Union Of India (Uoi) vs Moksh Builders And Financiers Ltd. And ... on 27 October, 1976

Equivalent citations: AIR1977SC409, (1977)1SCC60, [1977]1SCR967, AIR 1977 SUPREME COURT 409, 1977 (1) SCC 60, 1977 (1) SCR 967, 1977 (1) SCWR 358, 1977 9 LAWYER 156, 1977 SCC (TAX) 132, 1978 UPTC 75

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Bench: M.H. Beg, P.N. Shinghal

JUDGMENT

P.N. Shinghal, J.

1. These two appeals by certificate have been consolidated by an order of this Court dated April 15, 1969. They are directed against a common judgment of the Delhi High Court dated February 14, 1967, in Regular First Appeals Nos. 5-D and 54-D of 1958, by which the judgment and decree of the trial court dated January 13, 1958 have been set aside with costs throughout. As this has resulted in the dismissal of the suit raised by the Union of India, it has filed the present appeals.

2. The facts giving rise to the appeals are quite simple. Harjas Rai Malhotra, defendant) No. 3, is the father of Krishan Lal Malhotra, defendant No. 2. The liability of defendant No. 3 to income-tax and super-tax for the assessment year 1947-48, was fixed Rs. 1,25,090/11/- in March, 1952. A demand was made for its payment, but he neglected to meet it and a certificate was issued on October 8, 1952 to the Collector of Delhi for its recovery as arrears of land revenue. The Collector was asked to attach house No. 15, Keeling Road and house No. 9, Hailey Road in New Delhi, of defendant No. 3. Both the houses were attached on October 13, 1952. Meanwhile, defendant No. 3 appealed against the order of assessment. The Appellate Assistant Commissioner allowed the appeal on May 12, 1953, set aside the assessment and directed a fresh assessment. The order of fresh assessment was made on November 30, 1953 and the income-tax demand was reduced to Rs. 1,05,769.13. The assessments for 1944-45 and 1948-49 were completed on March 28 and 31, 1953, respectively, raising a tax demand for Rs. 1,94,738.15. A recovery certificate was issued to the Collector for the same on May 4, 1953 and the house at No. 15, Keeling Road was again attached on August 6, 1953.

3. We are not concerned with the house at No. 9, Hailey Road, for the controversy before us relates to house No. 15, Keeling Road, hereinafter referred to as the house. That house had been ostensibly purchased by defendant! No. 2 in December, 1946 for Rs. 60,000/-. He filed an application objecting to the attachment on the ground that the house belonged to him, but the Collector dismissed the objection holding that the house belonged to defendant No. 3. Defendant No. 2 did

not appeal against that order and did not question it by a suit.

