VINOD KUMAR DHALL

v.

DHARAMPAL DHALL (DECEASED)THROUGH HIS LRS. & ORS.

(Civil Appeal Nos. 4534-4535 of 2018)

APRIL 26, 2018

[ARUN MISHRA AND UDAY UMESH LALIT, JJ.]

Suit:

Suit for restoration of possession, mesne profit *and for permanent injunction – In respect of house property – Claiming to be owner of the property – Against brother (defendant No.1) and sister (defendant No. 2) of the plaintiff – Defendants' case was that the property was a family property and not exclusively owned by the plaintiff; and the possession of the defendant was in the capacity of owner – Trial Court decreed the suit – Decree was further affirmed by High Court in first appeal and in Review – On appeal, held: The facts and circumstances of the case indicate that the property in question was a family property and not exclusive property of the plaintiff – The courts below have acted perversely and in most arbitrary and illegal manner, while accepting the* ipse dixit *of the plaintiff and in decreeing the suit – Legal inferences from admitted facts have not been correctly drawn – Concurrent finding of facts which are impermissible and perverse cannot have binding effect on the Court – Suit is liable to be dismissed – Appeal allowed.*

Surendra Kumar v. Phoolchand (Dead) Through Lrs. & Anr. **(1996) 2 SCC 491;** *Union of India v. Moksh Builders & Financiers Ltd. & Ors.* **(1977) 1 SCC 60;** *Sri Marcel Martins v. M. Printer & Ors.* **(2012) 5 SCC 342;** *Vathsala Manickavasagam & Ors. v. N. Ganesan & Anr.* **(2013) 9 SCC 152 – relied on.**

Case Law Reference

(1996) 2 SCC 491	**relied on**	**Para 10**
(1977) 1 SCC 60	**relied on**	**Para 10**
(2012) 5 SCC 342	**relied on**	**Para 10**
(2013) 9 SCC 152	**relied on**	**Para 10**

A CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 4534-4535 of 2018.

From the Judgment and Order dated 27.10.2017 and 08.12.2017 of the High Court of Delhi at New Delhi in RFA No. 400 of 2010 and Review Petition No. 480 of 2017 in RFA No. 400 of 2010 respectively.

B Mahabir Singh, Sr. Adv., K. R. Chawla, Ajai Kumar Bhatia, Vijay S. Bishnoi, Advs. for the Appellant.

E. C. Agrawala, Shwetan K. Sailakwal, Tanmaya Agarwal, Vibhor Verdhan, Advs. for the Respondent.

C The following Order of the court was delivered:

O R D E R

1. Leave granted.

2. Heard learned counsel for the parties.

D 3. The defendant is in appeal aggrieved by the judgment and decree passed by the trial court, as affirmed by the High Court in first appeal and review applied had also been rejected by the High Court. The plaintiff-respondent, Dharampal Dhall (since deceased), filed a suit for restoration of possession, *mesne profits* and for a permanent injunction with respect to House No.ED-48, Tagore Garden, New Delhi.

E

4. The plaintiff – Dharampal Dhall came with a case that he acquired the leasehold rights on plot admeasuring 149.33 square yards under the perpetual lease deed granted by the President of India in his favour and registered on 31.01.1966. The plaintiff raised a construction over the plot and obtained the necessary sanction from the competent

F authority as per the site plan and got installed electricity, water, and sewerage connections in the premises. However, it was stated in the plaint itself that entire family started living in the said house. The marriage of plaintiff, as well as defendants and all sisters, were solemnized from the house in question. When the relationship of Defendant No.2- the

G sister of the plaintiff, became strained with her husband, she started living in the said house along with her daughter. Defendant No.1 for some time in 1971 had resided out of Delhi. Father of the parties – Kashmiri Lal Dhall died on 10.08.1980, leaving behind several properties at Delhi. Defendant No.1 started living separately with effect from the

H

year 1986. He acquired a house at Moti Nagar, New Delhi, and one more residential accommodation, *i.e.*, GH-1/318, Pashchim Vihar, New Delhi.

5. It was further averred in the plaint that the mother of the parties died in the premises in question in the year 1990. The house remained in the custody/ possession of the Defendant No.2. At the relevant point of time, the plaintiff was posted at Bombay. The house was furnished. Furniture of the plaintiff was still lying in the house. Plaintiff came back to Delhi in the year 1993. However, at the same time, Defendant No.2 was permitted to occupy the house. Later on, it was found that Defendant No.1 had also started living in the said house. The plaintiff asked defendants to vacate the premises. They did not do so. Though, Defendant No.2 had shifted residence in January 1995. Hence, the suit was filed, after serving notice dated 30.6.1995. Defendant No.1 was ousted from the house by the mother in the year 1986. Thus, he had no right in the house. The conduct of Defendant No.1 was not proper with the plaintiff.

