behalf of the defendant No. 1. It is further alleged that the

plaintiff was not conducting himself properly and he used to squander the property of the defendant No. 1. With above broad allegations, the defendant No. 1 has prayed for the dismissal of the suit.

4. The plaintiff field a re-joinder, in which he reiterated the allegations made in the plaint by denying those of written statement and from the above pleadings of the parties, the learned trial Court framed the following issues:-

1. Whether the defendants are in possession of the property in dispute as licensee? OPP

2. Whether the suit is not maintainable? OPD

3. Whether the suit is properly valued for the purposes of Court fee and jurisdiction? OPP

4. Whether the suit is within limitation? OPP

5. Whether the plaintiff is entitled to the mandatory injunction prayed for? OPP

6. Whether the defendants are in adverse possession and hostile possession of the suit property as alleged? OPD

Petitioner now wants to come forward with the plea of licensee. The question of licensor and licensee cannot arise in the given facts and circumstances of the case. Accordingly, I hold that defendants are not in possession as licences and hence this issue is decided against the plaintiff and in favour of the defendants.

Issue No. 2 was also decided against the plaintiff and in favour of the defendants. Issue No. 3 was decided in favour of the plaintiff and it was held that the suit is properly valued for the purposes of Court fee and jurisdiction, No finding was given on issue No. 4 and it was held that this issue has become redundant in view of the findings on issue No. 2. Issue No. 5 was also decided against the plaintiff. Issue No. 6 was decided against the defendant and so issue No. 7. Issue No. 8 was decided in favour of the defendants and it was held that the defendants had raised the construction. Issue No. 9 was not pressed by the defendants before the trial Court. Finally, vide judgment and decree dated 9.3.1994 the suit of the plaintiff was dismissed and aggrieved by (he judgment and decree the plaintiff field the appeal before the first Appellate Court and for the reasons given in paras 6 to 15 the first Appellate Court dismissed the appeal. But with slight different reasons it will always be appropriate on my part to reproduce these paras as under-

'6. During the course of proceedings in the trial Court, the defendants got produced the copies of documents marked D. Ex.DW-3/A, Ex.D1, Ex.D-2, Ex.D-4. EX.DW6/1 and certain other documents, which go to show that earlier i.e. upto 1970 the family was HUF and Des Raj was the Karta of the family. These documents further show that thereafter a partnership firm was contituted consisting of Des Raj, Kewal Krishan and Ramesh Kumar. These documents go to show that prior to 1970, the family of Desh Raj was HUF.

7. The appellant-plaintiff produced copies of documents Ex.PW-5/B, Ex.P W-6/A,, Ex.6/A, Ex.PW-5/D, which go to show that notices were received by Desh Raj and Inder Pal from Rehabilitation Department. These documents further show that Des Raj gave power of attorney in favour of counsel but thereafter Inder Pal engaged the same counsel and contested the proceedings. These documents were filed to show that the shop in dispute was taken in the name of Inder Pal and that he had contested the case in 1983. There is no dispute about this fact and this fact is even admitted by the defendant.

8. Now two question have to be decided in this case as to whether Inder Pal had taken the shop in dispute for his own use or he had taken the shop for the Joint Hindu Family and whether the defendants are in possession in their own right or they are in possession as licensees of Inder Pal.

9. The contention of the counsel for the appellant-plaintiff is that admittedly the shop in dispute was taken on lease by Inder Pal and has argued that the defendants cannot take the plea that the same has taken on behalf of others. His contention is that after the passing of the Benami Transactions (Prohibition) Act, 1988 (here-in-after to be referred as Act) no such plea is available to the defendants. He has referred me to Section 4 of the Act, which reads as under:-

' 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 coparcener in the family;

(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 trustee or towards whom he stands in such capacity.'

The learned counsel for the appellant-plaintiff has argued that Section 4 of the Act bars the claim of the defendants-respondents claiming themselves to be the owner of the property. In order to support his case, the learned counsel has referred to 1994(2) R.C.R. 105, Daulat Ram v. Smt. Kalavi Devi, in which case it was held that the Act was retrospective in operation and that question of benami ownership could not be raised in view of Section 4. He further made reference to (1994-1)106 P.L.R. 440, Smt. Devinder Kaur v. Smt. Ajit Kaur Sandhu (deceased), in. which case also it was held that the Act was retrospective in operation. A reference was made to case A.I.R. 1989 Supreme Court 1247, Mithilesh Kumari v. Prem Behari Khare, in which case it was held that a statute can be given a retrospective action. The learned counsel has vehemently argued that Section 4 of the Act bars any claim on the basis of any benami transaction and as such, the defendants-respondents cannot take the plea that they had taken the shop and that Inder Pal had acted on their behalf.

