G.Mahalingappa vs G.M. Savitha on 9 August, 2005

Equivalent citations: AIRONLINE 2005 SC 1088

Bench: D.M. Dharmadhikari, Tarun Chatterjee

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           CASE NO.:
Appeal (civil)  2867 of 2000

PETITIONER:
G.Mahalingappa

RESPONDENT:
G.M. Savitha

DATE OF JUDGMENT: 09/08/2005

BENCH:
D.M. DHARMADHIKARI & TARUN CHATTERJEE

JUDGMENT:
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J U D G M E N T TARUN CHATTERJEE, J.

This is an unfortunate litigation between a father and his married daughter on the right of ownership of a house measuring about 40 feet by 30 feet in Khata No.54 of Garehatty Village in Chitradurga Taluk in the State of Karnataka (hereinafter referred to as the "suit property").

The appellant, who suffered defeat in second appeal before the High Court at Bangalore (Karnataka), filed a Special Leave Petition which on admission got registered as a regular appeal being Civil Appeal No. 2867/2000 in this Court.

The appellant is the father of the respondent. The suit property was purchased by the appellant in the name of the respondent by a registered sale deed dated 24th of August, 1970 when the respondent was a minor of seven years of age. Subsequently, her marriage was settled and at that point of time she was assured that the respondent shall not be disturbed as she was given to understand that the suit property was her own property. She was married to one Shri C.Thippeswamy on 4th of December, 1980. Relationship between the appellant and the respondent was cordial till 8th of October, 1983, and only thereafter relationship became strained. At that stage she asked for vacation of the suit property not only from the appellant and his family but also from the tenants who were defendants 2 to 5 in the suit and for payment of rent to her. The appellant and the tenants had, however, refused to vacate their respective portions of the suit property in their possession or to pay rent to her. Accordingly, the respondent was constrained to file the suit for declaration of title and recovery of possession in respect of the suit property on the averment that since the suit property stood in her name, and the same was purchased for the benefit of the respondent and as a security for her marriage she was entitled to a decree for declaration and

possession. The suit was however filed on 5th of July, 1984.

The appellant resisted the claim of the respondent on various grounds by filing a written statement. According to the appellant, the suit property was purchased by his own funds in the benami of her daughter. He also denied the allegation that the suit property was purchased for and on behalf of the respondent under the sale deed dated 24th August, 1970 nor it was purchased as a security for her marriage. According to him, the respondent was born on 5th November, 1963 and immediately after the birth an astrologer was contacted from whom the appellant ascertained that she was born on an auspicious nakshatra and immediately thereafter he made up his mind to purchase a site with a view to construct a house for his residence. Accordingly, he purchased the suit property for a sum of Rs.500/-. It was not the intention of the appellant to create any benefit, any right in the suit property to the respondent. However, in the year 1984, the suit property was bequeathed by a Will in favour of the respondent and two sons. After the suit property was purchased in the benami of the respondent, he made improvement of the suit property and in doing so he mortgaged the suit property in favour of one Srinivasa Setty and obtained a loan of Rs.3,000/- on 15th September, 1972. Thereafter, he purchased another site adjacent to the suit property under a sale deed dated 23rd May, 1972. That sale deed was also obtained in the name of the respondent out of love and affection. At that time the respondent was about nine years old. The rest of the mortgaged amount was utilized for construction of the back portions of the house after spending his own money. After improving the same he constructed four portions which were in occupation of the tenants, and he himself discharged the mortgaged loan and other loans incurred for construction of the suit property. He also obtained permission of the Deputy Commissioner for alienation of the suit property for non-agricultural purposes. He paid taxes levied by the Revenue Authorities in respect of construction of the house. He also paid alienation charges and Kandayam of the suit property from time to time. Accordingly, the appellant sought for dismissal of the suit inter alia on the ground that he was the real owner and in possession of the suit property and the respondent was merely a benamidar in respect of the same. Parties went into trial with the following issues:

1) Does the plaintiff prove that she is the owner of the suit property?