6. In the written statement filed by Defendant No.1, it was contended that the suit was not properly valued. The defendant had been occupying the premises since the year 1966. The suit was barred by limitation and was not maintainable. The allotment of the plot was obtained initially in the name of Kumari Sneh Lata, who was the eldest child of late Kashmiri Lal Dhall. The father of the parties obtained it in the year 1963 from the Delhi Development Authority (DDA). The entire amount was paid by late Kashmiri Lal to the DDA. Subsequently, construction was raised in 1965-66 by Kashmiri Lal out of his own money. At that time. Plaintiff was only a student studying at IIT, Kharagpur, West Bengal. The possession of the defendant was in the capacity of the owner. The plaintiff had no source of income at the relevant point of time. No gift deed had been made by any person in plaintiff's favour. They are four sisters and two brothers, left as legal representatives of late Shri Kashmiri Lal. The suit was bad for non-joinder of necessary parties. The plaintiff was, thus, not entitled to any relief.

7. The trial court had decreed the suit. The judgment and decree had been affirmed by the High Court. Aggrieved thereby, the appellant has come up in appeals.

8. We have heard learned counsel for the parties at length. It was submitted by Mr. Mahabir Singh, learned senior counsel appearing

A on behalf of the appellant that the property was admittedly acquired in the name of Kumari Sneh Lata. Later on, at the time when her marriage was performed in the year 1966, the property was transferred in the name of Dharampal. At the time when the property was acquired in the name of Kumari Sneh Lata, in the year 1963, Dharampal, the plaintiff was a student at IIT, Kharagpur. He had no source of earning. Thus, B obviously, the money came from father and house was constructed in the year 1965-66. Thus, the plaintiff had no source of income which could have been invested in the house at the relevant point of time. As per the statement made by the plaintiff, he joined the services in April 1966. By that time, the house was already constructed. Thus, it was C the property owned by the family. The father had spent the money for construction of the house and for allotment of plot and thus it was a family property. It was used as the residence of the entire family, marriages of the children and the factum of enjoyment clearly indicated that it was not the property exclusively owned by the plaintiff. It was the family property even as per the case set up in the plaint as well as D the vital admissions made by the plaintiff in his deposition.

9. Mr. E.C. Agrawala, learned counsel appearing on behalf of the respondents, has submitted that the property, in fact, was acquired by Kumari Sneh Lata, out of her earning, she was the teacher. It was also submitted that a letter for change in the name was issued at her address E of school where she was serving. Thus, Kumari Sneh Lata had acquired the plot from DDA out of her own earning. Thus, it could be said to be the family property got allotted by father Kashmiri Lal Dhall. Thus, it was open to Kumari Sneh Lata to give it to the plaintiff. Thus, it would not become the family property. Though it was occupied by the family, F from time to time the plaintiff used to come and reside therein. He had permitted Defendant No.2 to reside only due to the fact that her relationship with husband was strained and Defendant No.1 was ousted by the mother in 1986. He had obtained two other properties in different localities at Delhi, *i.e.*, Moti Nagar, New Delhi and Pashchim Vihar, New Delhi. He had reoccupied the property in question behind the back G of the plaintiff in the year 1995-1996. Thus, the plaintiff was entitled to restoration of possession of the property and mesne profit. Both the Courts have concurrently found the fact that the plaintiff was the owner. It was purely the finding of fact and no case for interference in the appeals by this Court was made out .

H

10. The learned counsel for the appellant had relied upon the decision in *Surendra Kumar v. Phoolchand (Dead) Through Lrs. & Anr.* (1996) 2 SCC 491 in which this Court had laid down that there is no presumption that a family, because it is joint, possessed the joint property and therefore the person asserting the property to be joint had to establish that the family was possessed of some property with the income of which the property could have been acquired. But where it is established or admitted that the family which possessed joint property which from its nature and relative value may have formed sufficient nucleus from which the property in question may have been acquired, the presumption arises that it was the joint property and the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family. When the property was purchased by Manager of the joint family in the name of the appellant who was then minor in the absence of material to establish that consideration money was paid out of separate funds, it was opined that the property was rightly held to be the joint property by the courts below.

