REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. 106 OF 2010

M/S FAIR COMMUNICATION AND
CONSULTANTS & ANR. ...APPELLANT(S)

VERSUS

SURENDRA KERDILE ...RESPONDENT(S)

J U D G M E N T

S. RAVINDRA BHAT, J.

1. This appeal by Special Leave challenges a decision of the Madhya Pradesh, High Court, by which a suit for recovery of ₹ 80,000/- was decreed in appeal. The impugned judgment set aside the judgment and decree of the XIII Additional District Judge, Indore (hereafter "trial court").

2. The plaintiff (respondent in the present case, referred to hereafter as "Surendra") is the maternal uncle of the defendant-second appellant (hereafter referred to by his name as "Sanjay"). Sanjay is also the sole proprietor of first appellant/defendant (M/s Fair Communication & Consultants). Surendra filed a suit for claiming recovery of ₹ 1,08,000/- alleging that Sanjay and his proprietorship firm owed money lent. Surendra apparently was a resident of Nashik, but had completed his education at Indore. He was an Engineer employed at Nashik and owned some land and a flat (MIG Scheme No. 54, Indore). As Surendra wished to settle eventually in Nashik, he appointed Sanjay who used to reside in Indore as Power of Attorney and executed a deed of General Power of Attorney (GPA) in favour of Sanjay on 30.09.1989 for that purpose. Sanjay entered into an agreement to sell the property to one Niranjan Singh Nagra ("buyer") on 30.11.1989 and received a sum of ₹ 50,000/- as earnest money. Surendra alleged that Sanjay called him to Indore on 29.01.1990 and requested that the agreement to sell ought to be executed in favour of the buyer directly and that at the time of executing the agreement,

the buyer had paid ₹ 80,000/-. This amount was returned by Sanjay. Surendra also alleged that the buyer requested for cancellation of the Power of Attorney which was given to Sanjay. Sanjay requested Surendra for an advance in the sum of ₹ 80,000/- for the expansion of his business, which he was carrying on under the style of the first respondent proprietorship concern. Sanjay assured the plaintiff that he would return the amount shortly. Accordingly, ₹ 80,000/- was given by the plaintiff (Surendra) to Sanjay.

3. Sanjay issued three post-dated cheques for the sum of ₹ 16,500/-, ₹ 3,500/- and ₹ 60,000/- all dated 16.02.1990, drawn on the State Bank of India, Indore Branch. Before the due date, Sanjay requested the plaintiff (Surendra) not to present the cheques for collection for a few months; this request was complied with. The cheques, when presented, were returned by the banker to the plaintiff (Surendra). In these circumstances, the suit for recovery of a sum of ₹ 80,000/- (together with interest @ 12% till the date of the filing of the suit and for future interest, consequently, was instituted.

4. Sanjay, in his written statement denied the suit allegations. However, the written statement did not dispute the execution of the GPA or that he had entered - on behalf of the plaintiff, into the agreement to sell with Niranjan Singh Nagra and obtained ₹ 50,000/- as earnest money. The written statement also did not deny that Sanjay requested Surendra for a loan of ₹ 80,000/- which was given to him. However, in the defense, Sanjay alleged that Surendra asked him to return the amount on the same day i.e. 30.01.1990, which he did. The written statement then alleged that Sanjay repeatedly asked for the return of the three cheques but being the maternal uncle, the plaintiff insisted on keeping the three instruments, and prevailed upon him as the elder relative. It was also alleged in the written statement that Sanjay was assured that the cheques would be returned on the next day; however they were never returned.

5. After framing issues and recording evidence, the trial court dismissed this suit. The trial court was of the opinion that the evidence clearly showed that a sum of ₹

80,000/- had been deposited by Surendra in his bank account and that this circumstance, supported Sanjay's plea that the amount was returned immediately. The trial court was also of the opinion, that the discrepancy in the amount received towards the sale consideration, casts doubt regarding the veracity of the plaintiff's claim. Aggrieved by the dismissal of the suit, Surendra appealed to the High Court. During the course of appeal, two applications seeking to amend the pleading and relief clause in the plaint were sought.

6. The High Court after an overall reading of the evidence framed three points for consideration, while dealing first with the applications, and then the merits: they were firstly, the consideration of the sale of the suit property – if it was for ₹ 2,30,000/- and not ₹ 1,30,000/- ; secondly, whether such fact had to be pleaded by the plaintiff in the suit and lastly, whether in the absence of such pleading, it was necessary to allow the application for amendment. The High Court after analyzing the nature of evidence led, concluded that since Sanjay had admitted the signature on the agreement to sell, as well as the plaintiff's GPA, even though the document was a photocopy, it could not be ignored.