2) Is she entitled to possession of the suit property as contended by her?

3) Is she entitled for damages as claimed by her?

4) To what relief the plaintiff was entitled, if any?

An additional issue was framed which is of the following effect:

Does defendant No.1 prove that the suit was purchased nominally in the name of the plaintiff under the circumstances pleaded in the written statement, the plaintiff is a benamidar and he is the real owner of the suit property, as contended?

Parties went to trial after adducing evidence to support their respective claims as made out in the pleadings. Both the courts found on consideration of the oral and

documentary evidence on record as well as the pleadings that

1) the appellant had paid the purchase money.

2) the original title deeds were with the appellant.

3) the appellant had mortgaged the suit property for raising loan to improve the same.

4) he paid taxes for the suit property.

5) he had let out the suit property to defendant Nos. 2 to 5 and collecting rents from them.

6) the motive for purchasing the suit property in the name of plaintiff was that the plaintiff was born on an auspicious nakshatra and the appellant believed that if the property was purchased in the name of plaintiff/respondent, the appellant would prosper.

7) the circumstances surrounding the transaction, relationship of the parties and subsequent conduct of the appellant tend to show that the transaction was benami in nature.

On the aforesaid concurrent findings of fact it was held that the respondent had failed to prove that she was the real owner of the suit property and that the appellant was however the real owner of the same and the respondent was only a benamidar of the appellant.

Accordingly, the appellate court as well as the trial court dismissed the suit of the respondent.

Feeling aggrieved by the concurrent decisions of the appellate court as well as the trial court, a second appeal was filed before the High Court at Bangalore, which, however, had set aside the concurrent decisions and decreed the suit of the respondent only on the ground that the purchase by the appellant in the name of the respondent was intended for the benefit of the respondent. While coming to this conclusion, the High Court had taken into consideration the fact that since the appellant had already executed a Will bequeathing his property to the respondent and two other sons, which would, according to the High Court, amply show that the intention of the appellant to purchase the suit property in the name of the respondent was to benefit the respondent. In our view, this finding on the face of the record is erroneous and perverse. This finding, according to us, was arrived at by the High Court in the second appeal without any material on record to support such finding nor it was based after considering the oral and documentary evidence as well as the findings of fact arrived at by the trial court and appellate court. On the other hand, in our view, the findings of the appellate court as well as the trial court were based on due consideration of oral and documentary evidence on record and pleadings of the parties. To consider the intention to purchase the suit property for the benefit of the respondent, in our view, the fact of bequeathing the suit

property by executing a Will by the appellant in favour of respondent and two sons could not at all be a factor for consideration. The execution of the Will by the appellant in favour of his sons and the respondent would only indicate that the suit property was treated as the property of his own and the respondent was never accepted by him to be a real owner of the same. The other ground on which the concurrent findings of fact were set aside and suit was decreed is to the following effect:

> "Even otherwise, as could be gathered from the evidence and representation made at the Bar, her father used to purchase the property in the name of all his sons and daughters on auspicious days. It can be clearly gathered that the intention of the father was to benefit his children to avoid any possible conflict or dispute that may arise between them with reference to sharing of the properties after his life time. Therefore, taking the view on equity as well, and the cumulative circumstances, I am inclined to hold that the plaintiff is entitled to be held as the owner of the property."

We are unable to agree with this conclusion of the High Court. It is difficult to rely on the representation from the Bar that the appellant used to purchase properties in the names of his children on auspicious days and for that the intention of the appellant to purchase the suit property for the benefit of the daughter only must be presumed without having any material to support this conclusion from the record. We must not forget that the High Court was dealing with a second appeal which was filed against the concurrent findings of fact based on consideration of oral and documentary evidence adduced by the parties and such findings were on sound reasoning. Even otherwise, we are of the view that the presumption that the suit property was purchased for the benefit of the respondent only was amply rebutted by the appellant by adducing evidence that the suit property, though purchased in the name of the respondent, was so purchased for the benefit of the appellant and his family. As noted hereinearlier, the appellate court as well as the trial court on consideration of all the materials including oral and documentary evidence and on a sound reasoning after considering the pleadings of the parties came to concurrent findings of fact that purchase of the suit property by the appellant in the name of the respondent was benami in nature. As noted herein earlier, the following findings of fact were arrived at by the appellate court and the trial court to conclude that the transaction in question was benami in nature :-

1) the appellant had paid the purchase money.

