

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
APPELLATE SIDE

Present:

The Hon'ble Justice Tapabrata Chakraborty
&
The Hon'ble Justice Partha Sarathi Chatterjee

FA 109 of 2018
with
IA No. CAN 2 of 2019 (Old No. CAN 2764 of 2019) [Disposed of]

Sri Sekhar Kumar Roy
versus
Smt. Lila Roy & Another

For the Appellant : *Mr. Ayan Poddar,*
Mr. Soham Dutta,
Mr. Kamran Alam.

For the Respondents : *Mr. Sagnik Chatterjee,*
Mr. Sayan Mukherjee.

Hearing is concluded on : *8th May, 2023.*

Judgment On : **7th June, 2023.**

Partha Sarathi Chatterjee, J.

1. Judgment and decree dated 22nd December, 2016 passed by the learned Civil Judge, Senior Division, Sealdah in Title Suit no. 109 of 2011, whereby the suit for declaration, partition and permanent injunction

instituted by the plaintiff/appellant herein was dismissed, have been called in question in the present appeal.

2. One Sekhar Kumar Roy, the plaintiff/appellant (in short, Sekhar) presented the plaint contending *inter alia* that his father, Sailendra Kumar Roy, since deceased (in short, Sailendra) purchased the suit property by one registered deed of sale in 1969 in 'benam' of his wife, Smt. Lila Roy, defendant no. 1, since deceased (in short, Lila). Lila, who happened to be a house-wife, was a mere name lender and she did not contribute any single farthing towards consideration money since she had no independent income at the relevant time of purchase of the suit property. Sailendra got the building plan sanctioned in the name of Lila and by spending money from his own fund constructed two-storied building thereon. He thereafter died intestate on 29.5.1999 leaving behind his widow, Lila, the plaintiff as his son and one daughter, the defendant no. 2, namely Sumita Saha (in short, Sumita), who according to Section 8 of Hindu Succession Act have inherited 1/3rd share each of the suit property and Sekhar stayed in the suit property till 11.5.2011 and since then, he started leaving apart. Sekhar thereafter approached the defendants to effect partition of the suit property by metes and bounds but the defendants refuted the claim of partition of Sekhar and hence, the suit.

3. Records reveal that both the defendants defended the suit by filing separate written statements. Crux of the defence taken by Lila and defendant no. 2 in their written statement is as follows:

- i) Lila purchased the suit property from her 'stridhan' property. She asserted that she got the building plan sanctioned in her own name and then constructed two-storied building on the suit land from her own fund;
- ii) She further claimed therein that according to legislative fiat incorporated in Section 3 of Benami Transaction (Prohibition) Act, 1988 (hereinafter referred to as the 1988 Act), she became the absolute owner of the suit property and same was duly mutated in her name and deed of conveyance dated 20.1.1970 had never been challenged either by Sekhar or by her husband at any point of time and mere payment of requisite consideration money does not, *ipso facto*, prove *benami* transaction;
- iii) She claimed that Section 8 of Hindu Succession Act, 1955 has got no application in the present *lis* and she emphatically denied that Sekhar has acquired 1/3rd share in the suit property;
- iv) She lamented that Sekhar abandoned her in May, 2011 and since his marriage, Sekhar subjected her to mental and physical torture and she used to pass her days taking financial assistance from her daughter, the defendant no.2 and by executing one will, which was registered on 4.9.2011, she bequeathed the suit property in favour of Sumita;

4. Upon pleadings of the respective parties, the learned Court below framed as many as four issues. In corroboration of the facts depicted in the plaint, Sekhar adduced his oral testimony but he did not tender any document whereas to lend support to their case projected in written statement, both the defendants deposed and produced some documents which were admitted in evidence as Ext. A to E.

