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SooperKanoon Citation : sooperkanoon.com/869581

Court : Kolkata

Decided On : Feb-10-1997

Reported in : (1997)2CALLT43(HC)

Judge : Samir Kumar Mookherjee and ;Basudeva Panigrahi, JJ.

Acts : Benami Transactions Prohibition Act, 1988

Appeal No. : Appeal from Original Decree No. 62 of 1978

Appellant : Buddheswar Ghosh and ors.

Respondent : Ekkari Ghosh and ors.

Advocate for Def. : Bhaskar Bahattacharjee and ;P.K. Bhattacharjee, Advs.

Advocate for Pet/Ap. : S.P. Roychowdhury, ;Phani Bhusan Das and ;Amit Kumar Rakshit, Advs.

Judgement :

Samir Kumar Mookherjee, J.

1. The first appeal is against a decree for declaration and partition. The defendants are appellants. The plaintiffs belonged to the same branch of the family and the predecessor in interest of the plaintiffs and defendants were brothers.

2. The dispute involve in the appeal appears to be confined to the properties mentioned in the schedule attached to written statement. The other properties included in the plaint schedule, apart from those properties in the schedule of the written statement, appear to be not seriously claimed by the defendants/appellants. The Genealogical Table at page 34 of the paper book indicates the relationship between the parties.

3. The basis of plaintiffs claim with regard to the properties scheduled in the written statement is that though the properties stand in the name of the mother of the defendants they are really properties acquired out of joint family properties and as such he claims to have equal share with the defendants. The defence on the other hand is that the properties belonged absolutely to their mother in her own right, and were acquired out of her sridhan money. The alternative defence is that even assuming the allegation of Benami to be true the suit must be dismissed because of contravention of the provisions of the Benami Transactions Prohibition Act. In this connection the defendants have also taken the defence that, in the absence of appropriate pleading, it is no longer open to the plaintiffs to allege and prove that the exceptions, as mentioned in the Benami Transaction Prohibition Act apply. Thirdly, even if pleadings are amended, the benamdar not being the member of the joint family, the presumption of jointness of the properties cannot hold good.

The learned trial Judge, in the impugned judgment has recorded the following findings :-

i) The case of previous partition has sought to be made out by the defendant had been found to be not believable.

ii) Regarding Plot No. 493 recorded in C.S. Khatian No. 61, Plot Nos. 1026, 1029 & 908 recorded in Khatian No. 226 and C.S. Khatian No. 226, Plot 1348 and 1339 recorded in C.S. Khatian No. 228, Plot No. 1879 recorded in C.S. Khatian No..... Plot No. 1633 of Khatian No. 290, 3 annas share of Plot No. 1268 recorded in C.S. Khatian No. 82; Plot No. 1990 and 1447/2562 recorded in Khatian No..... were in possession of Bina Pani and rents in respect thereof were paid by her. The Deeds of Purchase with regard to these plots

contained clear recital that the consideration came out of Bina Pani's sridhan and had been gifted by her to the defendant by a registered Deed of Gifts dated 30th March, 1990. The defence evidence about separate possession and cultivation has been dis-believed.

iii) The Purchase pion were possible to have been met out of the income of joint family properties which were large. Claim of Bina Pani having sridhan was dis-believed. The properties were held to be joint family properties standing in the name of Bina Pani and plaintiffs entitlement to 8 annas share had been found.

iv) With regard to properties being plot Nos. 1634, 1638 and 1672 of Khatian No. 285 and Plot No. 1672/2360 of Khatian No. 289 which were acquired in a pre-emption proceeding admittedly by the plaintiffs 1 & 2, the plaintiffs case of he having paid half of the consideration money required to be deposited had been accepted as no documentary evidence was found available in support of the defence case of payment of 50% of the consideration money.

v) Plot Nos. 1268 and 1960, the two tanks known as Senpukur and Durga Madhab, Bina Pani was a name lender and defendants have 3 1/2 annas share, the plaintiffs share being 9 1/2 annas. In Durga Madhab, the plaintiff has 6 annas share plus 1/3 share of 4 annas and the remaining share belonged to the defendants.