2) the original title deed was with the appellant. And

3) the appellant had mortgaged the suit property for raising loan to improve the same.

4) he paid taxes for the suit property.

5) he had let out the suit property to defendant Nos. 2 to 5 and collecting rents from them.

6) the motive for purchasing the suit property in the name of plaintiff was that the plaintiff was born on an auspicious nakshatra and the appellant believed that if the property was purchased in the name of plaintiff/respondent, the appellant would prosper.

7) the circumstances surrounding the transaction, relationship of the parties and subsequent conduct of the appellant tend to show that the transaction was benami in nature.

Keeping these concurrent findings of fact in our mind which would conclusively prove that the transaction in question was benami in nature, let us now consider whether the appellant was entitled to raise the plea of benami in view of introduction of the Benami Transaction (Prohibition) Act, 1988 (In short "Act") and whether the Act was retrospective in operation. If so, in view of Section 4(2) of the Act, plea of benami in the defence of the appellant was not available to him.

Before a two Judges Bench decision of this Court, in the case of Mithilesh Kumari and another Vs. Prem Behari Khare 1989(2) SCC 95 this question had cropped up. In that decision, it was held that the question of benami cannot be taken as a plea either in the plaint or in the written statement even when the sale deed was executed and registered before the introduction of the Act and when the suit was filed before the Act had come into force. Before we proceed further, we may remind ourselves of certain provisions of the Act. Section 2 (a) defines 'benami transactions' which means any transaction in which property is transferred to one person for a consideration paid or provided by another person. Section 3 (1) and (2) reads as under:

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

(2) Nothing in sub-section(1) shall apply to the purchase of property by any person in the name of his wife or unmarried daughter and it shall be presumed, unless the contrary is proved, that the said property had been purchased for the benefit of wife or the unmarried daughter." (Underlining is ours) Section 4 of the Act prohibits the right to recover property held benami. It reads as under:

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."

(underlining is ours) Since in this case, we are concerned with the question whether the appellant was entitled to raise the plea of benami in his defence in view of the bar imposed in Section 4(2) of

the Act, let us now confine ourselves to the bar imposed in Section 4(2) of the Act of taking this plea in his defence and to the question of retrospective operation of this section or this provision is prospective in operation. Now, therefore, the question arises is whether under section 4(2) of the Act, defence can be allowed to be raised 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 or on behalf of a person claiming to be real owner of such property. As noted already, this question cropped up for decision before this Court in the case of Mithilesh Kumari and Another Vs. Prem Behari Khare 1989 (2) SCC 95. In fact, the retrospective operation of this provision, as noted herein earlier, was answered in the affirmative in the aforesaid decision. However, the correctness of that decision was doubted and an order was passed by this Court subsequently referring this question of retrospectivity for decision to a 3-Judges Bench of this Court. In the case of R.Rajagopal Reddy (Dead) by LRs. And Ors. Vs. Padmini Chandrasekharan (Dead) by LRs. 1995 (2) SCC 630, S.B. Majmudar, J. (As His Lordship then was) writing the judgment for the Three Judges Bench could not agree with the views expressed in Mithilesh Kumari's case and held that the Act was prospective in nature and it has no retrospective operation excepting certain observations made in respect of some cases which would be mentioned hereinafter. In paragraph 10 it was observed as follows:-