4. Thus far, the facts are not in dispute.

5. It was alleged in the plaint that the house was purchased by defendant No. 3, "benami", in the name of his son defendant No. 2, out of his "own funds drawn from his bank account" and that the "full beneficial ownership, right, title and interest in the said property has always belonged and continues to this day to belong to the 3rd defendant." The plaintiff alleged further that during the pendency of his appeal to the Appellate Assistant Commissioner against the assessment which had been made in March 1952 for 1947-48 and the assessment proceedings for 1944-45 and 1948-49, defendant No. 3 "in collusion and conspiracy with the 2nd defendant and certain other persons, and with the view, intent and purpose of defeating and delaying his creditors including the plaintiff, had recourse to diverse ways and means" as detailed in the plaint. He was thus alleged that, in February 1953, defendants Nos. 2 and 3 and five other persons purported to form a limited company known as Moksh Builders and Financiers Ltd., hereinafter referred to as the Company, which was arrayed as defendant No. 1 in the suit, with an authorised capital of Rs. 5,00,000/- divided into 5000 shares of Rs. 100/- each. There were 7 subscribers to the Memorandum and the Articles of Association of the Company and each of them took 10 shares. Soon after the Appellate Assistant Commissioner made his aforesaid order dated May 12, 1953 for fresh assessment of the income-tax liability of defendant No. 3, a sale deed dated May 25, 1953 was brought into existence whereby defendant No. 2 "purported to convey" the house to defendant No. 1 for Rs. 1,00,000/- of which Rs. 90,000/- were payable in the shape of shares in the Company, Rs. 8,000/- payable to Sunrise Investors Ltd. and Rs. 2000/- in cash. The plaintiff pleaded that "these transactions were all sham, colourable, and effected and entered into with the active aid, instigation and advice of the 3rd defendant and to subserve and carry out the object of placing his property, viz., No. 15, Keeling Road out of the reach of his creditors". It was further urged as follows, The consideration mentioned in the sale-deed of 25th May, 1953 was illusory. In effect and substances the 2nd defendant purported to sell a house to the 1st defendant in which company in return was to become a holder of shares of controlling interest, the shares being the alleged price. Except for the legal fiction of the 1st defendant Company being juristic person the sale was by the vendor to himself. None of these devices and subterfuges could divest the 3rd defendant of his ownership of the property in question. The 1st defendant company by its promoters directors and office bearers was fully aware of all the facts of the case, including the true state of the title to the property No. 15, Keeling Road, the highly embarra'sed financial circumstances of the 3rd defendant the facts that he owed to the plaintiff alone taxes to the amount of several lakhs of rupees etc. The 1st defendant is not a purchaser in good faith for consideration of the said property or without notice of the title of the 3rd defendant. On the other hand the sale deed dated 25th May, 1953 to the 1st defendant was executed by the name-lender the 2nd defendant at the instance of the true owner of the 3rd defendant with intent to defeat or delay the latter's creditors, and is voidable at the option of any of such creditors including the present plaintiff.

6. Defendant No. 1 objected to the attachment of the house for the realisation of the arrears of income-tax of defendant No. 3. The Additional Collector allowed the objection by a summary inquiry, and the Chief Commissioner dismissed the appeal on April 1, 1954. Both those officers,

according to the plaintiff, proceeded on "prima facie considerations" and left the parties to seek their redress in the civil court.

7. With these specific averments the plaintiff raised its suit seeking leave to sue on behalf and for the benefit of itself and the other creditors, if any, of defendant No. 3. It! prayed for a declaration that (i) the sale deed dated May 25, 1953 was void as against the plaintiff and all other creditors of defendant No. 3, and (ii) the house is and continued to be owned by defendant No. 3. In the alternative, the plaintiff prayed for a declaration that the shares allotted to defendant No. 2 belonged to defendant No. 3. It also prayed for a declaration that it was entitled to proceed against the "properties which may be declared to be of 3rd defendant's" by attachment and sale to realise the tax arrears due from him. A prayer was made for setting aside the orders of the Additional Collector and the Chief Commissioner on the objection petition of defendant No. 2.

8. Defendant No. 3 did not appear to contest the suit in spite of personal service and the trial court made an order on April 15, 1955 to proceed against him ex-parte. Separate written statements were filed by the Company and defendant No. 2

9. The Company took the plea, inter alia, that it had been genuinely and properly formed and that it was a bona fide purchaser for value and the "transaction was quite real and genuine". It denied that the sale deed dated May 25, 1953, was executed at the instance of defendant No. 3, or that it was intended to defeat or delay his creditOrs. It was pleaded that defendant No. 2 was the rightful owner of the house which he had rightfully purchased with "his own money CRupees 10,000/- by cheque No. 32920 dated 14.11.1946 on the New Bank of India Ltd., New Delhi drawn by his mother K. Rani and Rs. 50,000/- paid in cash before Sub-Registrar)". The Company also pleaded that the transaction of sale in its favour was without notice of any body else's claim and was binding.

10. Defendant No. 2 filed a short written statement stating that he was the owner of the house having purchased it with "his own money". He pleaded that he had paid Rs. 10,000/- by cheque on New Bank of India Ltd.. New Delhi, and Rs. 50,000/- were paid before the Sub-Registrar. He pleaded further that he had no knowledge of the Collector's crder and that his order, if any, was ex-parte. As regards the Company defendant No. 2 pleaded that it was a real and genuine Company and that out of his shares worth Rs. 90,000/- he had sold shares worth Rs. 74.000/-.

