

(2016) 09 CAL CK 0040
CALCUTTA HIGH COURT
Case No: S.A. No. 577 of 2008.

Debika Chakraborty - Appellant
@HASH Pradip Chakraborty

APPELLANT

Vs

RESPONDENT

Date of Decision: Sept. 2, 2016

Acts Referred:

- Benami Transactions (Prohibition) Act, 1988 - Section 4(2)(3b)

Citation: (2017) AIR(Calcutta) 11 : (2016) 4 ICC 556

Hon'ble Judges: Indrajit Chatterjee, J.

Bench: Single Bench

Advocate: Mr. Aniruddha Chatterjee, Mr. Siddhartha Banerjee and Mr. Suchayan Banerjee, Advocates, for the Appellant; Mr. Subir Sanyal and Mr. Suthirtha Das, Advocates, for the Respondent

Final Decision: Disposed Off

Judgement

Indrajit Chatterjee, J. - This is a battle between a divorced couple. The wife filed Title Suit No. 134 of 1987 before the learned Assistant District Judge, 1st Court, South 24 Parganas at Alipore within the district of 24-Parganas (South) with a prayer for eviction and recovery of khas possession. The specific case of the plaintiff as made out in the plaint so far as it is relevant for the purpose of adjudication of this second appeal may be summarised thus:-

2. That the marriage between the plaintiff and the defendant took place on 30th January, 1964. By two registered deeds of conveyance - both dated 16-01-1979, one executed by Muralidhar Jindal as vendor and the other executed by Smt. Kamala Jindal as vendor the plaintiff purchased two undivided one half share of flat no. 5, 4th floor, "Jindal house" at premises no. 8A, Alipore Road, P.S. Alipore, Kolkata and thus, the plaintiff became the absolute owner in respect of that portion of the property including the common area, like the stair case etc.

3. The consideration money was Rs.1,75,000/-. It is also the positive case of the plaintiff/appellant that she purchased the property from her own fund. Thereafter, the marriage between the parties was dissolved as per a decree as passed in Petition No. 101 of 1984 by an order dated 26th September, 1984 as passed by the learned Additional District Judge, Delhi.

4. Thereafter, the plaintiff requested the defendant to vacate the suit premises terminating the permissive possession but the defendant did not comply with the said request. The said Title Suit was filed as such treating the defendant as a trespasser praying for eviction and recovery of khas possession. The defendant contested the suit by filing written statement before the learned trial court, admitting the marriage but it was the specific case of the defendant that the said property was purchased by the defendant himself from his own money and the money contributed by his companies and he is in possession of the suit property by paying incidental charges like municipal taxes, maintenance charges, common electricity charges etc. Thus, it was his claim that he is must in permissive possession. He further claimed that the property was purchased in the name of the plaintiff but not for her benefit but for the benefit of the defendant and his family members. It may be noted that the written statement was filed on 18th September, 1989.

5. It was the further case of the defendant that the plaintiff shifted to U.K. and has been residing there. The defendant has denied that she is temporarily residing there (United Kingdom). It is also the specific case of the defendant that the plaintiff is not residing in the suit property and he being the absolute owner of the property is in exclusive possession of the same and as such, there is no question of passing any decree of eviction or for recovery of khas possession.

6. On appreciation of evidence both oral and documentary learned trial court was pleased to dismiss the suit. One Title Appeal No. 322 of 2000 was preferred by the plaintiff which was heard by the learned Additional District Judge, 3rd Court, Alipore and vide judgment and decree dated 13-06-2003 the learned First Appellate Court was pleased to remand back the suit for fresh trial. The said order was assailed before this court in F.M.A. 1739 of 2003 and this court was pleased to set aside the order of the learned First Appellate Court and directed the said appellate court to hear out the appeal. Learned First Appellate Court as per that order, heard the appeal and the appeal was dismissed as per judgment and decree dated 20-9-2007.