> "though the Law Commission recommended retrospective applicability of the proposed legislation, Parliament did not make the Act or any of its sections retrospective in its wisdom.". Thereafter on a careful consideration of the provisions made under sections 3 and 4 of the Act, it was observed:
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> "A mere look at the above provisions shows that the prohibition under Section 3(1) is against persons who are to enter into benami transactions and it has laid down that no person shall enter into any benami transaction which obviously means from the date on which this prohibition comes into operation i.e. w.e.f. 5/9/1988. That takes care of future benami transactions. We are not concerned with sub-section (2) but sub-section (3) of Section 3 also throws light on this aspect. As seen above, it states that whoever enters into any benami transaction shall be punishable with imprisonment for a term which may extend to three years or with find or with both. Therefore, the provision creates a new offence of entering into such benami transaction. It is made non-cognizable and bailable as laid down under sub-section (4) It is obvious that when a statutory provision creates new liability and new offence, it would naturally have prospective operation and would cover only those offences which take place after Section 3(1) comes into operation." (Underlining is ours).
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> In paragraph 11 of the said decision of this Court, the Supreme Court further observed "On the contrary, clear legislative intention is seen from the words "no such claim, suit or action shall lie", meaning thereby no such suit, claim or action shall be permitted to be filed or entertained or admitted to the portals of any court for seeking such a relief after coming into force of Section 4(1)." (underline is ours).
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> In the same paragraph the Supreme Court observed:

> " With respect, the view taken that Section 4(1) would apply even to such pending suits which were already filed and entertained prior to the date when the section came into force and which has the effect of destroying the then existing right of plaintiff in connection with the suit property cannot be sustained in the face of the clear language of Section 4(1). It has to be visualized that the legislature in its wisdom has not expressly made Section 4 retrospective. Then to imply by necessary implication that Section 4 would have retrospective effect and would cover pending litigations filed prior to coming into force of the section would amount to taking a view which would run counter to the legislative scheme and intent projected by various provisions of the Act to which we have referred earlier. It is, however, true as held by the Division Bench that on the express language of Section 4(1) any right inhering in the real owner in respect of any property held benami would get effaced once Section 4(1) operated, even if such transaction had been entered into prior to the coming into operation of Section 4(1), and henceafter Section 4(1) applied no suit can lie in respect to such a past benami transaction. To that extent the section may be retroactive."

In our view, similar is the position in law on the question of retrospectivity of section 4(2) of the Act.

Finally, this Court in the aforesaid decision held that the decision in Mithilesh Kumari & Anr. Vs. Prem Behari Khare erred in taking the view that under Section 4(2), in all suits filed by persons in whose names properties are held no defence can be allowed at any future stage of the proceedings that the properties are held benami cannot be sustained. It was also held that Section 4(2) will have a limited operation even in cases of pending suits after Section 4(2) had come into force, if such defences are not already allowed. The decision in R. Rajagopal Reddy (Dead) by LRs. And Ors. Vs. Padmini Chandrasekharan (Dead) by LRs. 1995 (2) SCC 630 which overruled the decision of two Judges Bench in the case of Mithilesh Kumari and Anr. Vs. Prem Behari Khare 1989 (2) SCC 95 was also approved by this Court in the cases of Prabodh Chandra Ghosh Vs. Urmila Dassi AIR 2000 SC 2534 and C. Gangacharan Vs. C.Narayanan AIR 2000 SC 589. In view of the aforesaid, this question is, therefore, no longer res integra.

Therefore, we are now to consider in this case whether the facts disclosed would indicate that even after coming into force of the Act the defence under Secion 4 can be available. Admittedly, the transaction in question was registered on 24th August, 1970. The suit was filed on 5th of July 1984 which was long before coming into force of the Act. It is an admitted position that the written statement in the suit taking plea of benami was also filed by the appellant long before the Act had come into force. Therefore, it was not a case where Section 4(2) of the Act will have a limited operation in the pending suit after Section 4(2) of the Act had come into operation. It is true that the judgment of the trial court was delivered after the Act had come into force but that could not fetter the right of the appellant to take the plea of benami in his defence. Since the Act cannot have any retrospective operation in the facts and circumstances of the present case, as held by this Court in the aforesaid decision, we are therefore of the view that the appellant was entitled to raise the plea of benami in the written statement and to show and prove that he was the real owner of the suit property and that the respondent was only his benamidar.

