(2009) 09 AP CK 0050

Andhra Pradesh High Court

Case No: C.M.A. No''s. 1254 of 1996 and 296 of 2006

Shaik Jani Basha and Others	APPELLANT
Vs	
Shaik Khasim Saheb and Another	RESPONDENT

Date of Decision: Sept. 7, 2009

Acts Referred:

- Benami Transactions (Prohibition) Act, 1988 - Section 3(2)
- Evidence Act, 1872 - Section 90

Citation: (2010) 1 ALD 239 : (2010) 2 ALT 88

Hon'ble Judges: L. Narasimha Reddy, J

Bench: Single Bench

Advocate: M. Venkatanarayana, for the Appellant; M.R.S. Srinivas, for the Respondent

Final Decision: Allowed

Judgement

L. Narasimha Reddy, J.
These two Civil Miscellaneous Appeals are between the same parties, and the subject-matter of the proceedings is almost the same. Hence, they are disposed of through a common judgment.

2. For the sake of convenience, the parties are referred to, as arrayed in C.M.A. No. 296 of 2006. The 1st appellant is the daughter of late Galib Saheb. The deceased-1st respondent is their mother. The 3rd appellant is the son of the 1st appellant. Galib Saheb was employed in the Police Department and is said to have taken voluntary retirement, when he was working as Assistant Sub-Inspector. He died in the year 1966.

3. The 1st respondent filed O.S. No. 135 of 1982 in the Court of Principal District Munsif, Kavali, against the appellants herein, for the relief of perpetual injunction, in respect of the suit schedule property. She pleaded that she purchased the property with her own funds, through a sale deed, dated 23-11-1959, and her eldest son, the

1st appellant, is trying to encroach into the property highhandedly. Subsequently, the plaint was amended, and the relief of recovery of possession was incorporated. It was urged that the 1st appellant had occupied a portion thereof, during the pendency of the suit. In his written-statement, the 1st appellant pleaded that his mother, the 1st respondent, did not have any independent resources or income of her own, and that the property was purchased with the income of his father, but in the name of the 1st respondent.

4. Even while O.S. No. 135 of 1982 was pending, the 1st appellant filed O.S. No. 652 of 1982, in the same Court, against respondents 1 and 2 and the 2nd appellant, for the relief of partition of items of property mentioned therein, which in turn are the subject-matter of the pending suit. The pleadings in O.S. No. 135 of 1982 were repeated in this suit, with slight modifications, except that the array of parties changed. During pendency of the suits, the 1st respondent, i.e. the sole plaintiff in O.S. No. 135 of 1982, and 1st defendant in O.S. No. 652 of 1982, died. The 2nd respondent came on record in the place of the plaintiff in O.S. No. 135 of 1982, and in the other suit he was already a party.

5. Apart from claiming rights as legal representative of the deceased-1st respondent, the 2nd respondent, relied upon a deed of settlement, dated 20-07-1982.

6. Though the suits were contemporaneous, between the same parties, and in relation to same property, they were tried separately. Through separate judgments, dated 10-10-1998, the trial Court decreed O.S. No. 135 of 1982 and dismissed O.S. No. 652 of 1982. It was held that the deceased-1st respondent is the owner of the said property and that the appellants have no right vis-a-vis the same. A.S. Nos. 8 of 1989 and 54 of 1988 were filed against the decrees therein, before the Court of Subordinate Judge, Kavali. Through separate judgments, dated 24-04-1996, the lower appellate Court, remanded the matters to the trial Court. On the ground that the validity of the deed of settlement was not considered by the trial Court, it was directed to frame additional issue as regards proof and validity of the deed of settlement and to permit the parties to adduce evidence, in relation to the additional issue. C.M.A. No. 1254 of 1996 is filed against the judgment in A.S. No. 54 of 1988. Initially, S.A. No. 462 of 1996 was filed against the judgment in A.S. No. 8 of 1989. Thereafter, it was converted into a Miscellaneous Appeal and numbered as C.M.A. No. 296 of 2006.

7. Sri M. Venkatnarayana, learned Counsel for the appellants, submits that the trial Court and the lower Appellate Court erred in treating the suit schedule properties as self-acquisition of the deceased-1st respondent. He contends that though the sale deed was executed in favour of the 1st respondent, it was purely a benami transaction, inasmuch as the funds were provided by her husband, late Galib Saheb. He submits that the trial Court committed several errors, such as by giving a finding to the effect that a suit for mere injunction is maintainable, even though the 1st

respondent herself prayed for the relief of recovery of possession. He contends that the sale took place much before the Benami Transactions (Prohibition) Act 1980 (for short "the Act") came into force, and even assuming that the Act operates retrospectively, the transaction is saved by Sub-section (2) of Section 3 of that Act. Learned Counsel further contends that by examining P.W.3 in O.S. No. 652 of 1982, the appellants have established that the consideration for the land was paid by Galib Saheb. It is also his case that the observation made by the lower Appellate Court, with reference to Exs.X-1 to X.4 are totally untenable, inasmuch as they do not have any relevance or bearing upon the capacity of the 1st respondent.

