

(2013) 07 DEL CK 0374

Delhi High Court

Case No: CS (OS) 1399 of 2011, IA No. 12036 of 2011 and CS (OS) 1480 of 2011

Satya Pal Gupta

APPELLANT

Vs

Sudhir Kumar Gupta

Sudhir Kumar Gupta Vs S.P.
Gupta

RESPONDENT

Date of Decision: July 1, 2013

Acts Referred:

- Benami Transactions (Prohibition) Act, 1988 - Section 2(a), 4
- Civil Procedure Code, 1908 (CPC) - Order 20 Rule 12, Order 7 Rule 11
- Specific Relief Act, 1963 - Section 34

Hon'ble Judges: Rajiv Sahai Endlaw, J

Bench: Single Bench

Advocate: Kirti Uppal and Mr. Nitesh Jain, in CSOS 1399/2011, IA No. 12036/2011 and Mr. Anupam Srivastava, in CSOS 1480/2011, for the Appellant; Anupam Srivastava in CS(OS) 1399/2011, IA No. 12036/2011 and Mr. Kirti Uppal and Mr. Nitesh Jain, in CS(OS) 1480/2011, for the Respondent

Judgement

Rajiv Sahai Endlaw, J.

This order/judgment is on IA No. 12036/2011 of the defendant in CS(OS) No. 1399/2011 under Order VII Rule 11 CPC and the impact if any thereof on CS(OS) No. 1480/2011. Shri Satya Pal Gupta (SPG) has filed CS(OS) No. 1399/2011 pleading:-

(a). that SPG purchased half share of 2 1/2 storied house No. K-115, Hauz Khas Enclave, New Delhi - 110 016 constructed over land ad measuring 528 sq. yds. from Mrs. Kamal Mathur wife of Mr. Gulab Singh Mathur vide registered Sale Deed dated 29th December, 1975 for a total sale consideration of Rs. 2,25,000/-;

(b). that the remaining half portion of the said property was owned by Mr. Rajiv Mathur son of Shri Gulab Singh Mathur, who also vide Sale deed dated 29th December, 1975 sold his half share in the said property to SPG who acquired the

same in the name of his youngest brother Shri Sudhir Kumar Gupta (SKG) for a sale consideration of Rs. 2,00,000/- paid by SPG;

(c). that SPG took possession of the entire property in or about the year 1975 and has been residing there with his wife children and parents; SKG never resided in the said property;

(d). that later on it was agreed between the two brothers i.e. SPG & SKG that the entire property would be owned by SPG to the exclusion of SKG as SKG had neither paid for nor stayed therein at any time; SKG also assured that a Release Deed in favour of SPG would be executed by him later; that the original title document of half portion of the property in favour of SKG is also with SPG as he is the de facto owner of the entire property;

(e). that SPG believing and trusting the assurances of SKG, being the younger brother of SPG, did not press for execution of the Release Deed;

(f). that while the Sale Deed in favour of SPG is of the ground floor of the property with garage and one servant quarter and undivided half share in the land, the Sale Deed in favour of SKG is of the first and second floors with terrace above of the property with half share in the land;

(g). that SKG had also taken loan of Rs. 2,05,000/- from SPG and the said loan together with the purchase price of the portion aforesaid of the property in the name of SKG paid by SPG on behalf of SKG i.e. total amount of Rs. 4,05,000/- was shown as due to SPG in the balance sheet of SKG; however in the year 1991 upon SKG agreeing to release his share in the property in favour of SPG, the sum of Rs. 2 lacs paid by SPG on behalf of SKG for purchase of the property was removed from the balance sheet which showed a sum of Rs. 2,05,000/- only as payable by SKG to SPG; similar changes were made in the balance sheet of SPG also; that SKG however kept delaying the execution of the Release Deed in favour of SPG;

(h). that correspondingly, the balance sheet of SKG which was earlier showing him as owner of 50% share in the property, also deleted the said entry;

(i). that in fact a Release Deed was prepared in the month of September, 1995 and kept in the office of Mr. Vinod Kumar Bindal, Chartered Accountant of both the parties but remained to be signed and was in a raid on 21st November, 2000 in the office of the said Chartered Accountant seized by the Income Tax officers; and,

(j). that SKG, though having been so left with no right in the property, had started disturbing SPG's peaceful possession thereof and hence the suit.

2. SPG has in CS(OS) No. 1399/2011 filed against SKG claimed the reliefs:-

(i). of declaration that he is the sole and absolute owner of the entire property pursuant to the release of half share of the property consisting of first and second floors with terrace by SKG in favour of SPG in the year 1991 as per balance sheet.

