
(2010) 11 DEL CK 0300

Delhi High Court

Case No: CS (OS) 187 of 2009 and I.A. No. 1188 of 2009

Mrs. Dinesh Kumari
Mishra

APPELLANT

Vs

Smt. Ranjana Mishra

RESPONDENT

Date of Decision: Nov. 30, 2010

Acts Referred:

- Benami Transactions (Prohibition) Act, 1988 - Section 2, 3, 4, 4(1), 4(2)
- Transfer of Property Act, 1882 - Section 45

Citation: (2011) 177 DLT 577 : (2011) 2 RCR(Civil) 301 : (2011) 2 RCR(Civil) 301

Hon'ble Judges: S. Ravindra Bhat, J

Bench: Single Bench

Advocate: Samrat Nigam, for Amit Punj, for the Appellant; Ravi Gupta Mala Narayan, Rahul Narayan and Ankit Jain, for the Respondent

Judgement

S. Ravindra Bhat, J.

Heard learned Counsel for the parties.

2. It is submitted that despite the best efforts, no settlement is possible. On the previous date of hearing, this Court had on consideration of the facts recorded inter alia as follows:

4. This Court has carefully considered the pleadings. Joint ownership of the suit property is an admitted fact. The Defendant's contention, however, is that the Plaintiff cannot accept more than 10% share in the property as the entire funding was by her. The Defendant, however, consciously does not say that there was any joint family; nor is there any allegation that the Plaintiff held such share or the share in the property in trust on her (i.e. the Defendant's) behalf.

5. Section 3 of the Benami Transactions (Prohibition) Act, 1988 prohibits anyone from holding property benami, which is defined u/s 2(a) as;

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

6. This Court is of the opinion that the defence set up in the written statement clearly is to the effect that the Plaintiff is a benami property owner on behalf of the Defendant. The Section 4 enacts a bar for the enforcement of any property right held benami.

7. Section 4(2) interestingly mandates that;

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.

Section 4(3) enacts a limited exception to the prohibition under Sections 4(1) and (2). It is to the following effect that;

(3) Nothing in this section shall apply:

(a) where the person in whose name the property is held is a coparcener in a Hindu undivided family and the property is held for the benefit of the coparceners in the family; or

(b) 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.

8. In this case, the Defendant unambiguously admits to the benami partnership of the Plaintiff; however, there is no assertion that the property was held as a HUF property or the Plaintiff held it trust or on behalf of the Defendant. In these circumstances, the Court is of the opinion that no further evidence is required and a trial is unnecessary.

3. The parties had sought for some time to explore the possibility of a settlement. As mentioned earlier, a settlement is not forthcoming. However, the Defendant had made a submission stating that even though this Court had rendered its prima facie view, the question of ratio or the portion of shares of property is undetermined, and that evidence is required to be gone into for this purpose. The Defendant's learned Senior counsel relied upon Section 45 of the Transfer of Property Act to submit that in such cases where ownership is admitted, the concerned parties would be entitled to shares in the property, in accordance with the proportion of payment (of consideration) made by them for acquiring it. It is stated that this provision remains unaffected by enactment of Benami Transactions (Prohibitions) Act, 1988 -hereafter referred to as Benami Act. Section 45 (of the Transfer of Property Act, 1882) reads as follows:

45. Joint transfer for consideration Where immovable property is transferred for consideration to two or more persons and such consideration is paid out of a fund belonging to them in common, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property identical, as nearly as may be, with the interests to which they were respectively entitled in the fund; and, where such consideration is paid out of separate funds belonging to them respectively, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property in proportion to the shares of the consideration which they respectively advanced.

In the absence of evidence as to the interests in the fund to which they were respectively entitled, or as to the shares which they respectively advanced, such persons shall be presumed to be equally interested in the property.

4. Learned Counsel relied upon the ruling of the Karnataka High Court in *M. Printer and Ors. v. Marcel Martin* AIR 2002 Kar 191. The question formulated for decision in that case is set out in paragraph -12 (b) of the report, which is in the following terms:

12 (b) In the event it is to be held that the Plaintiff and Defendant are co-owners of the schedule property whether the said transaction amounts to a benami transaction and is hit by the provisions of the 1988 Act.