5. Aggrieved by the judgment and decree whereby the suit was dismissed, Sekhar preferred the present appeal contending, *inter alia*, that the learned Court below ought to have considered that Lila happened to be a mere house-wife and she had no independent income and hence, she was a mere name lender and Sailendra, his father purchased the land and constructed a structure thereon for the benefits of his family members and learned Court below ought to have considered that Lila in her evidence admitted that she was not engaged in any profession throughout her life and Sailendra was the sole bread-earner of her family and defendants failed to prove that Lila paid the consideration money to purchase the land and Lila incurred expenses for construction of the building standing thereon.

6. Mr. Poddar, learned Advocate representing Sekhar, the appellant herein submits that Lila claimed that she purchased the suit property and constructed a building thereon from her 'stridhan' properties but no particulars of 'stridhan' properties have been disclosed and Lila did not disclose wherefrom she acquired the 'stridhan' properties and she did not disclose the value of her 'stridhan' properties. He contends that from the evidence of Lila it is graphically clear that she was a mere house-wife and

she had no independent income of her own whereas Sailendra had a business of soap and oil and that Sailendra was the only earning member of the family at the relevant time of purchase of the suit property. According to Mr. Poddar the learned Court below should have considered whether the story that Lila purchased the suit property from her own fund is probable or not. He asserts that the defendants failed to prove that suit property was purchased from Lila's 'stridhan' properties and hence, Court should have decreed the suit. He submits that cavil between the parties should be given a clear burial by declaring share of Sekhar and by ordering partition of the suit property. To bolster his submission, he placed reliance upon the judgments delivered in cases of *Union of India -vs- Moksh Builders And Financiers Ltd. & Ors.* reported in (1977) 1 SCC 60, *Pulin Behari Addy -vs- Debendra Nath Addy* reported in (1981) 1 CHN (CAL) 531, *Dr. Prasanta Kumar Das -vs- Susanta Kumar Das & Ors.* reported in (2017) 1 CHN (CAL) 452(DB).

7. In response, Mr. Chatterjee, learned Advocate appearing for the respondents submits that the suit property was purchased in 1970 and Sailendra died in 1999. Sekhar dragged Lila, his mother, aged about 85 years, in Court. Lila deposed in 2016 regarding the suit property which was purchased almost 46 years back. Hence, it is not expected that Lila would preserve all the documents and proofs relating to payment of consideration money and expenses borne for construction of building. He informed the Court that Lila has gifted the suit property in favour of her daughter in 2015 by dint of registered deed of gift and thereafter Lila died in 2019.

8. Mr. Chatterjee further contends that Lila paid taxes to the Corporation and drawing our attention to the evidence of the parties, he contends that Sekhar himself admitted that he did not look after her mother. He submits that appellant has been making desperate attempt to shift the burden upon the defendants but it is burden of the plaintiff to prove that Sailendra paid the consideration money and incurred the expenses for construction of the structure.

9. Mr. Chatterjee further submits that plaintiff has failed to prove that Sailendra had a motive to create *benami* in the name of Lila and plaintiff did not bring any evidence to prove that Sailendra had sufficient money to finance Lila for purchasing the suit property and hence, the learned Court below has rightly refused to decree the suit. He contends that from the evidence it is evident that after marriage, Lila came to possess jewellery and valuable articles and from such 'stridhan' articles, Lila purchased the suit property and constructed the building. To strengthen his submission he placed reliance upon a judgment delivered in case of *Valliammal -vs- Subramanian & Ors.* reported in (2004)7 SCC 233.

10. In reply, Mr. Poddar submits that question of onus has not been properly appreciated by the learned Court below. According to him, when both the parties have adduced their respective evidence, question of burden of proof loses its significance. Burden lies upon Lila to prove her source wherefrom she collected consideration money and expenses for construction of building since it is demonstrable from the evidence that she had no independent income. He submits that Lila lost his father at her age of 2

years and she was brought up by her maternal uncle and hence, the story that she came to possess jewellery and valuable articles before and at the time of her marriage has no leg to stand on.