(ii). of declaration that the recitals in the Sale Deed dated 29th December, 1975 executed by Mr. Rajiv Mathur in favour of SKG as null and void to the extent it shows SKG as the buyer and for declaration that SPG is the buyer/owner thereunder.

(iii). of injunction restraining SKG from claiming any rights in the property or from interfering in SPG's peaceful possession thereof.

3. CS(OS) No. 1480/2011 has been filed by SKG for recovery of possession of the first and second floors with terrace of the property and for recovery of Rs. 99 lacs towards arrears of damages for use and occupation and for pendente lite and future damages for use and occupation @ 2,75,000/- per month.

4. It is the case of SKG in his written statement in CS(OS) No. 1399/2011 that:-

(A). the claim of SPG is barred under The Benami Transactions (Prohibition) Act 1988;

(B). the claim of SPG is barred by time;

(C). the suit is undervalued;

(D). the funds of the joint family business were used for buying the entire property including the shares of SPG and SKG;

(E). SKG also has resided in the property and in any case the parents of the parties were admittedly residing in the property;

(F). that SKG had never released or agreed to release his share of property in favour of SPG;

(G). that Mr. Vinod Kumar Bindal, Chartered Accountant was not only a common Chartered Accountant but a common relative of both SPG and SKG and had in the interregnum connived with SPG and an FIR No. 199/2002 was registered against him and SPG and in the balance sheet of SKG from 1975 till 1991 and again from 2007 to 2011 SKG has been shown as having a share in property No. K-115, Hauz Khas, Enclave, New Delhi - 110 016; and,

(H). that even in the year 1992-2006 when the said share with respect to the property was removed from the balance sheet of SKG on account of collusion between SPG and the Chartered Accountant, SPG in his own balance sheet did not show having acquired the share of SKG in the property.

5. SKG has sought rejection of the plaint in CS(OS) No. 1399/2011 on the ground of the claim therein being barred by The Benami Transactions (Prohibition) Act, 1988. The counsels have been heard.

6. Besides reiterating their respective cases, the counsels have referred to the following judgments:-

(a). Judgments of SPG - [Kale and Others Vs. Deputy Director of Consolidation and Others, .](#)

(b). Judgments of SKG - [Khatri Hotels Private Limited and Another Vs. Union of India \(UOI\) and Another](#), [Achal Reddi Vs. Ramakrishna Reddiar and Others](#), [Kuppuswamy Chettiar Vs. A.S.P.A. Arumugam Chettiar and Another](#), [Ramdas Chimna Vs. Pralhad Deorao and Others](#), [Popat and Kotecha Property Vs. State Bank of India Staff Association](#), [Abdul Rahim and Others Vs. SK. Abdul Zabar and Others](#), and [Board of Trustees of Port of Kandla Vs. Hargovind Jasraj and Another](#).

7. Before commencing the discussion I may clarify that though the plaint in CS(OS) No. 1399/2011 attempts to portray that the Sale Deeds in favour of SPG and SKG are with respect to half undivided share in the property and further though in the balance sheets of the parties also the parties are described as having 50% share in the property but the Sale Deeds are not of half undivided share in the property but as aforesaid of ground floor only in favour of SPG and of first and second floors with terrace in favour of SKG, with each having half undivided share in the land underneath the property. It is important to keep the said perspective in the light of an attempt made especially by SPG to portray the two to be having undivided share in the property. As per the Sale Deed, the share of SPG and SKG in the built-up property is separate, distinct and demarcated and it is only the share in the land underneath the property which is otherwise indivisible which is equal and undivided.

8. The attempt of senior counsel for the SPG in the arguments was to contend that the case pleaded raises a triable issue and if SPG in evidence establishes that the sale consideration of the Sale Deed in favour of SKG has flown from the coffers of SPG and that SKG had in the year 1991-92 agreed to release "his share" in the property in favour of SPG, then SPG would be entitled to the reliefs claimed in CS(OS) No. 1399/2011.

9. So what has to be examined is whether, even in the event of SPG establishing so, he would be entitled to declaration sought and which would consequently lead to dismissal of CS(OS) No. 1480/2011 filed by SKG.

10. The ground taken in the application under Order VII Rule 11 being of the bar of The Benami Transactions (Prohibition) Act, 1988, the matter will first be examined thereunder though the counsel for SKG during the hearing has also urged arguments on the plea of limitation.

