Pawan Kumar Gupta vs Rochiram Nagdeo on 20 April, 1999

Equivalent citations: AIR 1999 SUPREME COURT 1823, 1999 (4) SCC 243, 1999 AIR SCW 1420, 1999 (2) SCALE 702, 1999 (2) LRI 598, 1999 (4) ADSC 218, 1999 ADSC 4 218, 1999 SCFBRC 273, 1999 (2) ALL CJ 1396, (1999) 3 JT 191 (SC), 1999 (5) SRJ 377, 1999 (2) UJ (SC) 862, 1999 (3) JT 191, (1999) 2 MAD LW 669, (2000) 1 RENCJ 130, (1999) 1 RENCR 483, (1999) 2 RAJ LW 270, (1999) 2 SCJ 420, (1999) 4 SUPREME 249, (1999) 2 SCALE 702, (1999) 3 ALL WC 1793, (1999) 4 CIVLJ 331, (1999) 2 CURCC 65, (1999) 2 RECCIVR 646, (1999) 2 RENTLR 278, (1999) 36 ALL LR 185, (1999) 3 MAD LJ 62, (1999) 2 CAL HN 45

Bench: K.T. Thomas, D.P. Mohapatra

PETITIONER:
PAWAN KUMAR GUPTA

Vs.

RESPONDENT:
ROCHIRAM NAGDEO

DATE OF JUDGMENT: 20/04/1999

BENCH:
K.T. Thomas, & D.P. Mohapatra.,

JUDGMENT:

Leave granted.

The enviable position to which the tenant of a shop building has ensconced himself as corollary to the judgment of the High Court (under appeal now) is that he need not thenceforth be accountable to any landlord. On the one side when the claim of appellant to be the landlord has been dis-countenanced by the High Court, at the other side the person whom the tenant proclaimed as his landlord has disclaimed the credential. If the judgment of the High Court remains in force the tenant stands elevated virtually to the status of owner of the suit building. But appellant is not prepared to concede defeat and hence he has come up with this appeal by special leave.

Facts which led to the aforesaid position can be summarised thus: Respondent was the tenant of the suit building (consisting of a shop room and godown premises) which belonged to one Narain Prasad. As per a sale deed executed on 23.1.1989 (Ext.P.11) Narain Prasad transferred his rights in the suit building to the appellant. On its footing appellant filed Civil Suit No.75-A of 1990 for eviction of the respondent under Section 12(1)(a) of the M.P. Accommodation Act, 1961 (for short "the Act") on the ground that respondent has not paid rent to the appellant. That suit was contested by the respondent raising the contention that the building was actually purchased by Pyarelal (father of the appellant) as per Ext.P11-sale deed and appellant is only a name-lender therein, and hence appellant is not entitled to get the eviction order or the rent of the building. In that suit the court found that appellant is the real owner of the building pursuant to Ext.P.11-sale-deed and that he was entitled to receive rent of the building. However, the suit was dismissed as the respondent deposited the arrears of rent in court during pendency of the suit but appellant was permitted to withdraw the arrears of rent so deposited by the respondent as per the judgment rendered in that suit.

Appellant filed the present suit (No. 304-A of 1994) under Section 12(1) (f) of the Act for eviction of the respondent on the ground that appellant requires the building bona fide for the purpose of starting a business of his own. Respondent contested the suit and in the written statement be contended, inter alia, that appellant is only benami to his father Pyarelal in Ext.P.11-sale deed and the real transferee was Pyarelal. Respondent further contended that the sale in favour of the appellant is void as it is forbidden under Section 3 of the Benami Transaction (Prohibition) Act, 1988, (for short the "the Benami Act").

One of the issues raised by the trial court in the present suit is whether respondent is precluded from raising the issue regarding benami nature of Ext.P.11-sale deed, due to the bar of res judicata. The trial court held that the finding in the previous suit (No.75-A of 1990) against the respondent would not operate as res judicata as the said suit was ultimately dismissed. The trial court then proceeded to consider whether appellant is only a benamidar under the aforesaid sale deed. The court concluded that appellant is the real transferee under the sale deed and is entitled to institute the suit. It was further found that appellant bona fide requires the building for his own business purpose. On the strength of such findings a decree was granted by the trial court for eviction of the respondent.

