

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **RFA No. 862/2017**

% **13th October, 2017**

SUNITA RAJPUT Appellant

Through: Mr. D.K. Mehta and Mr.
Rishabh Mehta, Advocates.

versus

SUSHEELA DEVI SAINI & ORS. Respondents

CORAM:
HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This Regular First Appeal is filed under Section 96 Code of Civil Procedure, 1908 (CPC) by the plaintiff in the suit impugning the judgment of the trial court dated 8.8.2017 by which the trial court has dismissed the suit for partition filed by the appellant/plaintiff with respect to the property D-16, Green Park, New Delhi (hereinafter referred to as 'suit property').

2. The facts of the case are that appellant/plaintiff pleaded that the suit property was no doubt purchased by the sale deed dated 7.12.1959 in the name of defendant nos. 1 to 3 in the suit, but actually

this property was owned by the father Sh. Waryam Singh because funds for the purchase of this property were given by the father Sh. Waryam Singh. It was also pleaded that the defendant nos. 1 to 3 were minors at the time when the sale deed dated 7.12.1959 was executed in their favour and that they had no source of finance for purchase of the suit property. Defendant nos. 1 to 3 filed a written statement and pleaded that they were the exclusive owners of the suit property and the father was not the owner of the suit property. It was pleaded by defendant nos. 1 to 3 that they were owners in terms of the sale deed dated 7.12.1959. It was also pleaded that the case of the appellant/plaintiff that since father had paid the moneys and therefore defendant nos. 1 to 3 would not be the owners of the suit property would be barred by Benami Transactions (Prohibition) Act, 1988 (hereinafter referred to as 'the Benami Act').

3. I may note that the original defendant no. 1 in the suit Sh. Kushal Pal Singh expired during the pendency of the suit and he was represented by his legal heirs who are now respondent nos. 1 to 4 in this appeal. Reference to respondent nos. 1 to 4, therefore, wherever the context so requires, will be reference to defendant no. 1. Defendant no. 2 in the suit was Sh. Vijay Kumar Saini and who is

sued as respondent no. 5 in the present appeal. Defendant no. 3 in the suit was Sh. Vinay Kumar Saini who expired during the pendency of the suit and was thereafter represented by his legal heirs and who are respondent nos. 6 to 8 in the present appeal. Reference to respondent nos. 6 to 8 would therefore include reference to defendant no. 3 or these respondents along with respondent nos. 1 to 4 will also be included in the general expression of defendant nos. 1 to 3 in the suit who filed a common written statement.

4. After pleadings were complete the trial court framed the following issues:-

- “1. Whether the suit is not barred by limitation? OPP
2. Whether the property bearing number D-16, Green Park, New Delhi was Benami property of late Mr. Waryam Singh? OPP
3. Whether the claim of the plaintiff is barred under the provisions of Benami Transaction (Prohibition) Act, 1988? OPD
4. Whether the plaintiff is entitled to partition, if so, what are the shares of parties? OPP
5. Relief.”

5. Trial court has held that the suit is clearly barred by the Benami Act because as per the provisions of Sections 3 and 4 of the Benami Act once the property by means of a title document is in the name of a particular person, then that particular person (defendant nos. 1 to 3 in this case) has to be taken as an owner of the property although funds/consideration for the purchase of the property came

from the third person (father Sh. Waryam Singh in this case) and who claims right in the property. By virtue of the Benami Act the benami owner becomes the real owner. In the present case the sale deed of the suit property dated 7.12.1959 was admittedly in the name of defendant nos. 1 to 3, and therefore the claim of the property only being benami in the hands of defendant nos. 1 to 3, and that actually father Sh. Waryam Singh was the owner on account of father having paid the consideration, would be a plea barred by the Benami Act.