10. The next argument of the learned counsel for the appellant-plaintiff is that admittedly the shop in dispute was taken on lease by Inder pal and the defendants-respondents cannot take the plea of benami and that as such, their possession is only that of a licensee. The learned counsel has argued that the shop in dispute was given by Inder Pal to his father Des Raj without any rent and without alienating die same and that as such, it has to be taken that the defendant respondents are in possession as licensees. He made a reference to 1987(1) All India Land Laws Reporter 556, Subhash Chandra v. Navnit Lal, in which case it was held that a suit for mandatory injunction to get the premises vacated from a licensee was maintainable. He further made reference to (1995-3) 111 P.L.R. 721, Ajit Singh v. Harmeet Singh, in which case the father allowed his son to stay in the house and it was held that occupation with permission did not create any right in favour of the son. In such case, the person who resides with permission remains in the house as licensee. A reference is further made to case (1997-1)115 P.L.R. 441, Mrs. Durga Devi v. Ganeshi, in which case it was held that person in permissive possession cannot claim adverse possession. The contention of the learned counsel is that in the case in hand, the defendants are in permissive possession but they have claimed themselves to be in adverse possession and they cannot be allowed to do so. A reference has also been made to (S.C.) 1993(3) R.C.R. 229, State of Punjab v. Brigadier Sukhjit Singh (Edit : Appeal from (1991-2)100 P.LR. 39), (1963)65 P.L.R. 490, Pooran Chand v. Malik Mukhbain Singh, and 1995 (2) R.C.R. 79, Conrad Dias of Bombay v. Joseph Dias of Bombay, in order to show the rights of a licensee. There is no dispute about the propositions laid down in these cases.

11. On the other hand, the contention of the counsel for the respondents-defendants is that plaintiff-appellant Inder Pal had taken the shop on lease for the joint Hindu Family and that since the shop in dispute was taken on lease i.e. since 1952 the defendants remained in possession of the shop and the plaintiff did, not lay any claim. His contention is that the plaintiff has admitted that since the taking of the shop on lease, his father has been carrying on the business in the shop. The plaintiff also admitted that there was not much of work at shop at Batata and that he had started the work at Pathankot and that some time thereafter he disposed of the property and paid back the money to his father. The contention of

the learned counsel is that all these facts would show that the plaintiff had taken the shop on lease for Joint Hindu Family. He also referred me to Section 4 of the Act and has contended that Sub-section (3) of Section 4 shows that the Act does not apply where the person in whose name the property was held was a coparcener in the Hindu undivided family and the property was held for the benefit of coparcener. The learned counsel has argued that plaintiff was residing with his father in 1952 when the shop in question was taken on lease. The plaintiff had no separate business and that all payments for taking the shop on lease had been made by firm M/s Des Raj Inder Pal. His contention is that the family was Hindu undivided family when the shop was taken on lease and that as such Section 4 will not come into operation and it has to be held that the property in dispute was taken on lease for the benefit of the Joint Hindu Family.

12. It may be pointed out here that the learned counsel for the appellant-plaintiff referred to me to para 3 of the written statement filed by the defendants and has argued that it has been averred by the defendants that Des Raj had constructed the shop and that since then he had been carrying on the business as sole proprietor. The learned counsel for the appellant-plaintiff had argued that since the defendants had taken the plea that Des Raj respondent-defendant was the sole proprietor of the business since the day of the taking of the shop on lease, the defendants now cannot take the plea that they had Hindu undivided family and that the plaintiff had taken the shop on lease as a member of the HUF.

13. I have carefully considered the arguments raised on both sides. The first question to be seen is as to whether the family was an undivided Hindu Family or not. This fact stands proved from the documents on the file. In this connection reference may be made to Ex.D-1, which shows that firm Desh Raj Inder Pal was HUF and that Des Raj, Kewal Krishan, Ramesh Kumar, Raj inder Kumar and Vinod Kumar were the male members of the family. This document clearly shows that the family of Des Raj was Hindu undivided family till 1970. The shop in question was taken on lease in 1952 and since then it remained in possession of Des Raj. It was after 1970 thus the firm was made a partnership firm. Now question to be seen is whether the defendants can be debarred from taking the plea as they had mentioned in the written statement that Des Raj was the sole

proprietor of the shop. Des Raj was the Karta of the HUF and if he had mentioned in the written statement that he was the sole proprietor of the firm, the same does not make any difference. Even otherwise also a wrong admission can be withdrawn. In this case it has been proved from documentary evidence that the family of Des Raj was HUF and as such the defendants cannot be debarred from taking this plea that the family was a HUF when the shop in dispute was taken on lease.