11. Crucial question which is to be answered in the present appeal is whether the transaction i.e. the purchase of suit property under registered deed of sale dated 20.01.1970 by Lila is *benami* transaction.

12. Benami Transaction (Prohibition) Act, 1988 defines the expression, '*benami transaction*' and equipped the appropriate authority with powers to acquire *benami* property. Provisions of three sections being Sections 3, 5 & 8 of the 1988 Act, which was initially a 9-section legislation, came into force with effect from 5.9.1988 whereas the remaining provisions thereof came into force from the date being 19.9.1988. Section 3 being a prohibitory legislation cannot have retrospective operation but the Section 2(a) of the Act which is a piece of declaratory legislation can have its application irrespective of its date or duration. So, definition of the expression '*benami transaction*' can be borrowed from Section 2(a) of the 1988 Act in respect of the transaction held prior to promulgation of the said Act. As defined in Section 2(a) of the Act '*benami transaction*' means any transaction in which property is transferred to one person for a consideration paid or provided by any other person. A transaction must, therefore, be *benami* irrespective of its date or duration.

13. In India, two kinds of *benami* transactions are generally recognized. Where a person buys a property with his own money but in the name of another person without any intention to benefit such other person,

the transaction is called *benami*. In that case, the transferee holds the property for the benefit of the person who has contributed the purchase money, and he is the real owner. The second case which is loosely termed as a *benami* transaction is a case where a person who is the owner of the property executes a conveyance in favour of another without the intention of transferring the title to the property thereunder. In this case, the transferor continues to be the real owner. [See, the judgment delivered in the cases of *Bhim Singh – vs- Kan Singh*, reported in (1980) 3 SCC 72 and *Pulin Behari Addy* (supra)].

14. However, there is a presumption in law that the person who purchases the property is the owner of the same and such presumption can be displaced only by pleading and successfully proving that the person whose name appears in the document is not the real owner, but only a *benami* and heavy burden lies on the person who pleads that recorded owner is mere name-lender.

15. Now, coming to the case at hand, it can be argued that to hold the subject transaction as *benami* transaction, it is to be proved by the principle of preponderance of probability that although the suit property was purchased in name of Lila but the consideration money was paid or provided by her husband and not by Lila.

16. Indisputably, subject deed of sale was executed and registered on 20.01.1970. Sekhar preferring the suit in 2011 claimed that Lila, transferee was mere name-lender and Sekhar adduced his oral testimony only and he did not produce any document whereas Lila deposed in 2016 and adduced

her oral accounts which found support from the evidence of DW-2 and Lila had produced all the documents relating to suit property.

17. During course of hearing, both the appellant and the respondents advanced their arguments on the issue relating to '*burden of proof*'. So, main question centred around the present appeal is whether it was Sekhar who had to discharge the burden to prove that the subject sale transaction was *benami* transaction or it was Lila who was to prove that she purchased the suit property from own fund or 'stridhan' properties detailing the source of such fund and disclosing every details of payment of consideration money.

18. The question relating to burden of proof has been set at rest in the judgment of *Jaydayal Poddar (Deceased) thr. Lrs. -vs. Mst. Bibi Hazra* reported in *AIR 1974 SC 171* in which the Hon'ble Apex Court ruled as follows:

"It is well settled that the burden of proving that a particular sale is benami and the apparent purchaser is not the real owner, always rests on the person asserting it to be so. This burden has to be strictly discharged by adducing legal evidence of a definite character which would either directly prove the fact or benami or establish circumstances unerringly and reasonably raising an inference of that fact. The essence of a benami is the intention of the party or parties concerned; and not unoften such intention is shrouded in a thick veil which cannot be easily pierced through. But such difficulties do not relieve the person asserting the transaction to be benami of any part of