7. The impugned judgment also reasoned that there was no dispute that another agreement to sell was executed on 30.01.1990 by the plaintiff (Surendra) in favour of Niranjan Singh Nagra, where the sale consideration was showed to be ₹ 1,30,000/-. The sale was also undisputedly completed on 31.01.1990. It was held that in these circumstances, the plaintiff had ₹ 1,80,000/- as on 30.01.1990, which clearly showed that the real consideration for the transaction was ₹ 2,30,000/-, though the document subsequently executed showed a lesser value as ₹ 1,30,000/-. The court noted that Surendra had not relied upon these circumstances to seek relief on the basis of the contract (for sale). The High Court then reasoned that these documents were needed only to consider their impact *vis-a-vis* the defendants' claim for return of ₹ 80,000/-.

8. The High Court in its impugned judgment upheld the plaintiff's contention that he possessed sufficient amount to advance ₹ 80,000/- to Sanjay. He also had sufficient funds to deposit amounts in the bank account, for which statement of account, Ex. D/1 was on the record. Given that the real consideration for the transaction was ₹ 2,30,000/-, the fact that some amount was deposited in the bank account, did not in any way detract from the suit claim. The court, therefore, held that the deposit by itself could not be relied on, that the amount was paid to Sanjay who issued three cheques. The High Court then concluded and held as follows:-

> *"15. Since it is not disputed by the respondents that the loan amount of Rs 80,000/- was given by the appellant on 30/01/90 and the dispute is only whether the amount was returned by the respondent no. 2 to the appellant on that very day on not, the important documents are Ex. P/1 to P/3, the cheques and the receipt of Rs 60,000/- Ex. P/9, which was issued by the respondent no. 2 in favour of appellant. When the amount was given back by the respondent no. 2 to the appellant on that very day then it is surprising why the receipt Ex. P/9 and the cheques Ex. P/1 to P/3 were not taken back by the respondent no. 2 from the appellant and why the receipt of refund of the amount was not taken. Apart from this there is nothing on record to show that why the cheque of Rs. 30,000/- Ex. P/8 was given by the respondent no. 2 to the appellant. These all documents goes to show beyond doubt that the appellant who is maternal-uncle of the respondent no. 1 lent a sum of Rs 80,000 to the Respondent no. 2, in lieu of which the cheques EX. P/1 to P/3 were not taken back by the respondent no. 2 as proprietor of respondent no. 1 and the amount was returned by the respondents to the appellant.*
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> *16. In view of this appeal stands allowed. The judgment and decree dated 22/07/95 passed by learned XIIIth Additional District Judge, Indore in Civil Suit No. 98-B/93 is set aside. Respondents are directed to pay Rs 80,000/- alongwith interest @ 6% p.a w.e.f. 16/02/90 with a period of two months, failing which the respondents shall be liable to pay the interest on the aforesaid amount @ 12% per annum. Respondents shall also be liable for the costs through out."*

9. It is argued by Mr. Santosh Kumar, learned counsel for the appellant that the high court committed an error in appreciation of the evidence and that the plaintiff had come forward with an entirely new case, in the cross-examination which was not backed by the pleadings. He further submitted that the impugned judgment was in error because it placed reliance on inadmissible documents and rendered findings exclusively based upon their appreciation. It was highlighted, that the impugned judgment was conjectural inasmuch as the court connected the receipt issued by Sanjay with the agreement, showing the sale consideration to be ₹ 2,30,000/-. It was emphasized that the original agreement was never produced or made part of the record.

10. Mr. Santosh Kumar next submitted that being a prohibited transaction, the story put forward by the plaintiff that the real value of the sale of ₹ 2,30,000/- as against the declared value of ₹ 1,30,000/- could not be countenanced by the court as it was contrary to the public policy. He also relied on the Benami Transactions (Prohibition) Act, 1988 (hereafter "the Benami Act") to submit that any plea based on *benami* transactions could not be canvassed in courts. It was argued that as on 30.01.1990 or soon thereafter, the plaintiff did not have any amount in his bank account. Counsel lastly argued that consistent position of the defendant, Sanjay was that the three cheques were issued to the plaintiff at the latter's insistence and that despite repeated requests, they were not returned. This was clearly stated in the written statement and was consistently reiterated during the course of the oral deposition. The high court, it was urged, fell into error in completely overlooking this aspect.