11. In *Union of India v. Moksh Builders & Financiers Ltd. & Ors.* (1977) 1 SCC 60, this Court has observed that where it is asserted that an assignment in the name of one person is in reality for the benefit of another, the real test is the source whence the consideration came as also to find out who has been in the enjoyment of the benefits of the transaction. The case of the appellant must be dealt upon the reasonable probabilities and legal inferences arising from proved or admitted facts. The burden of proof is not static and may shift during the course of the evidence. Thus, while the burden initially rests on the party who would fail if no evidence is led at all after the evidence is recorded, it rests upon the party against whom judgment would be given if no further evidence were adduced by either side on the evidence on record. Once the evidence has been adduced the case must always be adjudged on the evidence led by the parties. This Court has laid down thus:

> "15. It is nobody's case that the sale of the house to defendant 2 was fictitious and that the title of the transferor was not intended to pass. What we have to examine is whether the title, on the sale of the house in December 1946, was transferred to defendant 3, who was the real purchaser, and not to defendant 2, who was only the ostensible transferee and was no more than a "benamidar". It has been held in *Gangadara Ayyar and Ors. v. Subramania Sastrigal and Ors.* AIR 1949 FC 88, that

A

> "in a case where it is asserted that an assignment in the name of one person is in reality for the benefit of another, the real test is the source whence the consideration came."

It is also necessary to examine in such cases who actually have enjoyed the benefits of the transfer. Both these tests were applied

B by this Court in *Meenakshi Mills, Madurai v. The Commissioner of Income-Tax Madras*. [1955] S.C.R. 691. It is, therefore, necessary in the present case, to find out the source of the consideration for the transfer, as also to find out who has been in the enjoyment of the benefits of the transaction. It is equally well settled that, although the onus of establishing that a transaction is

C 'benami' is on the plaintiff.

> "where it is not possible to obtain evidence which conclusively establishes or rebuts the allegation, the case must be dealt with on reasonable probabilities and legal inferences arising from proved or admitted facts."

D

16. The burden of proof is, however not static, and may shift during the course of the evidence. Thus while the burden initially rests on the party who would fail if no evidence is led at all after the evidence is recorded, it rests upon the party against whom judgment would be given if no further evidence were adduced by

E either side i.e. on the(evidence on record. As has been held by this Court in *Kalwa Devadattam and Ors. v. The Union of India and Ors*. [1964] 3 SCR 191 that where evidence has been led by the contesting parties on the question in issue, abstract considerations of onus and out of place, and the truth of otherwise;

F of the case must always be adjudged on the evidence led by the parties. This will be so if the court finds that there is no difficulty in arriving at a definite conclusion. It is therefore necessary to weigh the evidence in this case and to decide whether, even if it was assumed that there was no conclusive evidence to establish or rebut the "benami" allegation, what would, on a careful

G assessment of the evidence, be a reasonable probability and a legal inference from relevant and admissible evidence."

12. In *Sri Marcel Martins v. M. Printer & Ors.* (2012) 5 SCC 342 it was held that Benami Transactions (Prohibition) Act, 1988 (for short, "the Act") would apply only in case property was held benami. In

H

case Section 4(3) is applicable it could not be said that property was held benami as such the provision of the Act would not apply.

13. Section 2(a) of Act defined 'benami transactions' as under:

"2. Definitions- In this Act, unless the context otherwise requires,—

(a) benami transaction means any transaction in which property is transferred to one person for a consideration paid or provided by another person;

(b) ....."

Section 4 of the Act is reproduced as under:

"4. Prohibition of the right to recover property held benami-

(1) 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.

(2) 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.

(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.

(emphasis supplied)

The bare reading of the aforesaid provision contained in Section 4(3) of the Act makes it clear that where a person in whose name a property is held as coparcener in a Hindu Undivided Family and the property is held for the benefits of the coparcener in the property, provisions of Section 4 containing prohibition of the right to recover the

property held benami would not be applicable. The bar of the Act is not applicable to a transaction as contained in section 4(3) (a) and (b). If the property is held in fiduciary capacity or is held as a trustee for the benefits of another person for whom he is a trustee or towards whom he stands in such capacity. Thus, the provision of Act could not be said to be applicable in the instant case.

14. In *Vathsala Manickavasagam & Ors. v. N. Ganesan & Anr.* (2013) 9 SCC 152, this Court considered the question whether the property was held benami or was joint family property. Where there was a tacit admission that the suit property was purchased by his father in his name for which he was not responsible, it was held to be joint family property.