6. The only way in which the suit would not be barred by the provision of Section 4(1) of the Benami Act was if there existed an HUF and the property was purchased in the name of a coparcener of a family or if the property is purchased in trust or by a person standing in a fiduciary capacity vide Section 4(3) of the Benami Act. In the present case, a reference to the plaint shows that there is no averment that there existed any HUF of Sh. Waryam Singh and his family. HUF is a legal concept and such a concept of existence of HUF and its property comes into existence if a property is inherited by a male person from his three paternal ancestors prior to passing of the Hindu Succession Act, 1956. After passing of the Hindu Succession Act even if a property is inherited by a person from his three paternal

ancestors, inheritance is not as an HUF in the hands of the person who inherits the same but it is inherited as a self-acquired property of that person vide *Commissioner of Wealth Tax, Kanpur and Others Vs. Chander Sen and Others, (1986) 3 SCC 567* and *Yudhishter Vs. Ashok Kumar, (1987) 1 SCC 204*. The only other way in which an HUF can be created is that after 1956 the property of a person is thrown in common hotchpotch.

7. A reading of the plaint shows that there is no cause of action pleaded of the suit property being inherited prior to passing of the Hindu Succession Act, 1956 or that the suit property was thrown into a common hotchpotch on a particular date, month and year. Also, in any case even assuming a plea was there of an existence of HUF, there is no evidence whatsoever led by the appellant/plaintiff that there existed an HUF and how that HUF came into existence and how that HUF's existence with its properties was then found recorded in various records including public records. Appellant/plaintiff therefore cannot have the benefit of the exception contained in Section 4(3) of the Benami Act that the suit property should not be held to be a benami property but should be held to be HUF property.

8. The other exception of Section 4(3) of the Benami Act is that the suit property was purchased in trust by the defendant nos. 1 to 3, however, even that cause of action is absent in the plaint. Also, no such case was argued on behalf of the appellant/plaintiff in the court below that the suit property has been purchased in trust or by the defendant nos. 1 to 3 in a fiduciary capacity. Therefore, even second exception contained in Section 4(3) of the Benami Act is not available to the appellant/plaintiff.

9. I may note that the court below has referred to the subject sale deed dated 7.12.1959, that the sale deed does not refer to the defendant nos. 1 to 3 in the suit as minors, and no evidence was led by the appellant/plaintiff as to how the defendant nos. 1 to 3 were minors when sale deed was executed in their favour on 7.12.1959. Also, in law there is no bar to a minor being beneficiary of a contract of ownership of an immovable property, and no doubt a minor cannot enter into a contract, but a minor can always be admitted to the benefits of a contract. One such example is provision of Section 30 of the Indian Partnership Act, 1932 which allows a minor to be admitted to the benefits of partnership.

10.(i) Learned counsel for the appellant/plaintiff has again argued that since the defendant nos. 1 to 3, even assuming that they were major, were hardly of 18-20 years and consequently they would have no source of income to purchase the suit property in terms of the sale deed dated 7.12.1959 and that the sale deed shows that consideration of the property was paid by Sh. Waryam Singh and therefore the suit property is to be held as not owned by defendant nos. 1 to 3 but by Sh. Waryam Singh and consequently appellant/plaintiff as a daughter of Sh. Waryam Singh gets the share in the suit property as Sh. Waryam Singh died intestate.

(ii) I cannot agree with the argument urged on behalf of the appellant/plaintiff, inasmuch as, even if father has paid the moneys for purchase of the property, that would only mean that the father in fact gifted moneys to defendant nos. 1 to 3 for purchasing/taking ownership of the suit property in the name of defendant nos. 1 to 3 i.e defendant nos. 1 to 3 were given ownership as regards the suit property. Trial court also rightly notes that after purchase of the suit property in the name of defendant nos. 1 to 3 by the sale deed dated 7.12.1959 there is no further act done by the late father Sh. Waryam Singh in the form of making of any Will or making of a declaration or

drawing up of a document that the suit property will not vest with the defendant nos. 1 to 3 in the suit but will vest with the entire family.

