

Sarmishta Gupta Vs Krishan Kumar Aggarwal

Court: High Court of Himachal Pradesh

Date of Decision: April 24, 2010

Acts Referred: Benami Transactions (Prohibition) Act, 1988 â€” Section 1(3), 4, 4(1), 4(2)
Contract Act, 1872 â€” Section 10, 23
Himachal Pradesh Tenancy and Land Reforms (Amendment) Act, 1987 â€” Section 1, 3, 4
Himachal Pradesh Tenancy and Land Reforms Act, 1972 â€” Section 118
Trusts Act, 1882 â€” Section 48

Hon'ble Judges: Kuldip Singh, J

Bench: Single Bench

Advocate: Raman Setti, for the Appellant; G.D. Verma and B.C. Verma, for the Respondent

Final Decision: Allowed

Judgement

Kuldip Singh, J.

The Appellant was Plaintiff, she filed a suit for declaration and possession, which was decreed by learned Sub Judge, 1st

Class, Nalagarh on 14.6.1996 but was dismissed by the learned Additional District Judge, Solan, Camp at Nalagarh on 26.2.1999 in Civil Appeal

No. 44-NL/13/96 and in Cross-objections No. 11-NL/13/97/96.

2. The case of the Appellant is that she is owner of land measuring 88 Bighas 6 Biswas, Khewat/Khatoni No. 28/46, Khasra No. 358, previously

before consolidation entered at Khewat No. 44/81 bearing Khasra Nos. 458/394 (14-0) and 460/397 (74-6), situated at Vill. Bir Palasi,

Pargana Palasi, Tehsil Nalagarh, District Solan (HP), sale deed dated 1.5.1986, sale deed dated 17.5.1986 and gift deed dated 17.11.1986 in

favour of deceased Ram Sarup by Respondent projecting him as General Power of Attorney holder of Appellant on the basis of forged General

Power of attorney dated 30.7.1981 are wrong, illegal without consideration and not binding on Appellant. The Appellant has prayed decree for

possession. The Respondent was Defendant No. 2 and his father Ram Sarup was Defendant No. 1 in the suit. Ram Sarup died during the

pendency of the Second Appeal and his name was deleted.

3. The suit was contested by Respondent and his father Ram Sarup and they took preliminary objections of valuation, jurisdiction. On merits, they

denied the claim of the Appellant. It was alleged that suit land was purchased by firm M/s Him Stone Crusher, in which Respondent, Ram Sarup,

and Ashok Kumar, brother of Respondent were partners. The suit land was purchased by firm from previous owner Karam Singh vide sale deed

dated 28.11.1980 in the name of Appellant. The possession of the suit land was already with Respondent and his father as Chakotedar of previous

owner Karam Singh since Kharif 1973. As per settlement arrived between the parties, the suit land was to be transferred in the name of deceased

Ram Sarup by means of correction of Khasra Girdawari as tenant, by way of sale or gift to be executed by the Respondent in favour of Ram

Sarup on the basis of General Power of Attorney dated 10.7.1981, registered on 30.7.1981. In these circumstances, the sale deeds and gift deed

were executed by the Respondent in favour of deceased Ram Sarup. The Respondent and deceased Ram Sarup defended the sale deeds and gift

deed. The Appellant had filed replication and reiterated her stand.

4. On the pleadings of the parties, the following issues were framed:

1. Whether the Defendant has obtained signatures on the blank paper and has forged by mis-representation, fraud and undue influence as alleged

and has got the power of attorney registered at Sr. No. 1231 dated 30.7.1982 and 258 dated 30.4.1982 as alleged? ...OPP

2. Whether the sale deed by Defendant No. 1 in favour of the Defendant No. 2 dated 1.5.1986 No. 342 dated 17.5.1986, No. 375 and gift deed

No. 823 dated 17.11.1986 are illegal, fraudulent without consideration and is a result of conspiracy by Defendants to grab the suit land? ...OPP

3. Whether the above sale deeds are void abinitio being hit by Section 118 of HP. Tenancy and Land Reforms Act? ...OPP

4. Whether the order dated 2.8.1985 of A.C.O is void without jurisdiction as alleged? ...OPP

5. Whether the Plaintiff has not fixed the correct amount of the court fee as alleged. ...OPD.

6. Whether the Plaintiff was as ostensible partner for effecting sham fictitious nominal sale deed of suit land from Karam Singh as alleged? ...OPD

7. Whether the Plaintiff is owner and is entitled to the relief claimed for? ...OPP

7-A Whether the Plaintiff was the trustee of the firm M/s Him Stone Crusher, as alleged. If so, its effect? ...OPD

7-B If issue No. 7-A is proved whether the sale deed was executed in favour of aforesaid firm in discharge of said trust, as alleged? ...OPD.