15. After hearing learned counsel for the parties, considering the aforesaid legal position, we are of the considered opinion that the appeals deserve to be allowed. Firstly, the plaintiff has not come up with the case that the property was acquired in the name of Kumari Sneh Lata in the year 1963 and it was she who had spent the money for getting the land allotted from DDA and in the construction of the house. No case has been set up in the plaint to show that Kumari Sneh Lata had spent the money in the construction of the house. He has suppressed the fact of allotment in the name of Kumari Sneh Lata. On the contrary, it had been admitted in the plaint itself that family started residing in the premises right from the beginning. In paragraphs 4 and 5, following is the pleading made by the plaintiff:

> "4. That on completion of the house all family member including defendant started living in the aforesaid house, the marriage of plaintiff as well as the defendant and all sister were solemnized from the house in dispute.
>
> 5. That the relation between the defendant No.2 and her husband became strain consequently she was been given shelter in the premises in dispute by the plaintiff."

16. It is apparent that the entire family was residing in the house in question right from the beginning and the marriages of the plaintiff as well as the defendants and all other sisters were solemnized in the house in question. It is apparent that Defendant No.2 was also residing in the house continuously right from the beginning and also the mother and she had also died in the house in question, as per the case set up by the

plaintiff in the year 1990. Thereafter, the house remained in occupation of the family members, is also apparent. On the contrary, there is admission made by the plaintiff that he never resided in the house. The following is the relevant portion of the deposition of the plaintiff set out hereunder:

> "It is correct that I never remained in the house in dispute since its construction. It is incorrect to say that after completion of the house, my parents and all the four sisters including defendant No.2 and brother defendant No.1 not started living with me at the house in dispute."

From the aforesaid statement, it is clear that the plaintiff never resided in the house and was not in possession and enjoyment of the house at any point in time.

17. Apart from that, when we come to the source of money for the purpose of purchase of plot, admittedly, the plaintiff was a student and he was admitted in the year 1961 at IIT, Kharagpur. At the time when the land was allotted in the name of Kumari Sneh Lata, he was still a student and he had no source of income at the relevant time in 1963 or in January 1966, when the allotment was changed in his name owing to the marriage of Kumari Sneh Lata. Thus, obviously, it was Kashmiri Lal who had spent the money in getting the land allotted and also had raised the construction in the year 1965-66. Though the plaintiff has stated that the construction was made sometime in the year 1966, his version cannot be said to be reliable. The plaintiff was silent in the plaint when the construction was raised. The defendant has come up with a specific case that the construction was raised in the year 1965-66 and that is reliable. Apart from that even if construction was made in 1966 the plaintiff had admitted that he obtained employment only in April 1966 and when the house was constructed in 1966, the plaintiff was not having enough earning so as to invest in the house or to purchase the plot in 1963. He was not even in a position to say his salary was Rs.400 or not. It was obviously owing to the marriage of Kumari Sneh Lata that the plot was transferred in the name of Dharampal, who happens to be the elder son of Kashmiri Lal. Thus, apparently no money was paid by Dharampal for allotment of the land to the DDA and obviously, it was paid in 1963 by Kashmiri Lal. The money was also spent in construction by the father Kashmiri Lal. Occupation and enjoyment of the house were with the entire family right from the beginning and till today the

A family is residing in the house. Apart from that, the plaintiff has admitted that when he came to Delhi on posting at All India Institute of Medical Sciences, he started living in the rented accommodation, as there was a paucity of accommodation for his stay in the house in question. Thus, all the facts and circumstances indicate that it was a family property and not the exclusive property of the plaintiff – Dharampal. Thus, the Courts B below have acted not only perversely but in a most arbitrary and illegal manner, while accepting the *ipse dixit* of the plaintiff and in decreeing the suit. Such finding of facts which are impermissible and perverse cannot be said to be binding. The legal inferences from admitted facts have not been correctly drawn.

C

18. Merely the fact that house tax receipt, electricity and water bills and other documents are in the name of Dharampal would carry the case no further, as it was the father who got the name changed of Kumari Sneh Lata in question in the name of Dharampal. The receipts were only to be issued in the name of the recorded owner, but Dharampal D never resided in the house as he was in service out of Delhi, obviously, the amountwas paid by family, not by Late Dharampal. Thus, we find that no benefit could have been derived from the aforesaid documents.

19. In view of the aforesaid, we have no hesitation in allowing the appeals and dismiss the suit filed by the plaintiff-respondents. Thus, we E order accordingly. No order as to costs. Pending application, if any, shall stand disposed of.

Kalpana K. Tripathy Appeals allowed.