8. Sri M.R.S. Srinivas, learned Counsel for the respondents, on the other hand, submits that late Galib Saheb was only a Constable and he did not have any income to such an extent, as to spare the funds for purchase of property. Learned Counsel contends that the concurrent findings of fact recorded by the Courts below to the effect that the 1st respondent is the absolute owner of the property do not warrant interference.

9. Both the suits were between the members of the same family. It was mainly a dispute between the mother, the 1st respondent, and her eldest son, the 1st appellant. The litigation started with the filing of O.S. No. 135 of 1982, by the 1st respondent for the relief of perpetual injunction. Before amendment of the plaint in that suit, the trial Court framed two issues, viz.,

(a) Whether a suit as claimed is not maintainable for bear permanent injunction? and

(b) Whether the plaintiff is entitled for perpetual injunction as prayed for, in the suit?

10. Subsequently, the 1st respondent pleaded that the appellants herein have encroached into the property and got amended the plaint. The relief of recovery of possession was incorporated. In the light of this, the trial Court framed the following additional issues.

(i) Whether the plaintiff is entitled for possession?

(ii) Whether the plaintiff is entitled for consequential permanent injunction?

(iii) Whether the plaintiff is entitled for damages as prayed for?

(iv) Whether the plaintiff is entitled for mesne profits

(v) To what relief?

11. On behalf of the respondents, P.Ws. 1, 2 and 3 were examined and Exs.A-1 to A-20 were filed. On behalf of the appellants, D.Ws. 1 and 2 were examined. The trial Court has taken on record Exs.C-1 to C-3.

12. The relief claimed in O.S. No. 652 of 1982 is the one, for partition of the suit schedule properties. The 1st appellant figured as the plaintiff and respondents 1

and 2, and the 2nd appellant figured as defendants. Two issues were framed, viz.,

(a) Whether the plaint schedule properties are not the self-acquisition of the 1st defendant?

(b) Whether the plaintiff is entitled to 14/40* share in the plaint schedule property?

13. The evidence adduced by the 1st appellant herein comprised of P.Ws. 1 to 3 and Exs.A-1 to A-7. On behalf of the 2nd respondent, D.Ws. 1 and 2 were examined and Exs.B-1 to B-3 were filed. The trial Court has taken on record Exs.X-1 and X-2. Through separate judgments dated 10-10-1998, the trial Court decreed OS. No. 135 of 1982, and dismissed O.S. No. 652 of 1982. In the appeals, the findings in the respective suits were confirmed and the matters were remanded, as regards proof of the settlement deed.

14. It was observed by the lower Appellate Court that though the appellants herein pleaded that Ex.B-3 is false and untenable, no additional issue covering that controversy was framed by the trial Court in both the suits, and in that view of the matter, it became necessary to remand the matters to the trial Court.

15. In the light of the arguments, advanced on behalf of the parties, a common question, that arises for consideration, in both the appeals, is, whether the 1st respondent purchased the properties with her own funds, or the sale deeds, standing in her name, are only benami in nature.

16. If the finding on the above question is that the 1st respondent was the real purchaser, and the transaction was not benami, the necessity to examine the validity of Ex.B-3 would arise. If the finding is otherwise. There would not be any necessity to examine the validity of Ex.B-3, in which event, the remand becomes untenable, if not unnecessary.

17. It is not in dispute that the document, in relation to the suit schedule property in question, marked as Ex.A-1 in O.S. No. 135 of 1982, in the name of the 1st defendant. The burden, to show that the transaction was benami in nature, is upon the appellants. Whether in the plaint in O.S. No. 135 of 1982, or the written-statement, in O.S. No. 652 of 1982, the plea of the 1st respondent was that she purchased the property with her own funds. Inasmuch as the purchase was in the year 1959, the transaction was basically not hit by the provisions of the Act. Assuming that the Act operated retrospectively, a separate regime exists, in relation to the transaction, inasmuch as Sub-section (2) of Section 3 exempts the operation of the provisions of the Act, in relation to a purchase made by a person, in the name of his wife, or son. The provision reads:

Section 3(2): Nothing in Sub-section (1) shall apply to:

(a) the purchase of property by any person in the name of his wife or unmarried daughter and it shall be presumed, unless the contrary is proved, that the said

property had been purchased for the benefit of the wife or the unmarried daughter;

(b) xxx

18. The plea of the appellants was that, the property was purchased with the funds of Galib Saheb, the husband of the 1st respondent.