7. This second appeal has been preferred as against that the judgment and decree.

8. The Division Bench formulated two points for consideration of this court -

1) Whether the Learned Trial Courts below committed substantial error of law in arriving at the finding of Benami ignoring the point that the husband could not take the plea of Benami in the written statement in view of the statutory bar contained in Section 4(2) of the Benami Transaction (Prohibition) Act, 1988;

2) Where the Learned Courts below committed substantial error of law in arriving at the finding of Benami without considering the question whether the plaintiff was acting as (sic) fiduciary capacity in relation to the purchase of the property in question? (vide page Nos. 49-50 of the paper book).

9. Before the learned trial court, the plaintiff examined herself as the sole witness and on behalf of the defendant/respondent, three witnesses were examined being the defendant himself as D.W.1, Ramesh Gupta, one Chartered Accountant as D.W.2 and Sudip Basak, the caretaker-cum-Accountant of the said building, "Jindal House" as D.W 3.

10. Mr. Chatterjee the learned Advocate appearing on behalf of the appellant submitted before this court that the provision of Section 4(2) of the Benami Transaction (Prohibition) Act, 1988 was not considered and as per the claim of the appellant, this claim of Benami cannot be taken either as a defence or as a claim to acquire title over a property. He further argued that Section 4(3)(b) of the said Act was also not considered.

11. It has further been submitted by Mr. Chatterjee by taking me to page no.49 of the paper book as regards the substantial questions of law that this Court is to decide as to whether the claim of the defendant is barred in view of Section 4(2) of the Act of 1988. He further submitted that the story of fiduciary relationship was neither claimed by the defendant in the written statement and nor any evidence was adduced on that point. He further submitted that the defence of the defendant that he purchased the property in the name of his wife for his and the benefit of his family is barred under Section 4(2) of the said Act of 1988. He cited a Division Bench decision of this Court as reported in **Cal L.T. 1997 (2) HC p.43 (Buddheswar Ghosh v. Ekkari Ghosh)** wherein the Division Bench of this Court decided regarding the burden of proof in a case under the said Act of 1988 and the factors to be taken into consideration by the Courts to prove as to whether the said transaction was benami or not. He referred to paragraphs 3 and 5 of the said judgment.

12. He also referred to a decision of the Apex Court as reported in **1995 (2) SCC p.630 (R. Rajagopal Reddy [dead, represented by the Legal Representatives] v. Padmini Chandrasekharan [dead, represented by the Legal Representatives])** wherein the Apex Court decided that the Act of 1988 was not retrospective in operation. Learned counsel took me to the written statement to show that it was filed after the Act of 1988 came into force.

13. Mr. Chatterjee further submitted that the registered deeds have a presumptive value and unless such presumption is repudiated by any cogent evidence, the Court cannot unsettle such registered deeds. He took me to the judgment of the Trial Court to say that in the said judgment, it was not considered at all whether the claim of the defendant was barred under the provisions of the Act of 1988. He also took me to the deeds of purchase in the name of the plaintiff to show that in those deeds

there is no recital that the property was purchased by the plaintiff from the money given by her husband.

14. He also attacked the judgment of the First Appellate Court being perverse as the said Court banked upon Exhibits "A", "A-1", "E-1", "F", "F-1" and "F-2". He submitted that "A" is the Income-tax statement of the plaintiff for the Financial Year, 1977-78, "A-1" is also her Income-tax statement for the Financial Year 1978-79, "E" is the certificate of Canara Bank certifying payments made to the plaintiff by Tractel Tifor Private Limited (hereinafter referred to as the said Company), and that "F" and "F-1" are the certificates of one Chartered Accountant obtained by the defendant to prove that payment was made by the said Company to the plaintiff.

15. Mr. Chatterjee submitted that this plaintiff got in total Rs.73,821/- as salary from the said Company and also rent for the relevant period.

16. He further submitted that this DW.1 admitted in his evidence that this plaintiff was the Managing Director of Kanak Engineering, another private limited company and as such, the plaintiff must have derived some income from that Company also. Thus, he tried to establish that this plaintiff/appellant had enough money to purchase the flat in question by two registered deeds executed and registered on 16th of January, 1979.

17. He further submitted that the possession of this defendant is not legal possession. As to the term "fiduciary relationship", learned Counsel submitted by taking me to Black's Legal Dictionary, 7th Edition, page no.640 to show that the relationship between the husband and the wife is not a "fiduciary relationship".