14. I have discussed above that plaintiff Inder Pal himself made statement to the effect that firm M/s Des Raj Inder Pal started working in the shop since after it was taken on lease and that the firm had been paying lease money. It is also clear from the statement of Inder Pal that he had no money to pay and he had taken the shop on behalf of the firm and that as such the defendants have a right to take the plea that the shop was taken on lease for the HUF and that Inder Pal was one of the coparcener of the Joint Hindu Family. So section 4 of the Act does not bar the defendants from taking the plea of benami. From all these facts, I have come to the conclusion that the shop in dispute was taken on lease by the Joint Hindu Family though it was in the name of Inder Pal, who was one of the coparceners of the Joint Hindu Family.

15. I have discussed above that the shop in dispute was taken on lease for the HUF and as such, the defendants had not taken possession of the shop as a licensee but they remained in possession of the shop being members of the HUF. Inder Pal was separated from the family and he was left with no right in the shop. The perusal of Ex.D-1 shows that he has not been shown as one of the members of the family. It is also an admitted fact that he had started business at Pathankot. So the possession of the defendants over the property in dispute was not permissive and the plaintiff-appellant is not entitled to seek possession of the disputed property. The defendants-respondents are not in permissive possession of the property and as such, the suit in the mandatory form is not maintainable and the plaint is not properly valued for the purposes of Court Fee and jurisdiction. The defendants are in possession of the shop since 1952. The plaintiff had started his business long time ago at Pathankot and since then he is not in possession of the shop and the defendants remained in possession of the shop as owner and their

possession was adverse to the interest of the plaintiff, but the plaintiff did not file any suit within 12 years of his dispossession and on account of this reason, the suit is not within time. For the facts discussed above, I have come to the conclusion that there is no merit in the present appeal and the same is dismissed with costs. Decree sheet be drawn accordingly and then file be consigned to the record room.'

6. I have heard Mr. A.K. Chopra, Advocate, on behalf of the appellant and with his assistance have gone through the records of this case.

7. After hearing the learned counsel for the appellant, I am inclined to dismiss this appeal in limine. It was argued at some length by the learned counsel for the appellant that the approach of the Courts below in dealing with the controversy in hand was not proper. The first Appellate Court has given those findings which were totally not permissible under the law by holding that the plaintiff in fact was a benami and that the property in question was taken on lease/licence from the government by defendant No. 1, but in the record of the government the name of the appellant-plaintiff figures. Mr. Chopra was also highly critical upon the discussion of the first Appellate Court by saying that totally different findings to the facts have been given with regard to the business and this business was in fact the business of Joint Hindu Family. The counsel submitted that under the Benami Transaction (Prohibition) Act, 1988, the plea which was taken by defendant No. 1 in the written statement is not permissible and once it is established on the record that this is not open to defendant No. 1, there should be no difficulty in holding that defendant were the licensees of the plaintiff and their licensees have been rightly revoked by the plaintiff and in these circumstances the defendants had no other option but to deliver the possession to the plaintiff.

8. I do not subscribe to the arguments raised by the learned counsel for the appellant. Section 4 of the Benami Transactions (Prohibition) Act, 1988 (hereinafter referred to as the Act) lays down that 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 be allowed in any suit, claim or action by or on behalf of a person claiming to be the real owner

of such property. Sub-section (2) of this section lays down that 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. But there are two provisos which have been added to Sub-section (2). Nothing as stated in Sub-section (2) shall apply 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 coparcener in the family and secondly 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.

9. Now let us see what was the case of the plaintiff and what was the defence. The case set up by the plaintiff was that the property was taken on lease by him from the government as a Nazool land. He constructed the property and then he delivered the permissive possession to defendants as a licensee and in spite of the revocation of the licence of the defendants, they had not delivered the possession. Hence the suit for mandatory injunction. On the contrary, the defence of the defendants was that the property in dispute was not constructed by the plaintiff, rather it was constructed by defendant No. 1 about 35 years back. The plaintiff never remained in possession of the suit property and the possession of the shop was never given by the plaintiff to the defendants. Des Raj, defendant No. 1 was carrying on the business of whole-sale since the property was taken on lease and defendant No. 2 Romesh also became a partner. When the property was being auctioned by the government for the purpose of lease/licence, defendant No. 1 Desh Raj deputed his son Inder Pal (plaintiff) to give a bid on his behalf and he acted accordingly. However, the government has leased out the, property in the name of Inder Pal but the fact is that defendants remained in possession as leasee since the date the shop in question was leased out. It was the answering defendant who had been paying the rent and had been carrying on his business in the shop after constructing the same. Since the plaintiff was not working properly and he had wasted the money, therefore, he had filed the present suit just for harassment.