The Karnataka High Court held, after setting out Section 45 and considering [C.V. Ramaswami Naidu and Others Vs. C.S. Shyamala Devi and Others](#), that:

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Therefore, if the source of the purchase price or the consideration for the investment in a joint enterprise emanates from a common fund, then the shares of each of the co-owners or co-entrepreneurs would be the same as their interest in that common fund. This equitable adjustment of rights is subject to a contract to the contrary. If, therefore, there is evidence that two or more persons purchased the property or an interest in the property, then the rule in Section 45 of the Transfer of Property Act would be automatically attracted, unless the parties have contributed otherwise in the matter of their quantum of interest in the joint property. The fact that the property was purchased in the name of one of the co-owners, would not make a serious dent on the above rule of good conscience, provided however it is established by acceptable evidence that such purchase in the name of co-owner was by accident or by consent and that the consideration for such purchase emanates from a common fund.

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28. It is in this background we have to examine each transaction. In view of the fact that benami transaction has been now defined under the Act if any transaction is held to be hit by the provisions of the said Act, the said transaction should satisfy the requirements of

benami transaction as defined under the Act. The first and the foremost requirement is that a property should have been transferred in the name of a person for consideration paid or provided by another person. In other words, the consideration for the transaction should not have flown from the person in whose name the property is purchased. If the person in whose name the property is purchased also has contributed consideration for purchase of the property in his name along with others whose name is not reflected in the sale deed, it would not amount to a benami transaction as defined under the Act.

The Court also held that in such an event, the party would be bound by estoppel from denying its proportion of contribution to the sale price for the property.

5. It is evident from the ruling in *M. Printer and Ors. v. Marcel Martin* and also the decision in *C.V. Ramaswami Naidu v. C.S. Shyamala Devi* (supra) that the Court considered the inter face between the provisions of the Transfer of Property Act and the Benami Act. What is material here, however, is that the Karnataka High Court failed to notice the two binding decisions of the Supreme Court in [Mithilesh Kumar and Another Vs. Prem Behari Khare](#), (rendered by a two Judges Bench which held that provisions were retroactive) and the subsequent three Judges Bench decision in [R. Rajagopal Reddy and Others \(deceased by legal representatives\) Vs. Padmini Chandrasekharan \(deceased by legal representatives\)](#), where the Court commented as follows:

As seen earlier, the preamble of the Act itself states that it is an Act to prohibit benami transactions and the right to recover property held benami, for matters connected therewith or incidental thereto. Thus it was enacted to efface the then existing right of the real owners of properties held by others benami. Such an Act was not given any retrospective effect by the legislature. Even when we come to Section 4, it is easy to visualize that Sub-section (1) of Section 4 states that 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 shall lie by or on behalf of a person claiming to be the real owner of such property. As per Section 4(1) no such suit shall thenceforth lie to recover the possession of the property held benami by the Defendant. Plaintiff's right to that effect is sought to be taken away and any suit to enforce such a right after coming into operation of Section 4(1) that is 19.5.1988, shall not lie.

6. This Court is unpersuaded to accept the Defendant's submissions in this case. Although the argument based on Section 45 is facially attractive, accepting it would undercut the entire object of Sections 3 and 4 of the Benami Act, particularly, Section 4(2). The provision categorically states that ("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.")

7. This provision was completely overlooked by the Karnataka High Court. The effect of accepting any submission based on Section 45, would be to consider the defence in

respect of a share or a portion disputed by one of the parties. That clearly falls between the ambit "right in respect of any property". Permitting any argument about the proportion or the contribution of one party would undercut the provisions and the object of the Benami Act itself. Besides, it will lead to startling results i.e. for instance in a given case where there is no contribution by the benamidar concededly, he would be held not entitled totally or entitled to the property completely, depending on how the Court interprets it), thus defeating Section 4. In the case of a person who has paid 30% and is shown as an owner of the entire property, Section 45 would be applied, and he will be held entitled to only that proportion of the share. Clearly, that was not the object to be achieved by Benami Act which was to entirely prohibit such argument. The term "No defence..." in respect of any "right", therefore, includes any right or defence in respect of a property, or a share, or part of a share in it. The Court also notices that the Defendants have not preferred any review petition.

8. In view of the above findings, the Court is of the opinion that the previous determination recorded on 8.10.2010 binds the parties and that the preliminary decree for partition has to be drawn. Accordingly, it is declared that the Plaintiff and Defendant are equal and half shareholders of the suit property.

9. Let a preliminary decree be drawn in the above terms.

10. Ms. Shobhna Takiar, Advocate (Mobile 9810962950) is hereby appointed as Local Commissioner to inspect the suit property and report to the Court within eight weeks whether the property can be suitably partitioned. The Commissioner shall visit the suit property after duly notifying both the Plaintiff and Defendant, and is also permitted to photograph the premises. The Commissioner's fee is fixed @ Rs. 75,000/- (Rs. Seventy five thousand), to be borne in equal proportions by the parties.

11. List on 11th February, 2011, for further proceedings towards drawing a final decree.