

Samaresh Mohan Ghosh Vs. Muktesh Mohan Ghosh and ors.

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Court : Kolkata

Decided On : Dec-16-1997

Reported in : (1998)1CALLT345(HC)

Judge : Debi Prosad Sarkar - II, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 66 and 115A - Order I, Rule 10;; [Constitution of India, 1950](#) - Article 227;; Benami Transaction (Prohibition) Act, 1988 - Sections 4(1 and 3) and 7;; Indian Trust Act, 1982 - Sections 81, 82 and 94;; [Income Tax Act, 1961](#) - Section 281 A

Appeal No. : Civil Revisional Jurisdiction C.O. No. 426 of 1997

Appellant : Samaresh Mohan Ghosh

Respondent : Muktesh Mohan Ghosh and ors.

Advocate for Def. : Mr. A.P. Roy Chowdhury, ;Mr. Priyabrata Mukherjee and ;Sumit Roy, Advs.

Advocate for Pet/Ap. : Mr. S.S. Haq and ;Mrs. Archana Manna, Advs.

Judgement :

D.P. Sarkar-II, J.

1. This is an application under Article 227 of the Constitution of India directed against an order dated 15.1.94 passed in Title Suit No. 23/1994 by the learned Additional District Judge, 8th Court, Alipore.

2. The facts leading to this revisional application are, in short, as follows :--

The dispute arises out of Partition Suits. The subject matter of the suit i.e. the suit property stands in the name of Samaresh Mohan Ghosh and Nikhilesh Mohan Ghosh in equal share as per the Deed of Purchase. Now, Samaresh filed Title Suit No. 23/1994 against Nikhilesh for partition of his half share. On the other hand, Nikhilesh as plaintiff filed another Suit No. 53/1994 for partition against Samaresh through the constituted Attorney namely Muktesh Mohan Ghosh--the elder brother against Samaresh and this Muktesh also as constituted Attorney filed written statement in Title Suit No. 23/1994 filed by Samaresh as plaintiff. Now, this Muktesh and other filed an application under order 1 Rule 10 of the CPC for his addition and the addition of his four sisters to the Suit as parties on the ground that the suit property was the property of their father--Late Tripura Binode Ghosh who purchased the property in the name of his two sons--Samaresh and Nikhilesh for the benefit of himself, the daughters, remaining son i.e. the present petitioner and the mother i.e. the wife of Late Tripura Binode Ghosh. The learned trial court was pleased to reject that application and against that order of rejection a revisional application under section 115A of the CPC was filed before the learned District Judge, Allpore and the matter was disposed of by the learned Additional District Judge, Allpore who was pleased to set aside the order of the learned trial court and allowed the prayer for addition of parties i.e. the present petitioner and his four sisters, mother being dead.

3. On being aggrieved by such order, the present application under Article 227 of the Constitution has been filed by the petitioner on the ground that the learned Additional District Judge acted without jurisdiction and as such Impugned order should be set aside.

4. Learned Advocate for the petitioner has also taken up the plea that after passing of the Benami Transaction (Prohibition) Act of 1988 such plea of benami transaction cannot be accepted by the court.

5. But it is contended by the O.P.s that section 4(1) of the Benami Transaction (Prohibition) Act has got no retrospective effect in terms of the Judgment of the apex court reported in : (1995)124CTR(SC)311 . The disputed purchase took place on 17.1.1972 i.e. long before the enforcement of the Benami Transaction (Prohibition) Act, 1988.

6. On the other hand, the learned Advocate for the petitioner points out that the apex court in its Judgment reported in : (1995)124CTR(SC)311 as referred to by the O.P.s creates a bar undoubtedly against application of the provision of that section to suit, claim or action to enforce any right in a property held benami against a person in whose name such property is held or any other person, if such proceeding is initiated by or on behalf of a person claiming to be the real owner thereof, prior to the coming into force of section 4(1) of the Act. in this context, it is further submitted by the learned Advocate for the petitioner that the said Act was enforced on 19th May. 1988. But the instant suits were instituted in 1994 i.e. long after the date of enforcement of the Act. Therefore, in such suits the plea of benami transaction cannot be pleaded.

7. The learned Advocate appearing for the O.P.s, on the other hand, has tried to assail the revisional application on three points :

Firstly, on the plea that it was not a benami transaction but it was a Trust under the indian Trust Act and as such it comes under the provision contained in section 4(3)(b) of the Benami Transaction (Prohibition) Act, 1988. The said enactment lays down that where the person in whose name the property is held is a trustee or other persons standing in the fiduciary capacity, and the properties held for the benefit of another person for whom he is a trustee or towards whom he stand in such capacity, nothing in that section i.e. section 4 of that Act shall apply. On the background of this case it is necessary to distinguish between Trust and a benami transaction. in case of a benami transaction the so called benamder is simply a name lender having no interest or title to the property; the real title lies with the person who claims to be the real owner. That apart, benami transaction has got some events the primary one of which is the source of consideration money; secondly, possession of the property, possession of the Title Deed with back

Deeds and motive behind acquisition of the property in benami etc.

8. In case of a Trust, the trustees hold the real title and the beneficiaries of the Trust hold the beneficial title or interest. Section 82 of the Indian Trust Act lays down that where a 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 money for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration.