18. On behalf of the defendant/respondent, it was submitted by Mr. Subir Sanyal, learned advocate, by taking me to Ext.1 and Ext.1A that there is mention in both the deeds that on which dates the consideration money was paid. He submitted that those deeds will reflect that payments were made on 15-01-1978, 02-01-1978 and 09-01-1979, thus, covering a period of one year. He further submitted that the plaintiff appellant got Rs.73,821/- vide Exts.E1 and E2 from Tractel Tifor India (P) Ltd. He also took me to Ext.A1 to satisfy this Court that Debika got Rs.36,800/- under the heading "Salary". He further submitted that this Ext.A1 is computation of her taxable income for the relevant year. He further submitted that in the document, there is also mention that rental income of the plaintiff was to the tune of Rs.45,000/-. Thus, he submitted that the argument of the plaintiff/appellant that actually the said company was indebted to the plaintiff to the tune of Rs.1,09,000/-, as claimed by Mr. Chatterjee, learned advocate, cannot be tenable.

19. He further submitted that in those statements, that is, Ext.A1, there is reflection that this plaintiff appellant got Rs.1000/- (Rs.250/- X 4) as seating fees for the entire year in attending the Board Meetings of that Tractel Tifor India (P) Ltd. Company. By that, the learned advocate tried to prove that this plaintiff did not mention in her statement for such computation that she received anything from Kanak Engineers

Private Limited and that is enough to nullify the claim of the plaintiff as PW1 that she was the Director of that company.

20. On my asking, Mr. Sanyal admitted that his client admitted as D.W.1 that this P.W.1 plaintiff was the Managing Director of Kanak Engineers Private Limited, but, he did not admit the period of such Directorship. He submitted that this plaintiff was the Company Secretary of Tractel Tifor and naturally before her marriage, she was not a Director of that company.

21. Mr. Sanyal took me to Ext.F2, that is, the Certificate of M/s. Arora, Gupta and Goel, Chartered Accountants, dated 11-01-1996 to convince this Court that from 17-01-1977 to 26-10-1977 in total Rs.89,000/- was transferred to the account of the plaintiff by Kanak Engineers Private Limited and from 07-02-1978 to 23-12-1978 Rs.48,000/- was approximately transferred in the account of the plaintiff from the fund of Kanak Engineers Private Limited.

22. Learned advocate also took me to Ext.E to show that vide Cheque No. 340763 dated 18-08-1978, Rs.9,000/- was transferred to the account of the plaintiff from the account of the defendant. Thus, he tried to convince this Court that vide E1 and E2, Rs.73,821/- came to Debika from Tractel Tifor Company from 23-12-1978 to 04-01-1979 and this amount plus Rs.9,000/- will take us to Rs.82,000/-.

23. As regards the account of Kanak Engineers Private Limited, it is the submission of Mr. Sanyal, by again taking me to Ext.F2, that the plaintiff got Rs.89,000/- plus Rs.48,000/-, in total to Rs.1,37,000/-. Thus Mr. Sanyal tried to prove that in total Rs.2,19,000/- was transferred to the account of the plaintiff either by the defendant or by his companies. He further submitted to consider the status of this defendant as he was the Promoter and Managing Director of Tractel Tifor Company and also the founder member of Kanak Engineers Private Limited. He further submitted that both the companies being private limited companies, the word of this defendant was the last word. He took me to the evidence of DW1 to show that this defendant had 70% share in respect of Tractel Tifor and 78% share in respect of Kanak Engineers Private Limited and Mercury Breweries.

24. Thus, through all these, Mr. Sanyal tried to convince this Court that actually the money came into the account of the plaintiff either from the personal account of the defendant or from the accounts of his companies and as such, he is the owner in respect of the suit flat. He further submitted that the fact that he is in possession of the property is not in dispute. Regarding such possession, he referred to the evidence of P.W.3 and the documents like Ext.G and H series.

25. Regarding the substantial question of law, as formulated, Mr. Sanyal submitted that Section 4(3) of the Act of 1988 is enough to save him from the rigors of the said Act. He took me to that Sub-Section of the said Act, which runs thus:

"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."