8. Relief.

5. The issues No. 1, 2, 7-A and 7-B were answered in negative, issues No. 3 to 7 were answered in affirmative and the suit of the Appellant was

decreed on 14.6.1996 by learned Sub Judge. The Respondent and deceased Ram Sarup filed appeal against the decision dated 14.6.1996, the

Appellant had also filed cross-objections in the appeal. The learned Additional District Judge allowed the appeal, dismissed the cross-objections,

set aside the judgment, decree dated 14.6.1996 and dismissed the suit of the Appellant, hence, Appellant has come in Second Appeal, which has

been admitted on following substantial questions of law:

1. Whether the provisions of Section 4(1) & 4(2) of the Benami Transaction (Prohibition) Act are not applicable when admittedly the initial title is

stated to flow out of a benami transaction?

2. Whether any sale or gift or transfer made in violation of the provisions of Section 118 of the H.P. Tenancy & Land Reforms Act, can confer any

right, title or interest upon the transferee under such a transaction?

6. I have heard Mr. Raman Setti, learned Counsel for the Appellant and Mr. G.D. Verma, Senior Advocate, learned Counsel for the Respondent

and have also gone through the record. It has been submitted on behalf of the Appellant that both the courts below have held that sale deeds and

gift deed executed by Respondent in favour of deceased Ram Sarup are in violation of the H.P. Tenancy and Land Reforms Act, 1972 (for short

Act). The learned Additional District Judge has erred in holding that even though there was bar for transfer of land in favour of non-agriculturist u/s

118 of the Act at the relevant time yet transactions made in violation of Section 118 were not void. The learned Additional District Judge has taken

wholly erroneous view while interpreting Section 118. The defence of the Respondent and deceased Ram Sarup that Appellant was holding the

suit land as benamidar is barred by Section 4 of the Benami Transaction (Prohibition) Act, 1988. The learned Counsel for the Appellant has

prayed that Appellant is entitled to decree as prayed in view of established facts on record.

7. Mr. G.D. Verma, learned Senior Advocate has supported the impugned judgment, decree. He has submitted that Appellant is estopped from

challenging the sales and gift, the Respondent is entitled to take benefit of Benami Transactions (Prohibition) Act. The Appellant has not paid the

requisite court fee on the plaint. The transactions could be challenged within one year. The permission u/s 118 can be taken later on. Once the

property has been transferred through sale deeds and gift deed then the Civil Court has no jurisdiction to consider the bar imposed by Section 118

of the Act. The evidence cannot be re-appreciated.

8. The submissions made by learned Counsel for the Respondent which are beyond the scope of aforesaid substantial questions of law cannot be

considered. The appeal has been admitted on aforesaid two substantial questions of law, only those submissions which are relevant for deciding

aforesaid substantial questions of law require consideration and not other submissions which are not relevant for deciding aforesaid substantial

questions of law.

9. The Section 4 of The Benami Transactions (Prohibition) Act, prohibits the real owner to assert his right to recover property by way of suit,

claim or action against a person who is holding the property as his benamidar, similarly Section 4 also prohibits that a real owner cannot put such

defence against his benamidar in any suit, claim or action. The suit was filed by Appellant on 13.9.1989. The Benami Transactions (Prohibition)

Act has repealed the Benami Transactions (Prohibition of Right to Recover Property) Ordinance, 1988. The Sub-section (3) of Section 1 of the

Benami Transactions (Prohibition) Act, provides that Section 4 of the said Act shall come into force on 19.5.1988.

10. On the date of filing of the suit, Benami Transactions (Prohibition) Act, had already come into force, therefore, in view of Section 4 of the

Benami Transactions (Prohibition) Act, Respondent cannot take shelter that Appellant was holding the suit property as benamidar of Respondent

and Ram Sarup. The Respondent and deceased Ram Sarup accepted the title of Appellant on the suit property and only thereafter, they got the

sale deeds and gift deed of the suit property in favour of deceased Ram Sarup. The Respondent and deceased Ram Sarup having admitted

Appellant to be the owner of the suit property at the relevant time, therefore, now the Respondent cannot be permitted to project the case that

Appellant was not the owner and he and Ram Sarup were the real owners at the relevant time. The substantial question of law No. 1 is decided

accordingly.