10. Before I proceed further into the matter, I may make a mention that the plaintiff has conveniently not made the government as a party and what was the reason in not impleading the government even as a formal party, is not difficult to for see. In fact, the plaintiff never got the possession from the government of the site in question. The possession was given to defendant No. 1, who constructed the shop right from the very beginning being the head of the family and thereafter a joint business was started. There is no evidence at all that the possession of the site in question was ever delivered to the plaintiff by the government. 'If the plaintiff was not in a position to establish when the licence was created, and in what manner and against what consideration, how the plaintiff can say that defendants are his licensees? In fact, the plaintiff just wants to take the advantage of the record of the government in which his name figures as a licensee/lessee. He wants to take the benefit of the privity of the contract between him and the government. In this light, the discussion of the first appellate Court is relevant to determine the nature of the business which was being carried out in the shop in dispute. Even if it is assumed for the sake of arguments that the discussion which has been entered into by the first Appellate Court in some of the paras is not directly relevant to the issue, still the plaintiff has to prove his case at the first instance. He cannot rely upon the weakness, if any, of the defence nor he can make capital of the discussion of the Courts below. The plaintiffs case was very simple that the defendants were inducted as licensees in the disputed shop and when he failed to prove the same, he cannot get injunction in the shape of mandatory one. In this light, the defendant came with the plea that the name of the plaintiff as a lessee in the record of the government is just for an entry sake. Defendant No. 1 Des Raj right from the very beginning was carrying on the business. The plaintiff shifted his business to Pathankot. He could Hot get a success and now he wants to return to Batala and wants to create an unnecessary fuss to disturb the business being carried by the defendants. Even if it is assumed for the sake of arguments, that the final bid of the government had gone in favour of the plaintiff with regard to Nazool land, still that bid was for the benefit of the joint Hindu family and the case of the defendants is covered by the first exception. Still further, the plaintiff was holding the lessee/licencee rights in a fiduciary capacity and for the benefit of other members of the family including his father and brother. But it is difficult to believe that the

plaintiff had created a licence in favour of the defendants. In fact, the intention of the plaintiff is not sincere and clear. In the garb of present suit, he wants to dispossess his father and brother from the property on the plea that they were inducted in the premises in dispute as licensees.

11. I do not dispute with the proposition of law that the suit for mandatory injunction against a licensee is legally maintainable. It is always maintainable, if the possession of a person, is permissive. But if the possession of a person is of his own right or in the capacity of a trespasser, in such a situation the suit for mandatory injunction is not maintainable. Therefore, I hold that both the Courts had rightly concluded that the defendants are not in possession of the property as licensee and, thus, the suit of the plaintiff for mandatory injunction was not legally maintainable.

12. The learned counsel for the appellant wanted to convince me that there was hardly any occasion on the part of the first Appellate Court to give a finding that the bid given by the plaintiff was benami and was made on behalf of other defendants' also when the site in question was given on lease or licence by the government. In my opinion, this finding was necessary because the defendants wanted to bring their case under Sub-Clauses (a) and (b) of Sub-section (3) of Section 4 of the Act and by evidence it was established that firm M/s Des Raj Inder Pal was HUF and other sons were the male members, of the family including Inder Pal plaintiff. Right from 1952 to 1970 the property was being enjoyed as Hindu undivided family property and in the year 1970 the firm was made a partnership firm. Inder Pal plaintiff made an admission before the trial Court that firm M/s Des Raj Inder Pal started working in the' shop after it was taken on lease and that very firm was paying the lease money. Also it is proved that Inder Pal had no money to pay and he had taken the shop on behalf of the firm and in these circumstances the defendants took a legitimate stand that the shop was taken on lease/licence by the HUF. In this regard Sub-clauses (a) and (b) of Section 4(3) of the Act give a valid defence to be taken to a person.

13. In short, this Court is of the considered opinion that the plaintiff has not been able to establish by his own conduct and admission and by circumstances that he

ever inducted his father and brother as licensees in the shop in dispute and in this view of the matter his suit for mandatory injunction was not maintainable. Nothing prevents him from filing an alternative remedy which may be permissible to him according to law. He has been rightly non-suited by the court below. I do not see any merit in this appeal and dismiss the same in limine with no order as to costs.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com