9. In the instant case, it appears from the affidavit-in-opposition that the case of the O.P.s is that their father actually paid the consideration money and purchased the disputed property in the names of two sons viz. Samaresh Mohan Ghosh and Nikhilesh Mohan Ghosh with the intention that Samaresh and Nikhilesh would be the trustees and shall hold the property as trustees for the benefit of Tripura Binode Ghosh, his wife, his sons and daughters.

10. In this connection, it is important to mention that section 7 of the Benami Transaction (Prohibition) Act, 1988 has repealed expressly sections 81, 82, 94 of the Indian Trust Act, 1982, section 66 of the Code of Civil Procedure and section 281A of the Income Tax Act, 1961.

11. Apart from that legal effect of such repeal, some relevant points also are necessary to be kept in mind in this connection. According to elder brother--petitioner--Muktesh the present petitioner--Samaresh was a minor at the time of disputed transaction and it was his case that the said minor Samaresh had no independent income. Apart from other questions, if we accept the statement that Samaresh was a minor, definitely it cannot be intended by the father--Tripura Binode to make and treat the minor son--Samaresh as a trustee.

12. The property was purchased in 1972 and thereafter the father- Tripura Binode was alive for long time, the mother died only in 1993 and the married sisters are all living, the petitioner--elder brother--Muktesh is also living but during the lapse of 21 years, neither the father nor the mother nor the brothers and sisters even raised the plea that Samaresh and Nikhilesh used to hold the property as trustee

for the father, mother, brothers and sisters. Muktesh as the constituted Attorney of Nikhilesh filed the written statement in the suit of Samaresh and the plaint in the suit of Nikhilesh but nowhere this plea was taken up.

13. More than 21 years after, for the first time the petitioner-Muktesh with his sisters have come forward with the plea that the disputed property was the property of their father and not of the persons in whose names it stands. Even if it is established that the father-Tripura Binode paid the consideration money for purchasing the disputed property by two separate Deeds in the names of two separate sons viz. Samaresh Mohan Ghosh and Nikhilesh Mohan Ghosh, in view of the principle doctrine of advancement, the two brothers should not be treated either as trustee or as benamders of Tripura Binode Ghosh.

14. The learned Advocate for the O.P.s submits that these are all questions relating to merit of the suits and these questions should not be taken into consideration at the time deciding the correctness of the impugned order by which Muktesh and his sisters directed to have been added as parties to the partition suits by the revisional court below.

15. The question of parties to a partition suits is a very Important question. In a partition suit all the persons should be made parties who have got common interest in the property brought into hotch-pot. A stranger or a person, prima facie, having no interest in the property which is the subject matter of partition should not be allowed to be added as a party unless it can be shown that actually the interest of such persons are involved in the suit property and if decree for partition is passed that will adversely affect their interest. To consider such question it is necessary to look into the questions discussed above. A party, at his sweet will should not be allowed to be added as a party simply on the asking and on the ground that he has got interest in the property which is the subject matter of the partition.

16. The second point that was urged before this court by the learned Advocate for the OPs is that the impugned order was passed by the subordinate court in exercise of revisional Jurisdiction under section 115A of the CPC Therefore, the application under Article 227 of the Constitution also being under revisional

jurisdiction, such second revision is not maintainable. Section 115 of the CPC makes it clear that once the revisional jurisdiction has been invoked under section 115A of the CPC the High Court shall not exercise its revisional Jurisdiction under section 115 of the CPC But Jurisdiction conferred by the Article 227 of the Constitution cannot be and should not be termed as revisional jurisdiction strictly speaking, although its Jurisdiction sometimes verges on the revisional power of a court. But it is clear from the provisions of Article 227 of the Constitution that this particular Article is meant for properly directing the subordinate courts in order to prevent error in jurisdiction and apparent illegal on the face of the record. The scope of section 115 of the CPC is wider than the scope under Article 227 of the Constitution. Therefore, the argument that once the disputed point has been decided under section 115A of the CPC, no application under Article 227 of the Constitution shall lie against such order cannot be accepted. It is necessary to be examined whether the revisional court below acted within its jurisdiction by allowing the application for addition of parties or not.

17. Lastly, it is submitted by the learned Advocate for the OPs that by the Impugned order the present petitioner-Muktesh Mohan Ghosh and his four married sisters have been directed by the court below to be added as parties to the partition suit. Therefore, the said impugned order should not be challenged or considered in the absence of all the parties directed to be so added.

18. It is pointed out by the learned Advocate for the petitioner that in the revisional matter those sisters did not contest. Only Muktesh- the elder brother preferred to contest that revisional case before the court below. So, in the present application under Article 227 of the Constitution that Muktesh has been made party, if the sisters did not take any active part or did not contest in the revisional court below, I think there is force in the argument that the application under Article 227 of the Constitution will not be bad for defect of parties for exclusion of those non-contesting sisters.

19. After careful consideration of the entire issues involved, I think that the partition suit should not be encumbered by addition of all the persons as parties on the plea which was never agitated by the father-Tripura Binode or anybody else during

long 21/22 years only for making the suit more complicated and to cause unnecessary delay in disposal of the matter.

Hence, the application under Article 227 of the Constitution of India is hereby allowed. The Impugned order passed by the revisional court below is hereby set aside. The learned trial court is directed to expedite the disposal of the suits. Without being prejudiced by the observations made above.

On the oral prayer of the learned Advocate for the O.P., the operation of this order dated 16.12.97 is stayed for a period of four weeks from this date to enable the party to approach to the higher forum.

If the party applies for xerox certified copy of the order dated 16.12.97, the department concerned is directed to issue the same within a week from the date of application.

20. Application allowed

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