11. It is submitted on behalf of the plaintiff/respondent that the basis for dismissal of the suit by the trial court was that the amount in question was part of the sale consideration of a sum of ₹ 1,30,000/- for the plot belonging to the respondent which has been sold and from which ₹ 50,000/- had been received earlier, and the remaining ₹ 80,000/- was received on the day when the loan had been given to the appellants. The

trial court observed that the sum of ₹ 80,000/- was received by the plaintiff and was deposited in the bank account on the next day, i.e. 31.1.1990. It is further argued that when this question was put to the plaintiff, it was explained that the entire transaction was for a consideration of ₹ 2,30,000/- and not ₹ 1,30,000/- and therefore, the amount deposited in the bank account had nothing to do with the loan advanced to the appellants.

12. It is argued that the first agreement dated 03.7.1989 was executed for a sum of ₹ 2,30,000/- by the first appellant himself on behalf of the plaintiff, and in fact that agreement was put to the first appellant/defendant in cross-examination where he stated that:

> *"…..it is corrected that my signature appears below at page no. 3 of stamp papers purchased on 3rd July. Witness himself stated that no any such agreement had been executed. Stamp paper only had been purchased in the name of fair communication. My signature appears for A to A on the page no. two and three annexed with the stamp paper dated 3rd July 1989' (Copy of the said agreement dated 3.7.1989 is Annexed herewith and marked as Annexure R-2)*

13. It is urged that the first appellant admitted his signature on the said document in his cross-examination; thus, clearly, the fact was established. The original of the document was with the buyer of the property and this fact was admitted by the appellant in his statement; therefore, its photocopy was produced. The document was relevant only to show that the plaintiff had the funds to advance to Sanjay and when extension of the loan to the appellant was admitted, the document is of no consequence.

14. What can be gleaned from the above narrative and submissions is that the plaintiff wished to dispose of his property at Indore, where the second defendant, nephew resided and carried on business. Since the parties were related, the plaintiff relied on the defendant and constituted him as his attorney. An agreement to sell was entered into for

the sale of the said property (a flat) on 03.07.1989: this fact is not disputed; equally, it is undisputed that the consideration for the flat in terms of this agreement was ₹ 2,30,000/-. This was admitted by Sanjay, the defendant in his deposition. It is also not disputed that the original agreement with the purchaser (who ultimately finalized the transaction), is dated i.e. 03.07.1989. A second agreement was entered into on 30.11.1989. However, this showed a lesser consideration of ₹ 1,30,000/-. It is also not disputed that Sanjay, the second appellant received ₹ 50,000/- from the buyer and handed over that amount to Surendra. Furthermore, on 29.01.1990, Surendra went to Indore at Sanjay's behest to conclude the transaction directly with the purchaser, Niranjan Singh Nagra. He also received the amount agreed. Also, there is no dispute that Sanjay wanted ₹ 80,000/- and was given it, by his uncle, the plaintiff, Surendra, for the purpose of expansion of his business. This is where the version of the two parties diverges: Sanjay alleged that the amount was returned the next day and that Surendra did not return the post dated cheques issued by him; Surendra alleges that Sanjay in fact never returned the amount. The trial court was persuaded by arguments on behalf of Sanjay and the circumstance that the sum of ₹ 80,000/- was deposited in Surendra's account on the same day. The High Court, however, took note of the plaintiff's stand, with respect to the real consideration, which was ₹ 2,30,000/- as against what was shown in the document, to say that the amount deposited in Surendra's account had nothing to do with the money lent to Sanjay.

15. The defendant/appellants arguments are two-fold: one, that the document on which the High Court returned its findings was a photocopy and was therefore, inadmissible; and two, that the question whether the sale consideration was ₹ 2,30,000/- or ₹ 1,30,000/- could not have been gone into, since that argument was based on a prohibited transaction, outlawed by the Benami Act.

16. As far as the first question goes, this court notices that the plaintiff had put the matter, during the course of cross examination, to the appellant/defendant. The latter,

unsurprisingly, admitted the document, *despite the fact that it was a photocopy.* The plaintiff had argued that the original of that document was with the purchaser: this was not denied. Once these were admitted, the plaintiff could not be faulted for seeking a consequential amendment, that was purely formal, to back his argument that there was sufficient money, after lending ₹ 80,000/- to the defendant, which was deposited in his account. The appellant's argument, in the opinion of this court, is insubstantial: the impugned judgment cannot be faulted on this aspect.