The District Court in the first appeal filed by the respondent upheld all the findings arrived at by the trial court and dismissed the appeal. A second appeal was preferred by the respondent before the High Court of Madhya Pradesh. During arguments learned single judge permitted the appellant to raise the plea of res judicata while supporting the decree for eviction.

However, learned single judge of the High Court held that there is no bar of res judicata for the respondent in raising the contention regarding the title of the appellant over the building. Learned single judge reversed the findings of the two courts regarding benami transaction and held that Ext. P.11 was executed in favour of Pyarelal and that transaction is hit by Section 3 of the Benami Act and consequently the transaction is void. Learned single judge dismissed the suit filed by the appellant.

Shri G.L. Sanghi, learned senior counsel contended that the plea of the respondent based on Section 3 of the Benami Act is barred by res judicata. Alternatively he contended that respondent has failed to show that Ext. P.11 is a benami transaction Learned senior counsel further contended that the High Court went wrong in fastening the appellant with the burden of proof to prove that Ext. P.11 is not a benami transaction. Even otherwise, appellant has proved that Ext.P.11 was executed in his favour and he is the real transferee, according to the learned Senior Counsel.

Shri S.S. Khanduja, learned counsel for the respondent supported every finding of the High Court and further contended that even if the burden is on the respondent to prove the benami nature of the transaction respondent has succeeded in discharging the burden. Regarding the plea of res judicata learned counsel submitted that it is not available to the appellant. Alternatively he pleaded that even if ownership of the building is found with the appellant he has not made out a ground for eviction under Section 12(1)(f) of the Act.

The reasoning adopted by the learned single judge for rejecting the plea of res judicata is the following:

> "Since the suit itself was dismissed, the appellant was not aggrieved and he had no right of appeal. Under such circumstances there could be no question of application of principles of res judicata. A successful defendant is not bound by any adverse finding against him in a suit, for the reason, it cannot file an appeal against that finding. This principle is firmly in the saddle."

To reach the said conclusion learned single judge relied on the decisions in Waris Khan & ors. vs. Admadullakhan & ors. (AIR 1952 Nagpur 238) and Firm Manhaiyalal Mohanlal Somani vs. Paramsukh (AIR 1956 Nagpur

273).

The earlier suit (75-A/90) was contested on the main issue that appellant was only a benamidar and hence he has no right in the suit property. The main plea of the respondent in that suit has been extracted in the judgment as follows:

> "The defendant has specifically denied that the plaintiff has purchased the suit premises. His contention is that disputed premises has been purchased by Pyarelal, father of the plaintiff in his name and it is a benami transaction and on that basis the plaintiff has not acquired any right."

Issues No. 1 and 2 in that suit were formulated in the following words:

> "1. Whether the plaintiff is owner of the suit premises?
>
> 2. Whether the defendant is tenant of plaintiff of disputed premises @ Rs.210/- p.m.?"

The decision of the court in that suit, on the above issues, was this: "I find that the plaintiff is the owner on the basis of sale-deed dated 23.1.1989 under section 2(b) of MP Accommodation Control Act; and when plaintiff is owner of the suit premises the defendant is definitely his tenant." The court in that suit then proceeded to consider the question of arrears of rent and held that "the plaintiff is entitled to obtain Rs.1400/- from the defendant towards arrears of rent; this rent has been deposited by the defendant in CCD which the plaintiff can withdraw." of course in the last para of the judgment the Court said that suit is "dismissed" and both parties were directed to bear their own costs.

Though the word "dismissed" has been employed in the last paragraph of the judgment a reading of it, as a whole, would show that the plaintiff had won the suit. The court found against the plea of the defendant that plaintiff was not the rightful owner of the building. Dismissal of the suit was not on account of any defect in the plaintiff's claim nor in the frame of the suit nor even on any technical reason, but solely because the amount claimed by the plaintiff from the defendant has been deposited by the defendant in the court during pendency of the suit. As the plaintiff was permitted to withdraw that amount his grievance in the suit would necessarily have been redressed fully.

The rule of res judicata incorporated in section 11 of the Code of Civil Procedure (CPC) prohibits the court from trying an issue which "has been directly and substantially in issue in issue in a former suit between the same parties", and has been heard and finally decided by that court. It is the decision on an issue, and not a mere finding on any incidental question to reach such decision, which operates as res judicata. It is not correct to say that the party has no right of appeal against such a decision on an issue though the suit was ultimately recorded as dismissed. The decree was not in fact against the plaintiff in that first suit, but was in his favour as shown above. There was no hurdel in law for the defendant to file an appeal against the judgment and decree in that first suit as he still disputed those decisions on such contested issues.