4. On the above findings, the suit had been decreed in preliminary form declaring plaintiffs 3 annas share and the defendants 8 annas share except in the two tanks where the plaintiff had 9 1/2 annas share and defendants 7 1/2 annas share.

5. We have given very anxious consideration and thoughts to the submissions made by the learned senior advocates for the rival parties, benami transactions have been given judicial recognitions as very common in India; the onus to prove benami has been accepted to be dlsplaceable by production of very slight evidence. It has also been judicially recognised that the factors or elements upon consideration of which a transaction, whether benami or not, has to be adjudicated are not rigidly definable. But the entirety of materials or evidence, in a particular case, is required to be considered for arriving at a conclusion. The relative

importance of a particular criterion or factor has been found to be dependent on the speciality of factors in a case and relationship between the real owner and the benamdar though the source of money or the custody or possession of the documents of title frequently assumes importance. It is also well accepted that merely because the benamdar is a Hindu female, who is a member of a joint Hindu family, there is no presumption that the property in question must have belonged to the joint family and not to her as her stridhan property. Even in such a case the burden of proof lies on him, who alleges benami. For authorities on the above propositions, references may be made to the cases of *Bhuban Mohini v. Kumud Bala*, reported in 28 CWN 131, and *Khabirannessa v. Sudhamoy*, reported in : AIR1958 Cal733 . Mere difficulty, in discharging the onus to prove benami, does not relieve the person, asserting benami, by taking recourse to conjectures or surmises as substitutes (vide *Jaydayal Poddar and Anr. v. M.S.T.P.B. Hazra*, reported in : [1974]2SCR90). The said case broadly laid down the following factors for consideration to adjudicate benami-(a) source, (b) nature and possession of property, (c) motive, (d) possession of the parties and relationship, (e) custody of title deeds and to conduct of the parties subsequent to the purchase. We have already indicated that the properties, described in Schedule A to the written statement, are the disputed properties, and, accordingly, we have dealt with the materials in appeal with regard to the said properties only. We have indicated also that the story of previous partition had been disbelieved by the learned trial Judge simply on the ground that the persons, who were alleged to be present at the time of partition, were not examined. It is, however, to be considered that there are ample materials on record to establish by documents that parties had been exercising acts of possession with regard to particular properties for a considerable period of time by payment of the dues with regard thereof and such possession had been recorded in the relevant records of rights. The finding of the trial court about the purchase prices were possible to have been made out of the income of the Joint family properties, which were large, stands vitiated by conjectures and surmises as there was no evidence adduced that payments were made by joint family or husband. In the background of this, the recitals in the deeds of title, relating to such properties carries with it a presumption of correctness and should not be easily set aside. In this connection

reference may be made to the case of Banga Chandra v. Jagat Kishor, reported in 21 CWN page 225, and the case of Chandra Kishore v. Kumar Upendra reported in 37 CLJ 319. The learned trial Judge approached this point upon wrong placement of onus by banking upon failure on the part of Bina Pani to prove the existence of her stirdhan. This finding was directly contrary to the established legal possession as summarised by us hereinabove. On the same principles the findings of the learned trial Judge regarding the tanks have to be set aside.

6. Before parting with the case, we would like to express that in view of the factual position of the suit being of the year 1970, when the Banami Transaction Prohibition Act, 1988 had not been enacted, on application of the principle laid down by the apex court in the case of R. Raja Gopal Reddy v. Padmini Ch.Sekharan, reported in : [1995]213ITR340(SC) , the submissions of Mr. Roy Chowdhury that the plaintiffs suit was not maintainable cannot be accepted.

7. For the reasons aforesaid, we allow the appeal and set aside the judgment and decree with regard to the properties mentioned in Schedule A to the written statement. The remaining part of the decree stands affirmed as a preliminary decree upon modification as above. There will be no order as to cost.

At the time of delivery of the judgment we are informed on behalf of the appellants that the sole plaintiff who is the respondent in the appeal had died during the pendency of the appeal but after conclusion of its hearing. A formal application has also been preferred, which is within time and inform. The same be treated as on day's list, and the names of the persons described therein as heirs of the respondents be brought on records of the case.

If an urgent certified copy is applied for, the department is directed to deliver the same within two weeks from the date of deposit of the requisite stamps and folios.

Basudeva Panigrahi, J.

8. I agree