(iii) Accordingly, in my opinion, the mere fact that the father Sh. Waryam Singh paid consideration of the suit property would not make the property as owned by the father, and more so because such a plea in fact would be a plea which will be barred by Section 4(1) of the Benami Act.

11.(i) Learned counsel for the appellant/plaintiff finally argued that there was an earlier partition suit filed by one sister Smt. Pushpa Sahni, respondent no. 9 in the present appeal and defendant no. 4 in the earlier suit, and though the suit was dismissed in default, however an order was passed in this suit on 2.5.1997 which shows that it was agreed that the suit property is a property of the family.

(ii) I again cannot agree with this argument urged on behalf of the appellant/plaintiff and the trial court in this regard has rightly held that the order dated 2.5.1997 passed in suit no. 2526/1989 by a learned single Judge of this court cannot amount to an admission by the defendant nos. 1 to 3 of the present suit that the suit property was a family property and it had to be divided among all the family

members. Trial court also rightly notes that the learned Single Judge who passed the procedural day's order in the suit on 2.5.1997 specifically recorded that a proper application was to be filed and that in fact when the order dated 2.5.1997 was passed only one brother namely Sh. Kushal Pal Singh was represented and other two brothers being the defendant nos. 2 and 3 in the present suit were not present when the order was passed on 2.5.1997. For the sake of convenience the order dated 2.5.1997 is reproduced as under:-

“02.05.1997

Present: Mr. I.C. Sudhir of the Plaintiff.

Ms. Sunita Harish for Defendant no. 1.

Defendant No. 1 in person as well.

Defendant No. 2 in person.

Defendant No. 5 in person.

Mr. Vikram Dhokaji, for Mr. Jawahar Lal Alwani, the purchaser.

Suit No. 2526/89, I.A.s 4817, 7053/94, 2189, 12600/95

Learned Counsel for the parties and the defendants, who are present in person, state that in so far as the Safdarjung Enclave Property is concerned, the same has been sold by the defendant No. 1. They further, state that in so far as the Green park Property located at D-16, Green Park, New Delhi, is concerned, the same can be sold and the proceeds thereof can be shared by the parties. The parties may file a proper application for this purpose.

The counsel of Mr. Jawahar Lal Alwani, purchaser of B-7, Extension -16, Safdarjung Enclave, New Delhi property is present. He will furnish details of the cheques through which the sale consideration was paid to defendant No. 1. In this regard an affidavit be filed by Mr. Alwani. The affidavit should be filed within four weeks.

It is stated by learned counsel for defendant No. 1 that some money received from the purchaser was deposited by defendant No. 1 in the State Bank of Patiala, Safdarjung Enclave, New Delhi branch. However, she is not in a position to give the account number. The defendant No. 2, who is present in person, also expresses his inability to give the account number of his mother. Let a communication be issued to the Manager of the above said bank for locating the account number of defendant No. 1, Smt. Vidya Wati, widow of Shri Waryam Singh.

List the matter on 29th May, 1997, in Chamber at 4:00 P.M., on which date some official of the State Bank of Patiala, Safdarjung Enclave, New Delhi branch will be present in Court.

A copy of this Order be given DASTI to learned counsel for the plaintiff so that the Plaintiff could get in touch with the Manager of the above said Bank.”

12. Learned counsel for the appellant/plaintiff also sought to argue that in the earlier suit there are admissions of the brothers in their written statement that the suit property is owned by the family, however, on going through the written statement filed by the brothers in the earlier suit no.2526/1989 I do not even remotely find any admission that the suit property at Green Park was a family property and had to be divided between all the family members. In fact, if this was so then the earlier suit would have been decreed under Order XII Rule 6 CPC and which was not so done and that the suit filed by the sister Smt. Pushpa Sahsni, respondent no. 9 herein, defendant no. 4 in the earlier suit, was in fact dismissed in default.

13. In view of the above discussion, I do not find any merit in the appeal and the same is hereby dismissed.

OCTOBER 13, 2017

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VALMIKI J. MEHTA, J