The two decisions of the Nagpur High Court relied on by the learned single judge (in the impugned judgment) have followed the rule set by the Privy Council in an early decision in Midhanpur Zamindari Company vs. Naresh Narayan Roy (AIR 1922 PC 241). It seems that the legal principle formulated by the Privy Council in the aforesaid decision regarding this facet of res judicata has since been approved and followed by the courts in India as the correct position. The said rule was founded on the following facts: When a zaminder sued for possession against the tenant the latter contested the suit on two alternative grounds, one by claiming occupancy right and the other by contending that the suit was premature. The court had recalled the plea of the tenant regarding occupancy right, but dismissed the suit as premature. In the subsequent suit filed by the zamindar against the same tenant their Lordships of the Privy Council did not agree that the finding regarding occupancy right in the first suit would operate as res judicata "for the tenant having succeeded on the other plea, had no occasion to go further as to the findings against him." The reason is that such adverse finding in the aforesaid suit would only be obiter dicta.

However, the Madras High Court in Veeraswamy Mudali vs. Palaniyappan and ors. (AIR 1924 Madras 626) and the Calcutta High Court in Fulbash Sheikh vs. Emperor (AIR 1929 Cal 449) distinguished the said principle in cases where the first suit was dismissed due to want of valid

notice to quit, and findings on disputed issues on title were held sufficient to operate as res judicata in subsequent suit between the same parties.

Thus the sound legal position is this: If dismissal of the prior suit was on a ground affecting the maintainability of the suit any finding in the judgment adverse to the defendant would not operate as res judicata in a subsequent suit. But if dismissal of the suit was on account of extinguishment of the cause of action or any other similar cause a decision made in the suit on a vital issue involved therein would operate as res judicata in a subsequent suit between the same parties. It is for the defendant in such a suit to choose whether the judgment should be appealed against or not. If he does not choose to file the appeal he cannot thereby avert the bar of res judicata in the subsequent suit.

In this case the position is still stronger for the appellant. Dismissal of the first suit was only on account of what the respondent did during the pendency of the suit i.e. depositing the arrears of rent claimed by the appellant. The court permitted the plaintiff to withdraw that amount under deposit for satisfying his claim. Such a degree cannot be equated with a case where the suit was dismissed as not maintainable because any adverse finding in such a suit would only be obiter dicta. The finding made in OS 75-A/90 that appellant was the real owner of the building as per Ext. P.11-sale deed became final. If the respondent disputed that finding he should have filed an appeal in challenge of it.

We therefore agree with the plea of the appellant that there is bar of res judicata in re-agitating on the issue regarding appellant's title to the building.

Alternatively, assuming that the finding in the first suit would not operate as res judicata, the contention of the respondent that Ext. P.11 is a void transaction being hit by Section 3(1) of the benami Act can now be considered. The trial court and first appellate court concurrently found that it is not a benami transaction but the High Court interfered with the said concurrent finding and held that the transaction is void. Learned single judge of the High Court observed that finding of the first appellate court is contrary to the pleadings of the plaintiff and that burden of proof had been wrongly placed on the defendant, and that the conclusion was based on considerations which are not germane to the issue. According to the learned single judge "it is clear from section 106 of the Evidence Act that is was the respondent to prove that the money was advanced by him because he had the special knowledge of the transaction between him and his vendor". The High Court held that appellant sailed to prove that the suit building was purchased by him on payment of sale price.

All the above three premise adverted to by the High Court are unsupportable. The clear pleading of the plaintiff is that he purchased the suit property as per Ext.P.11-sale deed. Burden of proof cannot be cast on the plaintiff to prove that the transaction was consistent with the apparent tenor of the document. Ext.P.11-sale deed contains the recital that sale consideration was paid by the plaintiff to Narain Prasad the transferor. Why should there be a further burden of proof to substantiate that recitals in the document are true?. The party who wants to prove that the recitals are untrue must bear the burden to prove it.