Before parting with this judgment, we may take into consideration of a short submission of the learned counsel for the respondent. The submission is that since the suit property was purchased by the appellant in the name of the respondent, the suit property must be held to have been purchased by him for the benefit of the respondent. Section 3 deals with Prohibition of benami transaction. Sub-section (1) clearly prohibits that no person shall enter into benami transaction. However, sub-section (2) of Section 3 clearly says that nothing in sub-section (1) shall apply to purchase of property of any person in the name of his wife, unmarried daughter and it shall be presumed, unless the contrary is proved, that suit property had been purchased for the benefit of the unmarried daughter.

Section 3(2) makes it abundantly clear that if a property is purchased in the name of an unmarried daughter for her benefit, that would only be a presumption but the presumption can be rebutted by the person who is alleging to be the real owner of the property by production of evidences or other materials before the court. In this case, the trial court as well as the appellate court concurrently found that although the suit property was purchased in the name of the respondent but the same was purchased for the interest of the appellant. We are therefore of the opinion that even if the presumption under section 3(2) of the Act arose because of purchase of the suit property by the father (in this case appellant) in the name of his daughter (in this case respondent), that presumption got rebutted as the appellant had successfully succeeded by production of cogent evidence to prove that the suit property was purchased in the benami of the respondent for his own benefit.

Let us now consider whether the concurrent findings of fact could be set aside by the High Court in the second appeal. It is well settled by diverse decisions of this Court that the High Court in second appeal is entitled to interfere with the concurrent findings of fact if the said concurrent findings of fact are based on non- consideration of an important piece of evidence in the nature of admission of one of the party to the suit, which is overlooked by the two courts below (See [2003 (7) SCC 481, Deva (Dead) Through LRs Vs. Sajjan Kumar (Dead) by LRs]). It is equally well settled that under section 100 of the Code of Civil Procedure, High Court cannot interfere with concurrent findings of facts of the courts below without insufficient and just reasons. (See [2003(7)SCC 52, Sayeda Akhtar Vs. Abdul Ahad]). In second appeal, High Court is also not entitled to set aside concurrent findings of fact by giving its own findings contrary to the evidence on record. (See [2001 (4) SCC 694, Saraswathi & Anr. Vs. S.Ganapathy & Anr.]).

As held herein earlier the High Court had set aside the concurrent findings of fact not on consideration of the evidence adduced by the parties but set aside the concurrent findings of fact on the basis of findings contrary to the evidence on record and without considering the findings of fact arrived at by the appellate court and the trial court. From the judgment of the High Court we further find that the concurrent findings of fact were set aside not on consideration of the findings of fact arrived at by the courts below but only on the basis of the arguments of the learned Advocate of the respondent. This was also not permissible to the High Court in Second Appeal to come to a contrary findings of its own only on the basis of the arguments of the learned counsel for the respondent without considering the findings of the trial court as well as the appellate court. (See [2002(9) SCC 735, Gangajal Kunwar (Smt.) and Ors. Vs. Sarju Pandey (Dead) by LRs & Ors.]). It is equally settled

that High Court in second appeal is not entitled to interfere with the concurrent findings of fact arrived at by the courts below until and unless it is found that the concurrent findings of fact were perverse and not based on sound reasoning. We ourselves considered the evidence on record as well as the findings of fact arrived at by the two courts below. From such consideration we do not find that the concurrent findings of fact arrived at by the appellate court as well as the trial court were either perverse or without any reason or based on non-consideration of important piece of evidence or admission of some of the parties. We are therefore of the view that the High Court was not justified in interfering with the concurrent findings of fact arrived at by the appellate court as well as the trial court which findings were rendered on consideration of the pleadings as well as the material (oral and documentary) evidence on record.

For the reasons aforesaid this appeal is allowed. The judgment of the High Court impugned in this Court is set aside and the judgments of the trial court as well as the appellate court are affirmed. The suit filed by the respondent shall stand dismissed. There will be no order as to costs.