26. He further submitted that the relationship between the husband and the wife is perfectly a fiduciary relationship and that the property was held by the wife as a trustee. He ended his argument by saying that both the Courts below rightly considered the evidence on record, both oral and documentary, and the findings of the Courts below cannot be said to be perverse by this Court in the Second Appeal to touch such concurrent findings.

27. On the law point Mr. Sanyal has cited the decision of the Apex Court as reported in **2012 5 SCC page 342 (Marcel Martins v. M. Printer)** paragraphs 36, 38, 44 and 45 to answer the point that the relationship between the husband and the wife is fiduciary. He further submitted on this case that the relationship between husband and wife cannot survive without confidence and trust as the relationship is based wholly on trust on each other.

28. Mr. Sanyal cited a decision of the Apex Court as reported in **AIR 1989 SC page 1247 (Mithilesh Kumari v. Prem Behari Khare)** to establish his contention that in a case where the husband and wife are staying in the same house it is immaterial from whose custody the deed was produced.

29. He also cited a decision of the Apex Court as reported in **AIR 1958 CAL page 733 (S.M. Khabirannessa Bibi v. Sudhamoy Bose)** to establish his contention that in a case of benami transaction wherein the Division Bench of this Court formulated the questions to be decided in such dispute and held that when there is no clear evidence of motive for creation of benami then naturally the source of the consideration money assumes paramount importance and the material enquiry seems to be as to who supplied the money for the acquisition of the disputed land and construction of the building thereon.

30. He also relied another decision of the Apex Court as reported in **AIR 2001 SC page 2920 (Veerayee Ammal v. Seeni Ammal)** wherein the Court held concurrent findings of the fact of the Courts below cannot be disturbed by the High Court in the second appeal on appreciation of evidence that another view is possible.

31. He also relied on another decision of the Apex Court as reported in **(2002) 4 SCC 460 at paragraph 13 (Zorawar Singh v. Sarwan Singh)** wherein the Apex Court held that misreading or misinterpretation of a small portion of evidence by the First Appellate Court was held not sufficient for setting aside findings recorded by the First Appellate Court on the basis of appreciation of entire evidence on record.

32. In reply it was submitted by Mr. Chatterjee that the decision of Mithiles Kumari (supra) is not a good law in view of the decision of the Apex Court as passed in Raja Gopal Reddy (supra). He further contended that the story of fiduciary relationship

was not pleaded at all in the written statement filed by the respondent and as such he cannot take the advantage of Section 4(3)(b) of the Act, 1988.

33. Regarding the concurrent finding of the courts below he submitted that wrong appreciation or non-appreciation of evidence will make the finding perverse. He further contended that the finding of the courts below must be treated as perverse in view of the fact that important points were not taken into consideration by both the courts below. He further submitted that even in the trial court Section 4 of the Act, 1988 was practically touched but not considered and that the First Appellate Court did not consider Section 4 at all and as such the findings of the both courts below can safely be treated as perverse. Thus, he submitted that there is enough merit in this appeal to undo the injustice caused by both the courts below. Thus, he submitted that the judgments and decrees of the courts below be set aside and decree be passed in favour of the respondent as prayed for in the plaint.

34. So long myself was with the argument of the learned advocates of the parties. I have gone through the evidence recorded by the trial court, documents produced and the judgments of the courts below.

35. The concurrent finding of the courts below is that it was the defendant who provided the money for the purchase of the flat in question. Taking into consideration the argument of Mr. Sanyal and the documents produced by the defendant relied upon by the First Appellate Court this Court is satisfied that the findings of the courts below as to the corpus of the deed cannot be said to be perverse to alter the concurrent findings of the courts below on this point this Court wants to rely upon the decision of *Veerayee Ammal (Supra)*. This Court is satisfied that consideration money came from the companies of the defendant who had major stake in those companies and little portion of the fund came from the personal account of the defendant. The consideration money was paid on instalments from the bank account of the plaintiff but such money came from the defendant's companies. The learned trial court duly appreciated the matter in its own way but the First Appellate Court decided the issue more specifically vis-à-vis the documentary evidence. I do not like to set aside the concurrent findings of the courts below which is based on sufficient materials on record.