11. The learned Sub Judge in paragraph 38 of the judgment has recorded a finding that Defendant No. 1 was not an agriculturist in H.P. at or

about the time when the sale deeds and gift deed were executed in his favour nor he had obtained permission from the State Government. In view

of this, the impugned sale deeds and gift deed were in contravention of the provisions contained in Section 118 of the Act and as such, these

transactions were void and do not pass any title to Defendant No. 1.

12. The learned Additional District Judge has also held that because of bar of Section 118 of the Act, the sale transactions dated 1.5.1986,

17.5.1986 and gift deed dated 17.11.1986 in respect of disputed land in favour of Ram Sarup were not valid. He has observed that question

would arise whether the Plaintiff could utilize this bar against the transfer of land in favour of non agriculturist or the invalidity of the deeds of

transfer to recover back the possession of the disputed land from Ram Sarup. The learned Additional District Judge has further held that even if the

sales and gift made in favour of Ram Sarup were invalid but those were not void abinitio, therefore, the Plaintiff can not take benefit of that fact to

recover back the possession of disputed land from Respondent Ram Sarup. The learned Counsel for the Appellant has assailed this finding of the

learned Additional District Judge.

13. The Act has been amended several times. The Section 118 of the Act at the time of sales and gift was as follows:

Transfer of land to non-agriculturists barred.-(i) Save as provided in this Chapter, no transfer (including sales in execution of a decree of a Civil

Court or for recovery of arrears of land revenue) by way of sale, gift, exchange, lease or mortgage with possession shall be valid in favour of a

person who is not an agriculturist.

(2) Nothing in Sub-section (1) shall be deemed to prohibit the transfer of any land by an agriculturist in favour of.-

(a) landless labourers; or

(b) landless persons belonging to scheduled castes and scheduled tribes; or

(c) village artisans; or

(d) landless persons carrying on an allied pursuit; or

(e) State government ; or

(f) Co-operative Societies and [a Bank].

(g) a non-agriculturist within the limits of municipal corporations, municipal committees, notified area committees for any one of the purposes, i.e.,

for construction of a dwelling house, a shop or commercial establishment or office or industrial unit subject to the condition that transfer of land for

such purposes shall not exceed-

(i) in case of a dwelling house-500 square metres;

(ii) in case of a shop, commercial establishment or office- 3000 square metres;

(iii) in case of an industrial unit such area as may be certified by the Department of Industries of the State Government;

(h) a non-agriculturist with the permission of the State Government for the purposes to be prescribed].

The Section 118 of the Act was substituted by Section 4 of Himachal Pradesh Tenancy and Land Reforms (Amendment) Act, 1987 as follows:

118. (1) Notwithstanding "anything to the contrary contained in any law, contract, agreement, custom or usage" for the time being in force, but

save as otherwise provided in this chapter, no transfer of land (including sales in execution of a decree of a civil court or for recovery of arrears of

land revenue), by way of sale, gift, exchange, lease, mortgage " with possession or creation of a tenancy shall be valid in favour of a person who is

not an agriculturist.

(2) Nothing in Sub-section (1) shall be deemed to prohibit the transfer of land by any person in favour of-

(a) a landless labourer; or

(b) a landless person belonging to a scheduled caste or a scheduled tribe; or

(c) a village artisan; or

(d) a landless person carrying on an allied pursuit; or

(e) the State Government; or

(f) a co-operative society or a bank; or

(g) a person who has become non-agriculturist on account of the acquisition of his land for any public purpose under the Land Acquisition Act,

1894; or

(h) a non-agriculturist who purchases or intends to purchase land for the construction of a house or shop, or purchases a built up house or shop,

from the Himachal Pradesh State Housing Board, established under the Himachal Pradesh Housing Board Act, 1972, or from the Development

Authority constituted under the Himachal Pradesh Town and Country Planning Act, 1977, or from any other statutory corporation set-up under

any State or Central enactment; or

(i) a non-agriculturist with the permission of State government for the purpose that may be prescribed:

Provided that a person who is a non-agriculturist but purchases land" with the permission of the State government under Clause (i) of this Sub-

section shall, irrespective of such permission, continue to be a non-agriculturist for the purposes of this Act: Provided further that a non-agriculturist

in whose case permission to purchase land is granted by the State Government, shall put the land to such use for which the permission has been

granted, within a period of two years or a further such period, not exceeding one year, as may be granted by the State government, to be counted

from the day on which the deed covering the sale of the land is registered and if he fails to do so, the land so purchased by him shall vest in the

State government free from all encumbrances":

(3) No registrar or the Sub-Registrar appointed under the Indian Registration Act, 1908 shall register any document pertaining to a transfer of

land, which is in contravention to Sub-section (1) and such transfer shall be void ab initio and the land involved in such transfer, if made in

contravention of Sub-section (1), shall, together with structures, buildings or other attachments, if any, vest in the" State Government free from all

encumbrances": Provided that the Registrar or the Sub-Registrar may register any transfer-

(i) Where the lease is made in relation to a part or whole of a building; or

(ii) Where the mortgage is made for procuring the loans for construction or improvements over the land either from the Government or from any

other financial institution constituted or established under any law for the time being in force or recognized by the State Government.

(4) It shall be lawful for the State government to make use of the land-which is vested or may be vested in it under Sub-section (2) or Sub-section

(3) for such purposes as it may deem fit to do so. Explanation:

For the purpose of this, section, the expression ""land"" shall include-

(i) land, the classification of which has changed or has been caused to be changed to "" Gair-Mumkin"", "" Gair-Mumkin Makan"" or any other Gair-

mumkin land by whatever name called, during the past five years countable from the date of entry in the revenue records to this effect;

(ii) land recorded as ""Gair-mumkin"", "" Gair-Mumkin Makan"" or any other Gair-mumkin land, by whatever name called in the, revenue records,

except constructed area which is not subservient to agriculture; and

(iii) land which is a site of a building in a town or a village and is occupied or let out not for agricultural purposes or purposes subservient to

agriculture.

The Section 1 of Himachal Pradesh Tenancy and Land Reforms (Amendment) Act, 1987 is as follows:

Short title, extent and commencement-(1) This Act may be called the Himachal Pradesh Tenancy and Land Reforms (Amendment) Act, 1987.

(2) It extends to the whole of the State of Himachal Pradesh.

(3) It shall be deemed to have come into force from the date of commencement of the Himachal Pradesh Tenancy and Land Reforms

(Amendment) Act, 1972, but Section 3 and Section 4, in so far as it amends Clause (g) and the second proviso to Clause (i) of Sub-section (2),

Sub-section (3) and Sub-section (4) of Section 118 of the said Act, shall come into force at once.

14. The two courts below have recorded a finding of fact that in view of Section 118 of the Act, the transactions dated 1.5.1986, 17.5.1986 and

17.11.1986 in favour of Ram Sarup were not valid. Therefore, the question is who will be the owner of the suit land, the moment the transactions

dated 1.5.1986, 17.5.1986 and 17.11.1986 were found to be illegal. The obvious answer is that transferee, in that situation cannot be held to be

the owner with right to possession of the suit land. The transactions in the present case are of the year 1986. The Sub-section (3) of Section 1 of

the Himachal Pradesh Tenancy and Land Reforms (Amendment) Act, 1987 provides that Sub-section (3) and Sub-section (4) of Section 118 of

said Act shall come into force at once. The Himachal Pradesh Tenancy and Land Reforms (Amendment) Act, 1987 was assented to by the

President on 25.3.1988 and then it came into force. Thus land purchased in contravention of Section 118 of the Act shall vest in the Government

on coming into force Sub-section (3) of Section 118 of the Act on or after 25.3.1988. The vestment of land in the Government purchased in

contravention of Section 118 is not retrospective.

15. The learned Additional District Judge has erred in drawing hair splitting distinction between invalid transaction and void transaction. According

to his reasoning even though the transfers were invalid but these were not void, therefore, Appellant is not entitled to recover possession of the suit

land. The reasoning given by learned Additional District Judge is not based upon some legally acceptable principle.