In this context reference to Section 91 and 92 of the Evidence Act will be useful. As per the former, in all cases in which any matter is required by law to be reduced to the form of a document no evidence shall be given in proof of the terms of such matter except the document itself. Section 92 forbids admission of any evidence for the purpose of contradicting, varying, adding to, or subtracting from the terms of such document. One of the exceptions to the said rule is that any fact which would invalidate the instrument can be proved by adducing other evidence.

In this case, Ext.P.11 is the document by which transfer of ownership from Narain Prasad was effected. When any party proposes to show something which is at variance with the terms of Ext.P.11 the burden of proof is on him. When respondent asserted that the real transaction is not what is apparently mentioned in Ext.P.11 the burden is on the respondent to establish the transaction which he asserts to be the real one.

We do understand that respondent made a bid to discharge his burden by examining Pyarelal (father of the appellant) and Narain Prasad (the executant of Ext. P.11) as witnesses for the defendant. But it was a risky course of action which he undertook and the risk proved to be costly for him as both witnesses stood by the apparent terms of Ext.P.11 regarding consideration. In other words, both witnesses of the respondent stuck to the version that consideration for the sale was paid by the appellant.

It is true that respondent adduced evidence to show that Ext.P.11 was preceded by an agreement entered into between Pyarelal and Narain Prasad for the sale of the suit building. The High Court adverted to the said agreement. But even with that agreement the respondent has only succeeded in showing that Pyarelal had enough money and appellant was not having so much of funds to pay the purchase money for Ext.P.11. Perhaps the said circumstance may lead to an inference that Pyarelal, the father of the appellant, gave money to his son to pay the consideration for buying the property.

Section 3(1) of the Benami Act contains the interdict that no person shall enter into any benami transaction. The aforesaid prohibition has been judicially pronounced as prospective only, (vide R.Rajagopal Reddy v. Padmini Chandrasekharan (1995 2 SCC 630). As the Benami Act was passed on 5.9.1988 it would apply to Ext. P.11 which was executed subsequently. A contention was bolsteced up in the High Court on behalf of the tenant that since the sale consideration was provided by Pyarelal the sale deed would be a benami transaction.

Section 2(a) of the Benami Act defines benami transaction as "any transaction in which property is transferred to one person for a consideration paid or provided by another person." The word "provided" in the said clause cannot be construed in relation to the source or sources from which the real transferee made up funds for buying the sale consideration. The words "paid or provided"

> are disjunctively employed in the clause and each has to be tagged with the word "consideration". The correct interpretation would be to read it as "consideration paid or consideration provided". If consideration was paid to the transferor then the word provided has no application as for the said sale. Only if the consideration was not paid in regard to a sale transaction the question of providing the consideration would

arise. In some cases of sale transaction ready payment of consideration might not have been effected and the provision would be made for such consideration. The word "provided" in Section 2(a) of Benami Act cannot be understood in a different sense. Any other interpretation is likely to harm the interest of persons involved in genuine transactions, e.g., a purchaser of land might have availed himself of loan facilities from banks to make up purchase money. Could it be said that since the money was provided by the bank it was benami transaction?.

2 We are, therefore, not inclined to accept the narrow construction of the word "provided" in Section 2(a) of the Benami Act. So even if appellant had availed himself of the help rendered by his father Pyarelal for making up the sale consideration that would not make the sale deed a benami transaction so as to push it into the forbidden area envisaged in Section 3(1) of the Benami Act.

Thus, looking from either angle the contention of the respondent that appellant had no title to the suit property could not stand legal scrutiny. The High Court erred grossly in adopting such a view which is in conflict with law and is in reversal of the concurrent findings of the two fact finding courts.

Shri S.S. Khanduja, learned counsel for the respondent lastly pleaded that if ultimately the respondent is found to be the transferee under the Ext. P.11-sale deed the case may be remitted to the High Court for considering the question whether appellant's claim for eviction on the ground that he needs the building for his own use in bona fide. Shri G.L. Sanghi, learned senior counsel pointed out that there is concurrent finding by two courts on that aspect. We have noticed that the High Court which admitted the second appeal had formulated certain questions of law, and none of such questions pertained to the finding regarding the bona fides of appellant's claim for eviction. Hence no purpose would be served by remanding the case to High Court.

In the result, we allow this appeal and set aside the impugned judgment. The decree passed by the trial court as confirmed by the first appellate court will stand restored. We pass no order as to costs.