11. The Benami Transactions (Prohibition) Act, 1988, by Section 4 thereof prohibits any suit or claim or action or defence, by a person claiming to be the real owner of the property, to enforce any right in respect of any property held benami, against the person in whose name the property is held. Exception however is carved out in respect of property held in the name of a coparcener in a Hindu Undivided Family for the benefit of coparceners in the family and property held in trust or in a fiduciary capacity for the benefit of another person of whom such person is a trustee or towards whom he stands in such capacity. Section 2(a) of the said Act

defines a benami transaction as a transaction in which property is transferred to one person for consideration paid or provided by another person.

12. Though the senior counsel for SPG did not make any submissions on the said aspect but if we carefully look at the pleadings of SPG it is found that the case pleaded by SPG is not of SKG being the benami and SPG being the real owner of the property. On the contrary the plea is, of the consideration paid by SPG for purchase by SKG standing as loan repayable by SKG to SPG in the balance sheets of the parties. The same, in my view would not constitute a plea of benami. Transactions of financing by banks and other financial institutions of purchase of property abound in today's time and in which though consideration is paid by such financier but title is conveyed in favour of another. Such transactions cannot by any stretch of imagination be said to be benami or coming within the purview of Benami Act. The case of SPG really is of release/relinquishment in the year 1991-1992 by SKG of his share in the property in favour of SPG. Relief of declaration also to the said effect only has been claimed. However, SPG in addition thereto has also claimed the relief of declaration that the recitals in the sale deed with respect to the upper floors showing SKG to be the purchaser thereof is void. The said relief is inconsistent to the first relief of declaration of title of upper floors pursuant to the release. Though the relief of declaration of title pursuant to release cannot be said to be hit by the provisions of Benami Act but the relief of declaration of the recitals in the sale deed qua the upper floors is premised solely on the plea of the sale consideration having flown from SPG and the said relief will definitely be hit by Benami Act. The application of SKG under Order VII Rule 11 of the CPC is thus allowed to the extent of the relief in prayer paragraph (b) and the plaint of SPG insofar as claiming the said relief is rejected.

13. I am however of the view that SPG on the case pleaded is not entitled to the relief of declaration on the plea of SKG having released his share in the property in favour of SPG, also.

14. SPG claims the upper floors of the property to have stood transferred by SKG in favour of SPG by change in the entries in the balance sheets of SKG and SPG. What has to be considered at this stage is whether from the factum of SKG (even if proved to have done so voluntarily), between the years 1992 and 2006 removing the said property from list of assets in his balance sheet coupled with removal of the loan of Rs. 2 lacs earlier shown as due to SPG, it can be said that SKG has ceased to be the owner of the said upper floors and SPG has become the owner thereof, for this Court to grant the reliefs claimed.

15. In my opinion, no. The mode of transfer of immovable property is prescribed in the Transfer of Property Act, 1882 and the Registration Act, 1908 and there can be no transfer in any other manner. Admittedly no registered transfer deed has ever been executed. In the absence thereof, SPG cannot be said to have become owner and SKG cannot be said to have ceased to be the owner of the said upper floors of

the property. It may be highlighted that SPG has not sued for specific performance of the agreement if any by SKG to transfer the said upper floors to SPG. CS(OS) No. 1399/2011 of SPG is premised on SKG having ceased to be the owner and SPG having become the owner pursuant to the agreement between the parties of the year 1991-1992. Being fully aware that the said transfer is not in accordance with law, the doctrine of Family Settlement qua which it has been held that technicalities cannot be allowed to come in the way, is sought to be invoked.

16. However for there to be a Family Settlement/arrangement, it has to be first established that there was a family and bona fide disputes in that family and the settlement was to resolve the said family disputes and rival claims by a fair and equitable division or allotment of properties between the various members of the family. It is this essential ingredient, that the claim of SPG is lacking. SPG himself has pleaded that he and his family and SKG and SKG's family have never resided together. The doctrine of Family Settlement / arrangement is invoked only for the reason of SKG and SPG being brothers. There is no plea even to show that there was any family dispute which threatened to disturb harmony in the family or any rival claims which required settlement to be entered into to save lengthy costly litigation or the honour of the family. The settlement pleaded is also one way of conveyance by SKG of the upper floors of the property to SPG and not by fair and equitable division or allotment of properties between various members of the family. Though SPG and SKG are stated to be having other siblings also but none of them are stated to have been parties to the settlement alleged. I am therefore unable to hold that an opportunity has to be given to SPG to prove any such agreement by SKG to convey the upper floors of the property to SPG in as much as even if SPG were to succeed in proving so, the same would still not make SPG the owner of the upper floors admittedly owned by SKG.