19. By the time the trial of the suits commenced, the 1st respondent died. Admittedly, the 2nd respondent, who stepped into the shoes of the 1st respondent, did not have any personal knowledge about the transaction. However, he made an endeavour to prove that the parents and brothers of the 1st respondent were quite sound. To establish this, he marked Exs.X-1 to X-4. These documents are in relation to acquisition of properties, by the grandparents, parents or the brothers, as the case may be, of the 1st respondent. One Mr. Sk. Kalesha, brother of the 1st respondent, deposed as P.W.2, in O.S. No. 135 of 1982, and as D.W.2 in the other suit. He referred to Exs.X-1 to X-4. However, in cross-examination, it was elicited through him that in the said documents it was mentioned that the purchasers were doing coolie work. This belied his contention that they were doing business and were having sufficient means, to give substantial amount to the 1st respondent.

20. Notwithstanding the weakness on the part of the respondents, the appellants were under obligation to prove their contention. The 1st appellant specifically pleaded that the funds for purchase of the property under Ex.A-1 was arranged by his father-Galib Saheb. Apart from that he stated that the family did business in provisions and hiring of rickshaws, and with those and other funds, houses were constructed by Galib Saheb over the property. The construction of houses over the property was not disputed. The stand of the 1st respondent was wavering in this regard. At one stage, she pleaded that she permitted the 1st appellant to construct a house on the property. She did not deny the construction of other houses by her husband. However, she stuck to the stand that the land was purchased with her funds.

21. In the absence of Galib Saheb and the 1st respondent, the best person to speak about the same is the vendor under Ex.A-1. He was examined as P.W.3, in O.S. No. 652 of 1982. He stated that he sold the property for a consideration of Rs. 1,500/-. According to him, a sum of Rs. 1,200/- was paid, by Galib Saheb, and promissory note was executed for the balance. The amount covered by promissory note was also said to have been paid by Galib Saheb himself. Nothing contrary to this was elicited in the cross-examination of this witness. Nor any other evidence was adduced to impropablise this version.

22. It is true that Section 90 of the Evidence Act prohibits oral evidence, contrary to the recitals in a written document. The principle, however, has its own limitations, in its application to the plea, as to benami nature of a transaction. The very plea that the transaction was benami in nature, warrants proof, contrary to the recitals in the document. Ostensible nature of a purchase under the document can be proved only

by adducing evidence, contrary to the recitals. If Section 90 of the Evidence Act is to be applied in its letter and spirit, in such cases, it just becomes impossible for any one, to plead that any transaction was benami in nature. It is a different thing, as to whether the transaction in question is prohibited under the Act. However, if it is permissible under that Act, to take a plea, as to the nature of transaction, a different approach is needed to Section 90 of the Evidence Act.

23. It is not uncommon that male members in the family, that too, employed in Government service, purchase properties in the name of their spouses or children. Though the burden to prove that a transaction was benami, is upon the one, who pleads it, the onus in such cases is equally heavy. This becomes more acute, when the cases fall in the exempted category u/s 3(2) of the Act. It must be proved to the satisfaction of the Court, at least in discharge of onus, that the person in whose name the property is purchased, had adequate and independent resources.

24. The evidence of Kalesha, brother of the 1st respondent, as P.W.2, in O.S. No. 135 of 1982, is silent, as to the nature of properties that were given to the sister at the time of marriage. There was no evidence, to suggest that she had any independent income or sources. The family comprised of a person, employed as an Assistant Sub-Inspector, and a person, who was independently doing business, till he was appointed as constable i.e. the 1st appellant herein. It is difficult to infer that such a family had to depend exclusively upon the 1st respondent, in the matter of acquisition of property. The fact that houses came to be constructed over the property by Galib Saheb, and other members of the family, was established beyond any reasonable doubt. This clearly suggests that the property was never treated as exclusive acquisition of the 1st respondent. The transaction under Ex.A-1 was benami in nature, and it stood excluded u/s 3(2) of the Act. The result is that the property was liable to be partitioned, in accordance with law, among the appellants 1 and 2, and the 2nd respondent.

25. Hence, the appeals are allowed and the judgments under appeals are set aside. As a consequence, O.S. No. 135 of 1982 is dismissed. There shall be a preliminary decree, as prayed for, in O.S. No. 652 of 1982. It is directed that, it shall be open to the parties to file application before the trial Court for re-adjustment of shares, on account of the death of the 1st defendant in that suit. As and when such application is made, the trial Court shall pass appropriate orders, in accordance with law, and modify the preliminary decree.

26. There shall be no order as to costs.