11. The trial court found that) the house was purchased "benami" in the name of defendant No. 2, by defendant No. 3 with his own money and that the sale of the house to the Company by defendant No. 2, was "sham and was effected in order to defeat or to delay the creditor of defendant No. 3 and that defendant No. 1 had no real existence." The trial court therefore granted a decree declaring that the sale deed dated May 25, 1953 was void as against the plaintiff and all other creditors, if any, of defendant No. 3 and that the House" is and continues to be owned by the 3rd defendant and that the plaintiff is entitled to proceed against the said properties by way of attachment and sale to realise the tax arrears due from him." The trial court set aside the orders dated October 9, 1953 of the Additional Collector on the objection petition of defendant No. 2 and of the Chief Commissioner dated April 1, 1954.

12. As the High Court has set aside the judgment and decree of the trial court, the present appeals have been filed by the plaintiff as aforesaid. We shall refer to the findings of the High Court as and when necessary.

13. The main point in controversy was whether the house was purchased by defendant No. 3 'benami' in the name of defendant No. 2 ? This was the subject matter of issue No. 1 in the trial court.

14. We have made a reference to the plaintiff's plea that the purchase was "benami" and payment was made out of the funds of defendant No. 3, which were drawn by him from his own account. As has been mentioned, defendant No. 3 did not care to appear and contest the suit even though he was served and knew the nature of the plaintiff's claim and the basis thereof. Defendant No. 2 appeared at the trial and pleaded that he purchased the property "with his own money". The source of the money was within his special knowledge, but it will be recalled that he contended himself by pleading that Rs. 10,000/- were paid by him by a cheque and Rs. 50,000/-were paid before the Sub-Registrar. We have made a reference to the plea of the Company in this respect.

15. It is no body's case that the sale of the house to defendant No. 2 was fictitious and that the title of the transferor was not intended to pass. What we have to examine is whether the title, on sale of the house in December 1946, was transferred to defendant No. 3. who was the real purchaser, and not! to defendant No. 2, who was only the ostensible transferee and was no more than a "benamidar". It has been held in Gangadara Ayyar and Ors. v. Subramania Sastrigal and Ors. A.I.R.1949 F.C. 88 that "in a case where it is asserted that an assignment in the name of one person is in reality for the benefit of another, the real test is the source whence the consideration came." It is also necessary to examine in such cases who actually has enjoyed the benefits of the transfer. , Both these tests were applied by this Court in Meenakshi Mills, Madurai v. The Commissioner of Income-Tax Madras. [1956] S.C.R. 691 It is therefore necessary in the present case, to find out the source of the consideration for the, transfer, as also to find out who has been in enjoyment of the benefits of the transaction. It is equally well settled that, although the onus of establishing that a transaction is 'benami' is on the plaintiff, 'where it is not possible to obtain evidence which conclusively establishes or rebuts the allegation, the case must be dealt with on reasonable probabilities and legal inferences arising from proved or admitted facts."

16. The burden of proof is, however not static, and may shift during the course of the evidence. Thus while the burden initially rests on the party who would fail if no evidence is led at all after the evidence is recorded, it rests upon the party against whom judgment would be given if no further evidence were adduced by either side i.e. on the(evidence on record. As has been held by this Court in Kalwa Devadattam and Ors. v. The Union of India and Ors. that where evidence has been led by the contesting parties on the question in issue, abstract considerations of onus and out of place, and the truth of otherwise; of the case must always be adjudged on the evidence led by the parties. This will be so if the court finds that there is no difficulty in arriving at a definite conclusion. It is therefore necessary to weigh the evidence in this case and to decide whether, even if it were assumed that there was no conclusive evidence to establish or rebut the "benami" allegation, what would, on a careful assessment of the evidence, be a reasonable probability and a legal inference from relevant

and admissible evidence.