17. The doctrine of family settlement / family arrangement as expounded in detail in Kale supra cannot be applied to hold the provisions of the Transfer of Property Act and the Registration Act and the Stamp Act being not applicable to transfer of separate individual properties by one family member to another. The Transfer of Property Act and the Registration Act do not make any exception in this regard. Merely because the parties to the transfer are members of family is no ground not to comply with the legal provisions. The Supreme Court in [Hansa Industries Pvt. Ltd. and Others Vs. Kidarsons Industries Pvt. Ltd.](#), has held that a family settlement is based on the assumption that there is an antecedent title of some sort in the parties and the settlement acknowledges and defines what that title is with each party relinquishing all claims to property other than that falling to their respective share and recognizing the right of others as they had previously asserted to the portions allotted to them respectively. It was further held that it is for this reason that no conveyance is required in such case to pass the title from the one in whom it resides to the person receiving it under the settlement as it is assumed that the title claimed by the person receiving the property under the settlement had always resided in

him/her so far as the property falling to his/her is concerned and therefore no conveyance is necessary. However in the present case the claim if any of SPG to the title of the upper floors of the property was on the plea of Benami which is not permissible and else the claim of SPG even as per the balance sheet of SPG and SKG was only for recovery by SPG from SKG of the sale consideration paid by SPG for the property and which cannot be said to be a claim to the upper floors of the property. The doctrine of family settlement is thus not available to SPG.

18. A Release Deed on Rs. 10/- non-judicial stamp paper is stated to have been got prepared in the month of September, 1995 and kept in the office of the Chartered Account and to have been seized from there. It is in this context that the attempt of SPG to portray the acquisition of undivided shares in the property in the name of SPG and SKG has to be seen.

19. Release/relinquishment on non-judicial stamp paper of Rs. 10/- is permitted and registered when title to the property had been inherited from a common ancestor. In such situation, since acquisition of title by inheritance is not owing to any voluntary act of the person on which the title devolves, the law permitted such person, if did not desire to hold such title, to convey the same by way of a release/relinquishment on a non-judicial stamp paper of Rs. 10/- in favour of some other heir of the common ancestor. However if the conveyance is intended to be from owner to another, ad valorem stamp duty is required to be paid. In the present case as aforesaid SPG and SKG acquired different floors of the property under different Sale Deeds with SPG being the owner of the ground floor and SKG being the owner of the upper floors and release/relinquishment on a stamp paper of Rs. 10/- in any case was not permissible. The title held exclusively by SKG of the upper floors of the property could have been conveyed to SPG even if under nomenclature of Release/Relinquishment Deed, only by paying ad valorem stamp duty thereon. To the same effect are the judgements of the Division Bench of Karnataka High Court in [Ranganayakamma Vs. K.S. Prakash](#), and of the Andhra Pradesh High Court in [Goli Ramaswami and Another Vs. Narla Jagannadha Rao and Others](#) . The reliance by the counsel for SKG in this regard on Kuppuswamy Chettiar and Ramdas Chimna(supra) is also apposite.

20. Though the senior counsel for the SPG has not argued but SPG in the plaint has also sought to claim the relief on the basis of adverse possession. However no credence can be given to the said claim also since the case made out by the SPG is not of claiming adversely to SKG but of since the year 1992 claiming to be the exclusive owner of the property on the basis of release by SKG of the upper floors of the property in favour of SPG. The claim of SPG is thus of having acquired title to the upper floors in a lawful manner and not in an unlawful manner. The Supreme Court in [T. Anjanappa and Others Vs. Somalingappa and Another](#) , [L.N. Aswathama and Another Vs. P. Prakash](#), and [Chatti Konati Rao and Others Vs. Palle Venkata Subba Rao](#), has held that in such a state of pleadings the plea of adverse possession is not

available.

21. Once it is found that the SPG has not acquired any title to the property in the manner pleaded, the declaration claimed by him cannot be granted.

22. Though as aforesaid, in the application under Order VII Rule 11 of the CPC the plea of the claim of SPG being barred by limitation has not been taken, but the counsel for SKG has urged that the same can always be considered by this Court and the other judgments supra have been cited on the said aspect. It is his contention on the basis of Khatri Hotels Private Limited supra that the limitation of three years for the relief of declaration starts to run from the date when the cause of action first accrues and in the present case as per the averments in the plaint the cause of action for the SPG to the relief of declaration accrued in the year 1992 and the suit filed in the year 2011 is palpably barred by time. Similarly relying on Abdul Rahim supra it is argued that a suit for cancellation of a transaction has to be filed within a period of three years from the date of knowledge and it is contended that the suit for declaration qua Sale Deed could have been filed within three years of the execution of the Sale Deed in 1975.