the serious onus that rests on him; nor justify the acceptance of mere conjectures or surmises, as a substitute for proof. The reason is that a deed is a solemn document prepared and executed after considerable deliberation, and the person expressly shown as the purchaser in the deed, starts with the initial presumption in his favour that the apparent state of affairs is the real state of affairs. Though the question, whether a particular sale is benami or not, is largely one of fact, and for determining this question, no absolute formulae or acid test, uniformly applicable in all situations, can be laid down; yet in weighing the probabilities and for gathering the relevant indicia, the courts are usually guided by these circumstances: (1) the source from which the purchase money came; (2) the nature and possession of the property, after the purchase; (3) motive, if any, for giving the transaction a benami colour; (4) the position of the parties and the relationship, if any, between the claimant and the alleged benamidar; (5) the custody of the title-deeds after the sale and (6) the conduct of the parties concerned in dealing with the property after the sale.”

19. In the given case, Sekhar claimed that his mother, Lila was a mere name-lender. He deposed that at the relevant time of sale, he was not present and he could not say the actual amount of consideration money and he admitted that he did not verify from attesting witness, identifier etc. whether his father paid the consideration money and he admitted that his father never claimed himself to be the real owner of the suit property and he

admitted that he did not have any document to show that his father paid the consideration money.

20. From evidence of Lila, it appears that Lila admitted that she was a home-maker throughout her life and she had no independent income of her own and she asserted that she purchased the suit property from her 'stridhan' properties. She claimed that she herself purchased the property selling her gold ornaments. Admittedly, Lila testified that during his stay in the suit property, Sekhar used to behave well with her.

21. Mr. Poddar tried to convince us that since both the parties have led evidence, question of burden of proof has lost its significance and Court should pass judgment appreciating evidence let in by the parties and since, Lila failed to disclose the particulars of her 'stridhan' properties and since, Lila admitted that she was a home-maker throughout her life having no independent income of her own, the learned Court below should have come to the conclusion that Lila was nothing but a mere name-lender.

22. At the cost of reiteration, it may be stated that a Court is required to bear in mind the well-settled principles to the effect that the burden of showing that a transfer is a *benami* transaction always lies on the person who asserts it. In the Indian society, if a husband supplies the consideration money for acquiring property in the name of his wife, such fact does not necessarily imply *benami* transaction. Source of money is, no doubt, an important factor but not a decisive one. The intention of the supplier of the consideration money is the vital fact to be proved by the party who asserts *benami*. In other words, even if it is proved that Sailendra paid the

consideration money, the plaintiff must further prove that Sailendra really intended to enjoy the full benefit of the title in him alone.

23. In the case before us, Sekhar could not bring any evidence even to show what was amount of consideration money and how the consideration money was paid and how the suit property was purchased and even he could not prove who paid the consideration money. He could not produce any document relating to the suit property. Title deed and all documents relating to the suit property were all along in the custody of Lila and Lila all along paid municipal tax and got the suit property mutated in her name and Sekhar could not bring any evidence on record to lead any prudent man to infer that his father had a motive to create *benami* in name of his mother or Sailendra intended to enjoy the full benefit of the title in him alone. Judgments relied upon by the appellant in spite of having unquestionable value of the proposition laid down therein, shall not come in aid of the appellant in the factual matrix of the case at hand.

24. As a result, we are inclined to hold that learned Court below has correctly held that Sekhar has failed to discharge his burden to prove that subject sale transaction is *benami* transaction and we have not found any wrong in the approach and decision of the learned Court below and we are of the view that judgment and decree impugned cannot be annihilated.

25. *Ex consequenti*, the appeal fails. Judgment and decree impugned are affirmed. Parties shall bear their own costs.

26. Let a decree be drawn up, accordingly.

27. Let a copy of this judgment along with the LCR be sent down to the learned Court below forthwith.

28. Urgent Photostat copy of this judgment, if applied for, shall be granted to the parties as expeditiously as possible, upon compliance of all formalities.

(Partha Sarathi Chatterjee, J.)

(Tapabrata Chakraborty, J.)