16. In *In Re: H.E.H. The Nizam's Jewellery Trust*, one of the question for consideration before the Supreme Court was the effect of alienation

made by trustees in presence of Section 48 of the Trusts Act, 1882. The Supreme Court has held as follows:

29. It is axiomatic that where there are more trustees than one, all must join in the execution of the trust, except where the instrument of trust

otherwise provides. Therefore, as laid down by this Court in *L. Janakirama Lyer* case, if the validity of an alienation effected by the trustees falls to

be considered only in the light of Section 48, the fact that out of the three trustees only two have executed the sale deed would by itself make the

transaction invalid and would not convey a valid title to the transferee.

30. In the present case, as the High Court rightly observes, there is no such clause in the trust deed authorizing the execution of the trusts to be

carried out not by all but by one or more or majority of the trustees. In the absence of such a specific provision, the general law envisaged in

Section 48 of the Act would govern the rights of the parties. We are, accordingly, of the opinion that the alleged contracts of sale entered into by

the four trustees were not binding and of no legal effect, and could not be enforced. It must necessarily follow that the alleged contracts for sale

entered into by them could not ripen into concluded contracts so as to bind the entire body of beneficiaries.

17. The Section 10 of the Indian Contract Act, 1872 provides that all agreements are contracts if they are made by the free consent of the parties

competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void. The Section 23 of the

said Act further provides the consideration or object of an agreement is lawful, unless it is forbidden by law or is of such a nature that, if permitted,

it would defeat the provisions of any law or is fraudulent or involves or implies injury to the person or property of another or the Court regards it as

immoral, or opposed to public policy. The Section 23 further provides that in each of these cases, the consideration or object of an agreement said

to be unlawful. Every agreement, of which the object or consideration is unlawful, is void.

18. The Section 118 of the Act prohibits the transfer of the land in favour of a person who is not an agriculturist. The thrust of Section 118 is that a

person who is not an agriculturist is not entitled to acquire title of land by way of transfer under the Act. The public policy behind Section 118 is to

check transfer of land in favour of a person who is not an agriculturist. The two courts below have held that the transfers dated 1.5.1986,

17.5.1986 and 17.11.1986 are barred by Section 118 of the Act. In view of Section 23 of the Indian Contract Act, the transfer of land in violation

of Section 118 of the Act is not only invalid but it is void and, therefore, the finding of learned Additional District Judge that the aforesaid transfers

of sales, gift were not void is not sustainable.

19. In the present case, in view of statutory bar u/s 118 of the Act transfer of land vide sale deeds dated 1.5.1986, 17.5.1986 and gift deed dated

17.11.1986 in favour of deceased Ram Sarup who was not an agriculturist under the Act are invalid and would not convey a valid title to

deceased Ram Sarup. In other words, the Appellant would remain the owner of the suit land despite aforesaid transactions. The Appellant has

filed the suit for possession; she has proved her title on the suit land.

20. The plea of estoppel is not available to the Respondent against the Appellant inasmuch as there is no estoppel against law. The Civil Court has

jurisdiction to consider the legality of transaction in terms of Section 118 of the Act. The submissions of learned Senior Advocate that transfer

could be challenged in one year, objection with regard to court fee are beyond the scope of aforesaid substantial questions of law. The learned

Senior Advocate has relied *Rahul Bhargava v. Vinod Kohli and Ors.* 2008 (1) SLC 385 that permission for sale u/s 118 of the Act can be

obtained later on. In *Rahul Bhargava* the suit was for specific performance of contract. It was held that for filing suit for specific performance, no

permission is required under the Act. It is only if the suit is decreed then such permission may be required at the time of registration of the sale deed

on the basis of specific performance decree. In the present case suit is not for specific performance of contract. The sale deeds and gift deed were

already executed and registered in favour of deceased Ram Sarup, a non-agriculturist, without taking permission u/s 118 of the Act, therefore,

Rahul Bhargava (supra) is not applicable in the present case. The Respondent has not filed any appeal or cross objections. The impugned

judgment and decree are not sustainable and liable to be set aside. The substantial question of law No. 2 is answered in favour of the Appellant

and against the Respondent.

21. No other point was urged.

22. The result of the above discussion, appeal is allowed, impugned judgment and decree are set aside. The sale deeds dated 1.5.1986,

17.5.1986 and gift deed dated 17.11.1986, executed by Respondent in favour of deceased Ram Sarup in respect of suit land are declared illegal

and void and not binding on the Appellant, who is declared owner of the suit land and a decree of possession of the suit land is passed in favour of

the Appellant and against the Respondent. No costs.