23. The senior counsel for SPG in response thereto has contended that the plea of limitation is not available to SKG for the reason of this Court having on 18th February, 2013 permitted SPG to amend the plaint. It may be stated that this Court on 18th February, 2013 did not permit amendment of the plaint; rather it was held that the amendment in the prayer clause sought was already covered by the prayer made in the plaint. Even otherwise merely because an amendment has been allowed is no ground for holding the amended relief allowed by way of amendment to be within time. The Supreme Court in [Ragu Thilak D. John Vs. S. Rayappan and Others](#), has held that the dominant purpose of allowing amendment is to minimize litigation and the plea that the relief sought by way of amendment was barred by time is arguable.

24. Article 58 of the Schedule to the Limitation Act prescribes the limitation to obtain the relief of declaration to be of 3 years commencing from the date when the right to sue first accrues. SPG, though in the plaint in CS(OS) No. 1399/2011 has pleaded that the cause of action for the relief of declaration on the basis of entries in the balance sheet arose in the years 1991-92 when SKG had so agreed to release his share/portion of the property and further arose in September, 1995 when release deed was got prepared and in the year 2000 when it was seized in the Income Tax raid but the cause of action for a relief of declaration of title u/s 34 of the Specific Relief Act, 1963 is the date of denial of title by the defendant. The averments in the plaint are not very clear as to when the said title was denied. Be that as it may, the plaint cannot be rejected on the ground of limitation without giving SPG an opportunity to elucidate.

25. I may lastly notice that the counsel for SPG after the close of hearing has also handed over written submissions and which have also been considered by me hereinabove.

26. The application of SKG for rejection of the plaint in CS(OS) No. 1399/2011 is accordingly partly allowed and the plaint of SPG qua relief para (b) is rejected. The plaint qua the other reliefs is also rejected for the reason of not disclosing a cause of action and SPG being not entitled to the relief of declaration as owner on the basis of release as per balance sheet.

27. That brings to the effect thereof on CS(OS) No. 1480/2011. The defence of SPG to CS(OS) No. 1480/2011 for possession is the same which has already been rejected. It has to thus necessarily follow that the claim of SKG in CS(OS) No. 1480/2011 in so far as for the relief of possession, has to be decreed immediately.

28. In so far as the relief of mesne profits/damages for use and occupation is concerned, an inquiry under Order XX Rule 12 will be required to be held thereon. Accordingly the following issues are framed:-

(i). To mesne profits from what date and at what rate is Shri Sudhir Kumar Gupta entitled from Shri Satya Pal Gupta? OP Sudhir Kumar Gupta.

(ii). If Shri Sudhir Kumar Gupta is found entitled to any arrears of mesne profits, whether Shri Sudhir Kumar Gupta is entitled to any interest on arrears thereof and if so for what period and at what rate? OP Sudhir Kumar Gupta.

(iii). Relief.

Resultantly the following order is passed:-

A. The plaint in CS(OS) No. 1399/2011 is rejected.

B. A decree is passed in favour of Shri Sudhir Kumar Gupta and against Shri Satya Pal Gupta in CS(OS) No. 1480/2011 for recovery of possession of the first and second floors with terrace above of property No. K-115, Hauz Khas Enclave, New Delhi - 110 016 by removal of whosoever may be found in possession thereof and putting Shri Sudhir Kumar Gupta into possession thereof.

C. Decree sheet be drawn up.

D. Mr. B.S. Bannerjee, Advocate is appointed as Court Commissioner to conduct the enquiry into the mesne profits in terms of above. The fee of the Court Commissioner is tentatively fixed at Rs. 1 lac to be borne initially by Shri Sudhir Kumar Gupta and subject to final order if any as to costs.

E. The parties to file their list of witnesses on the said enquiry within fifteen days.

F. Shri Sudhir Kumar Gupta to file affidavits by way of examination-in-chief of all his witnesses within six weeks.

G. The parties to appear before the Court Commissioner with prior appointment on 31st July, 2013 for fixing the dates for recording of evidence.

H. The Court Commissioner is requested to conduct the enquiry within the Court complex.

I. The Court Commissioner is further requested to complete enquiry on or before 31st January, 2014.

J. The Registry is directed to produce the file before the Court Commissioner as and when directed.

K. List CS(OS) No. 1480/2011 awaiting report on 26th February, 2014.