17. The sale in question was admittedly made in December 1946. Defendant No. 2 had admitted in his statement date May 29, 1957 that he was bom in 1928. He was therefore 18 years old at that time. His father) (defendant No. 3) was also alive at that time, and it is not his case that he (defendant No. 2) had any money of his own, for he has stated that he got Rs. 10,000/- from his mother and Rs. 50,000/- from his grandfather to constitute the sum of Rs. 60,000/- for which he purchased the house. It is however a significant fact that the defendant No. 2 did not disclose any such source of the money in his written statement dated April 15, 1955. It took him two years to come out with such a case. He was given an opportunity, during the course of his cross-examination, to explain the omission regarding the disclosure of the source of the sum of Rs. 50,000/- in his written statement, but he contented himself by saying that he could not give "any reason as to why he (I) omitted to mention in the written statement about receipt of Rs. 50,000/-from his (my) grandfather". Similarly he failed to explain why he did not mention in his written statement that the cheque for Rs. 10,000/- was drawn by his mother. It is true that there is a mention in document Ex. DI that out of the sum of Rs. 60,000/- "a sum of Rs. 10,000/- has already been paid to the vendor by the vendee by cheque No. 32920 dated November 14, 1946, on the New-Bank of India Ltd., New Delhi," but it is again significant that while the document states that the payment of Rs. 10,000/- was made by the vendee (defendant No. 2) by the aforesaid cheque, he has stated in the trial court that the cheque for Rs. 10.000/- was issued by his mother, in favour of the vendor. He was not able to explain the discrepancy and merely stated that his written statement (which did not disclose the source and the named of the person who drew the cheque for Rs. 10,000/-) was correct. If it had been a fact that defendant No. 2 really obtained a cheque for Rs. 10,000/- from his, mother, in the vendor's name, and if it was not really a cheque drawn by his father, there was nothing; to prevent him from establishing. that fact with reference to the counter-foil of his mother's cheque book or her account with the bank. The defendant has also not stated whether he repaid the money to his mother and, if so, when, or whether it was a gift to him and, if so, why, when she had another son also. As it is, it cannot be said that defendant No. 2 has been able to establish that it was he who paid the sum of Rs, 10.000/-to the vendor.

18. According to the written statement of defendant No. 2, the balance of Rs. 50,000/- was paid before the Sub-Registrar. He has stated that about 7 or 8 days before his death, his grandfather Sohnat Mal (who died in October 1946 paid him Rs. 50,000/- after taking out the money which was "lying underneath his pillow." He could not however stand the test of cross-examination, for he could not state where the money was kept by his grandfather and whether he at all had a bank account. The High Court did not care to examine the reliability of the defendant's evidence regarding the source from which he received Rs. 60,000/- even though it was an important question and had been examined by the trial court with reference to all the other evidence on the record including the statement of Amar Nath Sharma D.W.3. We find that there is no reason for us to disagree with the trial court's view in the matter, based on the parol evidence on the record. In arriving at this conclusion, we have not relied on that part of the trial court's judgment where it has made a reference to the admission of defendant No. 3, for we shall deaf with them; separately. The reasonable preponderance of probability therefore is that defendant No. 2 has failed to establish the source of the consideration of Rs. 60,000/- even though it was an important fact within his special

knowledge. He could not there fore be said to be the real owner of the house.

19. It is also an important fact that defendant No. 2 has failed to prove that he enjoyed the benefit of the sale. He claimed that he had shown the rent of the house in his income-tax returns, but he did not produce any rent note. Even the tenant who was said to be living in the house on the date of the sale, has not been examined. While the trial court has examined this aspect of the controversy, the High Court has missed it altogether.

20. The High Court went by the view that statement Ex. P. 1 of defendant No. 3, the income-tax return of defendant No. 3 showing the house as his property, his statement of account and the assessment order for the year 1948-49 showing the same, were not admissible in evidence against defendant No. 2 and that there was no evidence either of the plaintiff or the defendants on which a finding as to the benami" nature of the transaction could be based. That decision is obviously based on a misappreciation of the law relating to "benami" transactions for, as has beer, stated, it was necessary to find out whether it was defendant No. 3 who had enjoyed the benefit of the transaction. Moreover, the finding of the High Court is against the evidence on the record, and must be set aside. We have therefore no hesitation in holding that the purchase of the house was "benami" and that its ostensible owner defendant No. 2 was not the Teal owner but was a "benamidar."