17. Now as to the second argument by the appellant, which is that the plaintiff's plea that the real consideration for the sale was ₹ 2,30,000/- entails returning findings that would uphold a plea based on a *benami transaction*, this court is of the opinion that the argument is unmerited. *Benami* is defined by the Act as a transaction where

(a) where a property is transferred to, or is held by, a person, and the consideration for such property has been provided, or paid by, another person; and

(b) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration.

Benami transactions are forbidden by reason of Section 3; no action lies, nor can any defense in a suit be taken, based on any *benami* transaction: in terms of Section 4 of the Act.

18. In the opinion of this court, the argument that the plaintiff's plea regarding the real consideration being barred, has no merit. The plaintiff did not claim return of any amount from the buyer; the suit is not based on any plea involving examination of a benami transaction. Besides, the plaintiff is not asserting any claim as *benami* owner, nor urging a defense that any property or the amount claimed by him is a *benami* transaction. Therefore, the defendant appellant's argument is clearly insubstantial.

19. The relevant provisions of law, i.e. Sections 3 and 4 of the Benami Act, read as follows:

> "*Prohibition of benami transactions.*

3. (1) No person shall enter into any benami transaction.

(2)Whoever enters into any benami transaction shall be punishable with imprisonment for a term which may extend to three years or with fine or with both.

(3) Whoever enters into any benami transaction on and after the date of commencement of the Benami Transactions (Prohibition) Amendment Act, 2016, shall, notwithstanding anything contained in sub-section (2), be punishable in accordance with the provisions contained in Chapter VII.]

(4) [***]

Prohibition of the right to recover property held benami.

4. (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…"

20. In *Valliammal (D.) by L.Rs v Subramaniam & Ors.* (2004) 7 SCC 233, this Court held that the onus of establishing that a transaction is *benami* is upon one who asserts it:

"13. This Court in a number of judgments has held that it is well established that burden of proving that a particular sale is benami lies on the person who alleges the transaction to be a benami. The essence of a benami transaction is the intention of the party or parties concerned and often, 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. Refer to Jaydayal Poddar v. Bibi Hazra, Krishnanand Agnihotri v. State of M. P., Thakur Bhim Singh v. Thakur Kan Singh, Pratap Singh v. Sarojini Devi and Heirs of Vrajlal J. Ganatra v. Heirs of Parshottam S. Shah. It has been held in the judgments referred to above that the question whether a particular sale is a benami or

not, is largely one of fact, and for determining the question no absolute formulas or acid test, uniformly applicable in all situations can be laid. After saying so, this Court spelt out the following six circumstances which can be taken as a guide to determine the nature of the transaction :

(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. (Jaydayal Poddar v. Bibi Hazra1, SCC p 7, para 6).

14. The above indicia are not exhaustive and their efficacy varies according to the facts of each case. Nevertheless, the source from where the purchase money came and the motive why the property was purchased benami are by far the most important tests for determining whether the sale standing in the name of one person, is in reality for the benefit of another. We would examine the present transaction on the touchstone of the above two indicia.

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18. It is well-settled that intention of the parties is the essence of the benami transaction and the money must have been provided by the party invoking the doctrine of benami. The evidence shows clearly that the original Plaintiff did not have any justification for purchasing the property in the name of Ramayee Ammal. The reason given by him is not at all acceptable. The source of money is not at all traceable to the Plaintiff. No person named in the plaint or anyone else was examined as a witness. The failure of the Plaintiff to examine the relevant witnesses completely demolishes his case."

These observations were reiterated in *Binapani Paul vs. Pratima Ghosh & Ors.* 2007 (6) SCC 100.

21. In the present case, the appellants did not prove that the transaction (to which they were not parties) was *benami*; on the contrary, the appellant's argument was merely that the transaction could not be said to be for a consideration in excess of ₹ 1,30,000/-: *in the context of a defense in a suit for money decree.* The defendant/appellants never said that the plaintiff or someone other than the purchaser was the real owner; nor was the interest in the property, the subject matter of the recovery suit. Therefore, in the opinion of this court, the conclusions and the findings in the impugned judgment are justified.

22. For the foregoing reasons, this court is of opinion that there is no merit in the appeal; it is accordingly dismissed, without order on costs.

….....….....J.
[INDIRA BANERJEE]

…….....J.
[S. RAVINDRA BHAT]

New Delhi,
January 20, 2020.