36. The parties being the ex-husband and wife naturally it is of no consequence to whom the possession of the flat was with. Thus, this ingredient to test as to whether the transaction was benami or not needs no answer from this Court. I admit that the burden of proof was with the defendant who claimed the benami transaction. This Written Statement was filed on 18th September, 1989 and the Act of 1988 came into force much earlier and as such the claim ipso facto is barred under the provisions of Section 4 (1) of the said Act of 1988.

37. Section 4 (1) that Sub-section runs thus:-

"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."

38. The defendant has admitted in the Written Statement that he purchased the property in the name of his wife out of money paid by his company and such purchase was made for his benefit and also for the benefits of his family members. Thus, he did not even say in the W.S that the property was purchased for the benefit of his.

39. It is well settled that intention of parties is the essence of the benami transaction and money must have been provided by the party invoking the doctrine of benami **2007 (6) SCC Page 100 (Binapani Paul v. Pratima Ghosh)**.

40. As per the provisions of the Act of 1988 right to recover and/or resist recovery by the real owner against benami now stands extinguished. I rely upon the decision of the Patna High Court as reported in **A.I.R 1997 Pat 156 (Smt. Sarojini Bala Dasi v. Smt. Nirmala Devi)**. Benami transaction means where property is acquired in the name of one person but the purchase price is paid by another. The case before the floor of this Court is not a case of Sham transaction.

41. Sections 3 and 4 of the Act have to be read and understood together. They are not disjunctive provisions in a comprehensive legislation intended to prohibit benami transaction. In **A.I.R 1992 SC 885 (Om Prakash v. Jai Prakash)** the Apex Court held that Section 4 of the Act of 1988 is a total prohibition against any suit based on benami transaction. Section 3 (1) of the said Act has prohibited any benami transaction and as per Sub-section 2 (a) nothing of that Sub-section 1 will apply as regards purchased of property by any person in the name of his wife or unmarried daughter and it shall be presumed unless contrary is proved that the said property has been purchased for the benefit of the wife or unmarried daughter.

42. Regarding the substantial question no.1 & 2: The legal questions are taken up together being interlinked. Sub-section 2 of Section 4 of the Act of 1988 runs thus "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". This court is not unmindful of the fact that the only exception to this is Section 4 (3)(b) which I have already quoted earlier. It is true that the two deeds were executed and registered prior to the coming into force of that Act of 1988 but the Written Statement was filed on 18th September, 1989 and one specific claim was taken therein that the plaintiff is the benamdar or a mere name lender and the money was provided by the defendant for the purchase of the property for his benefit.

43. Now the question is whether the learned courts below did not consider that Section 4(2) of the Act of 1988. On scrutiny of the judgment passed by the learned

trial court it appears that only one sentence was used by the learned trial court in disposing of the plea as to whether Section 4 of the Act of 1988 can be made applicable in the said suit. The learned trial court proceeded to say while answering issue no.3 "admittedly this case is beyond the purview of Section 4 of the benami transaction and the prohibition Act". The learned trial court further said that this being so the defendant had no right to prove that the property was purchased in his name. The learned trial court relied upon the judgment of the Apex Court as reported in **AIR 1977 SC 409 (Union of India v. Moksh Builders and Financiers Ltd. and Ors.)** wherein the Apex Court held that an admission by a party is substantive evidence of the fact admitted and admissions duly proved are admissible evidence irrespective of whether the party making them appeared in the witness box or not and whether that party when appearing as witness was confronted with those statements in case it made a statement contrary to those admissions.

44. I have already said that defendant admitted that the said transaction was benami and in view of such admission there is no question of any second thought that the deeds in questions were benami in nature. This court is of the opinion that the learned trial court did not discuss the matter in details how the suit was not barred under Section 4 of the said Act. The learned First Appellate Court did not consider the matter at all even though in the memo of first appeal that defence was taken by the appellant/plaintiff. The question now is whether for that reason the judgments of the courts below can be altered. The substantial question No.2 is regarding fiduciary relationship as to whether the plaintiff was acting as (sic) fiduciary capacity in relation to the purchase of the property in question. The term "fiduciary capacity" is to be considered by this court. This term was very much considered by the Apex Court in Marcel Martins (supra) wherein the Apex Court took into consideration different dictionaries. In Bouvier's Law Dictionary wherein the term "fiduciary capacity" was defined and the author included the relationship of husband and wife as fiduciary one like that of medical and religious adviser.