21. The ancillary question is as to who was the real owner of the house for whom defendant No. 2 was the "benamider" ? We have not taken the admissions of defendant No. 3 into consideration so far, but they have a direct bearing on the question now before its. He recorded a statement Ex. P. 1 dated August 12, 1950 before Puran Chand P.W. 1, Income-tax Officer, which has been proved by the witness. It has been stated there as follows,-

I purchased 15 Keeling Road on 12.12.46 for Rs. 60,000/-in the name of my son (Major Krishan Lal). This money was paid out of my bank accounts and I have shown the details and payments from my bank pass books.

22. Then there is document Ex. P. 6 which is a copy of the personal account of defendant No. 3 It was filed in connection with the return of his income-tax for 1947-48. An attempt was made to argue that the document had not been proved or marked as an exhibit. We have seen the original document! and we have no doubt that the whole of it was tendered in evidence and was marked as Ex. P. 6. The identity of the document has been established by the statement of Puran Chand P.W. 1 that the scribbling on it was made by him. The document has therefore been proved beyond doubt. It shows that it was defendant No. 3 who spent Rs. 60,000/- on "property" in that assessment year. Both exhibits P. 1 and P. 6 go to prove that the house was purchased by defendant No. 3 out of his own funds in the name of his son defendant No. 2 who, it will be recalled, was admittedly only 18 years old at that time and did not have any money of! his own. Moreover defendant No. 3 showed the income accruing from the house as his own income in his return for the years 1947-48 and 1948-49. Counsel for the respondents have urged for the exclusion of these admissions. The main attack was that they were admissions of a co-defendant and were not admissible against defendant No. 2. As has been stated, we have not taken them into consideration as evidence against that defendant. There is however no force in the other argument that they are not admissible in evidence

against defendant No. 3 as he was not confronted with them in the trial court and they were not adverse to the interest of their maker at the time when they were made. It has been held by this Court in Bharat Singh and Anr. v. Bhagirath that an admission is substantive evidence of the fact admitted, and that admissions duly proved are "admissible evidence irrespective of whether the party making them appeared in the witness box or not and whether that party when appearing as witness was confronted with those statements in case it made a statement contrary to those admissions." In taking this view this Court has noticed the decision in Ajodhya Prasad Bhargava v. Bhawani Shanker Bhargava and Anr. also. The! point has been considered and answered as follows in Wigmore on Evidence, Volume IV, 1048 (at page 3),-

The theory of the Hearsay rule is that an extra judicial assertion is excluded unless there has been sufficient opportunity to test the grounds of assertion and the credit of the witness, by cross-examination by the party against whom it is offered (post, 1362); e.g. if. Jones had said out of court. "The party opponent Smith borrowed this fifty dollars", Smith is entitled to an opportunity to cross-examine Jones upon that assertion. But if it is Smith himself who said out of court, I borrowed this fifty dollars, certainly Smith cannot complain of lack of opportunity to cross-examine himself before his assertion is admitted against him. Such a request would be absurd. Hence the objection of the Hearsay rule falls away, because the very basis of the rule is lacking, viz., the need and prudence of affording an opportunity of cross-examination.

23. Moreover, the defendant No.3 had full opportunity to appear and defend himself, but he did not do so and; the case proceeded against him ex-parte. The plaintiff even tried to examine him as his own witness, but his appearance could not be secured in spite of the prayer for the issue of summonses and a warrant. There is therefore no force in the argument to the contrary.

24. So also, there is no force in the argument that the aforesaid admissions or statements of defendant No. 3 could not be read against him as they were not adverse to his interest when made. There is no such requirement of the Evidence Act and the argument is untenable as it unreasonably restricts the opportunity to prove the true state of affairs on the party's own showing and to demolish his subsequent claim as self-contradictory. This point has also been dealt with in Wigmore on Evidence, 1048 (at page 4) in this way,-

It follows that the subject of an admission is not limited to facts against the party opponent's interest at the time of making it. No doubt the weight of credit to be given to such statements is increased when the fact stated is against the person's interest at the time; but that circumstance has no bearing upon their admissibility. On principle, it is plain that the probative reason why a party-opponent's utterance is sought to be used against him is ordinarily the reason noted above, in par. (l) b, viz. that it exhibits an inconsistency with his present claim, thus tending to throw doubt upon it, whether he was at the time speaking apparently in his own favour or against his own interest.

25. The contrary view, has been characterised by Wigmore as "a fallacy, in the fullest sense."

26. Another argument which has been advanced against the admissibility of the aforesaid admissions of defendant No. 3 is that they could be evidence only in terms of Section 33 of the Evidence Act. That argument is also quite untenable because Section 33 deals with statements of persons who cannot be called as witnesses, and does not restrict or override the provisions relating to admissions in the Evidence Act. The High Court also committed a similar error of law in its impugned judgment. The aforesaid admissions of defendant No. 3 are therefore satisfactory evidence to prove that he himself was the owner of the house and his son, defendant No. 2 was merely a "benamidar" for him.

27. It would thus appear that the finding of the trial court on issue No. 1 which dealt with the question whether the house was purchased by defendant No. 3 "benami" in the name of defendant No. 2, was correct and should be restored as the High Court's finding to the contrary has been vitiated by the substantial errors of law mentioned above.

28. The other important question is whether the sale of the house in favour of the Company (defendant No. 1) was a sham transaction and was effected to defeat and delay the creditors of defendant No. 3. This was the subject matter of issue No. 2 and the trial court's finding in affirmative has not even been examined by the High Court.

29. We find that the admitted facts of the case are by themselves sufficient to show that the finding of the trial court is justified and does not call for any interference. Defendant No. 3 was assessed to income-tax for a sum of Rs. 1,25,090/11/- for assessment year 1947-48 in March 1952. Defendant No. 3 failed to pay that amount on demand and a recovery certificate was issued on October 8, 1952. The house was therefore attached on October 13, 1952. Defendant No. 2 raised an objection, and prayed for the release of the house. The Collector rejected the objection on March 3, 1953. No appeal, or other remedy was sought against that order. The Appellate Assistant Commissioner however allowed the appeal of defendant No. 3 against the assessment of income-tax and ordered a fresh attachment by his order dated May 12, 1953. In the meantime, the Company was incorporated in February, 1953. The assessment of income-tax for the years 1944-45 and 1948-49 was completed in March 1953 raising the tax demand to Rs. 1,94,735.15, and a recovery certificate was issued on May 4, 1953. It was in these circumstances that defendant No. 2, who had failed to obtain an order for the release of the house as aforesaid, hastened to sell it to the Company on May 25, 1953. As has been stated, a fresh recovery certificate was issued to the Collector on May 4, 1953 and the house was again attached on August 6, 1953. These facts speak for themselves and are quite sufficient to justify the trial court's finding that sale of the house to the Company was a sham transaction and arose out of the anxiety to save the house some how from sale for realisation of the income-tax. The Company was in fact dominated by defendant No. 2 and his close relations and did not even pay the sale price in cash. It is also significant that the shares of the other relations were insignificant. Moreover the Company could not lead evidence to show that it was able to transact any substantial business whatsoever. We have therefore no reason to disagree with the trial court's finding that the Company was formed just to transfer the house to it in an effort to save it from attachment and sale for realisation of the income-tax arrears of defendant No. 3. The finding of the trial court on the issue is quite correct and the High Court committed a serious error of law in not examining this aspect of the matter at all even though it had a great bearing on the controversy.

30. In the result, we are constrained to allow the appeals. The impugned judgment and decree of the High Court dated February 14, 1967 are set aside and the decree of the trial court is restored with costs throughout one hearing fee.