45. In the decision of the Apex Court as reported in **(2011) 8SCC 497 (CBSE v. Aditya Bandopadhyay)** the Apex Court ruled that the term "fiduciary relationship" is used to describe a situation or transaction where one person (beneficiary) places complete confidence in another person (fiduciary) in regard to his affairs, business or transactions. It further illustrated that such term also refer to a person to hold a thing a trust for another.

46. "Fiduciary Capacity" may not be capable of a precise definition, it implies a relationship that is analogous to the relationship between a trustee and the beneficiaries of the trust. This expression is in fact wider in its import for it extends to all such situations as place the parties in positions that are founded on confidence and trust on the one part and good faith on the other.

47. The court is to take into consideration the factual context in which the question arises for it is only factual backdrop that the existence or otherwise of a fiduciary relationship can be deduced in a given case, having said that, let me consider the fact of the present case to determine whether the appellant stood in a "fiduciary capacity" vis-à-vis the respondent/defendant.

48. In the given case before this court when the property was purchased in the name of this plaintiff/appellant in the year 1979 there was no cloud in the marital relationship between the parties. I have already said that evidence is galore that the entire consideration money came from either the defendant personally or from his private limited companies. It is immaterial whether the defendant violated the provisions of the companies act or whether such money was reimbursed to the company. It is true that after purchasing the property the parties shifted to the suit flat and the defendant is still residing there. The marriage between the parties was dissolved on 26.09.1984 that is roughly after six years of the execution of those deeds and the suit was filed on 2nd of July, 1987 that is after a gap of 2 year 9 months of the divorce. Thus, when a fat amount (as per money value of 1978-79) was given to the wife for the purchase of the suit flat this court is satisfied that the husband had good faith on his wife and that the relationship at that point of time was "fiduciary" one. The plaintiff/appellant was like a "trustee" vis-à-vis her husband, if he is treated as "trust". The cumulative effect of the circumstances noted above, when seen in the light of the substantial amount paid by the defendant/husband that puts the plaintiff/appellant in "fiduciary capacity" vis-à-vis her husband. Such being the case the transaction is completely saved from the mischief of Section 4 of the Act by reason of the same falling under Sub-Section 3(b) of Section 4. Thus, I reiterate that the plea of banami as raised by the respondent/defendant was not, therefore, barred by the said Act of 1988.

49. It is true that in the written statement the claim was not made by the defendant that the wife was in a fiduciary relationship with her husband and on that score the learned Advocate on behalf of the appellant submitted that this ground cannot be taken up by this court. I am sorry to say that this being one legal question it is immaterial whether it was urged in the pleading. Thus, the argument of Mr. Chatterjee on this point is not convincing to this court and answered in the negative.

50. Thus, both the substantial question of law as framed is answered accordingly. Thus, in view of the discussions so long made, this court is satisfied that there is no merit in second appeal and the second appeal is dismissed accordingly.

51. There will be no order as to costs.

52. Thus, the impugned judgments and decrees passed by the learned trial court and first appellate court are hereby confirmed.

53. The department is directed to communicate this judgment to the first appellate court along with the lower court records for necessary action on its part.

54. Urgent Photostat copy of this judgment be given on application made by the parties observing rules.

(Indrajit Chatterjee, J.)

Later:

55. After the judgment is read over and delivered Mr. Siddhartha Banerjee, learned Advocate representing the appellant prays that an order be passed for a limited period so that the defendant/respondent may not alienate the suit property or put any encumbrance on the suit property.

56. Heard Mr. Suthirtha Das, learned Advocate appearing on behalf of the respondent the prayer of Mr. Banerjee is reasonable one this court hereby restrained the defendant/respondent from alienating the suit property or putting any encumbrance thereon for a period of one month from this day.