JAYDAYAL PODDAR (DECEASED) THROUGH HIS L.RS AND ANOTHER

*v.*

MST. BIBI HAZRA AND ORS.

*October* 19, 1973

[V. R. KRISHNA IYER AND R. S. SARKARIA, JJ.]

*Benami Transaction—Burden of proving that a particular transaction is benami lies on the person who asserts it—This burden has to be discharged by definite proof—Essence of* benami *is the intention of parties—Circumstances to be taken into consideration for determining whether a transaction is* benami *or real—Source of purchase money if the most important test.*

The burden of proving that a particular sale is *benami* and the apparent purchaser is not the real owner, always rests on the person asserting it to be so. This burden has to be strictly discharged by adducing legal evidence of a definite character which would either directly prove the fact of *Benami* or establish circumstances unerringly raising an inference of that fact. The essence of a *benami* is the intention of the party or parties concerned; and not unoften, 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. Though the question, whether a particular sale is *Benami* or not, is largely one of fact, and for determining this question, no absolute formulae or acid tests, uniformally applicable in all situations, can be laid down; yet in weighing the probabilities and for gathering the relevant indicia, the Courts are usually guided by these circumstances : (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.

These indicia are not exhaustive and their efficacy varies according to the facts of each case. Nevertheless the source whence the purchase money came, is by far, the most important test for determining whether the sale standing in the name of one person, is in reality for the benefit of another. [91H-92E]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1759 of 1967.

From the judgment and Decree dated the 31st October, 1962 of the Patna High Court in First Appeal No. 619 of 1958.

*V. S. Desai* and *R. C. Pra,* for the appellant.

*L. M. Singhvi, U.P. Singh* and *A. T. Patra,* for respondent No. 1.

The Judgment of the Court was delivered by

SARKARIA, J.—This appeal by certificate is directed against the appellate judgment and decree, dated the 31st October, 1962, of the High Court of Judicature at Patna.

The plaintiffs-appellants instituted a suit on 30-6-1956, in the Court of Subordinate Judge, Samastipur for a declaration of title and possession in respect of a pucca house in Plot No. 216, Ward III of Samastipur Municipality. It was alleged that Abdul Karim (Def.

A No. 1) had out of his own funds purchased this house in the name of his wife Mst. Hakimunnissa by a registered sale-deed dated 10-5-1941, from one Abdul Motilib. After the purchase, Defendant No.1, who was in possession of the house, executed two mortgage deeds, dated 6-1-1948 and 28-7-1948, in favour of his son-in-law, Abdul Latif (Defendent No. 3), husband of Mst. Bibi Hazra (Defendant No. 2). Abdulkarim (Defendant No. 1), in order to clear the mortgage dues and B for meeting other necessities, agreed to sell the house to Plaintiff No. 1 for a consideration of Rs. 20,000/-. Pursuant to this agreement of sale, Plaintiff No. 1 paid a sum of Rs. 10,209-4-0, by instalments to Defendant No. 1. Another sum of Rs. 2,990-12-0 was left with Plaintiff No. 2, for payment of the mortgage debts of Defendant No. 3, Rs. 6,800/-, the balance of the price, was paid in cash to the vendor at the time of the registration of the sale-deed on 25-5-1951. Thereafter C Plaintiff No. 2 got this house mutuated in the Municipal records in her favour. Despite the sale, defendants Nos. 1 to 3, acting in collusion, continued to be illegal possession of the house.

Defendant No. 1, while admitting the execption of the sale deed dated 25-5-1951, pleaded that it was without consideration. He however, asserted that the house had been purchased by him, and that Mst. Hakimunnissa was only his *benamidar*. The suit was registered by Bibi D Hazra, Defendant No. 2, on the ground that the house had been purchased by her mother, Mst. Hakimunnissa with her own money, she being a lady of considerable means; and, on Mst. Hakimunnissa's death in 1944, she (Mst. Hazra) inherited and came in possession of 12 annas share therein, while the remaining 4 annas share devolved on Defendant No.1 according to Mohammedan Law by which the parties E were governed in matters of succession. Mst. Hazra further pleaded that the sale deed, dated 24-5-1951 executed by Defendant No. 1 in favour of Plaintiff No. 2, being a fictitous and collusive document, was ineffective *qua* her share in the house.

The trial court held that "the disputed house did really belong to Abdul Karim, and Mst. Hakimunnissa was his *benamidar* in the sale F deed (Ex.D/1) by which the house was acquired", and as such Mst. Hazra (Defendant 2) had no interest in it. It further found that the sale-deed in favour of Plaintiff No. 2 executed by Defendant No. 1 in respect of the suit house was "valid, genuine and for a consideration". In the result, it decreed the plaintiffs' suit.

In First Appeal No. 619 of 1958 preferred by Mst. Hazra (Defendant No. 2), the High Court reversing the finding of the trial court, G held that the plaintiffs had failed to show that Mst. Hakimunnissa in whose name the sale-deed (Ex. D/1) dated 10-5-1941 stood, was only a *benamidar* and not the real purchaser. In consequence, plaintiffs' suit was dismissed with regard to 12 annas share of Bibi Hazra and a decree for joint possession of 4 annas share of the vendor (Defendant 1) was passed in favour of plaintiffs.

H It is well settled that the burden of proving that a particular sale is *benami* and the apparent purchaser is not the real owner, always rests on the person asserting it to be so. This burden has to be strictly discharged by adducing legal evidence of a definite character which

would either directly prove the fact of Benami or establish circumstances unerringly and reasonably raising an inference of that fact. The essence of a *benami* is the intention of the party or parties concerned; and not unoften 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. The reason is that a deed is a solemn document prepared and executed after considerable deliberation and the person expressly shown as the purchaser or transferee in the deed, starts with the initial presumption in his favour that the apparent state of affairs is the real state of affairs. Though the question, whether a particular sale is *Benami* or not, is largely one of fact, and for determining this question, no absolute formulae or acid tests, uniformally applicable in all situations, can be laid down; yet in weighing the probabilities and for gathering the relevant indicia, the courts are usually guided by these circumstances: (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 claiment 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.

The above indicia are not exhaustive and their efficacy varies according to the facts of each case. Nevertheless no. I, *viz.* the source whence the purchase money came, is by far the most important test for determining whether the sale standing in the name of one person, is in reality for the benefit of another.

The question in the case is to be considered in the light of the above indicia. As regards circumstance (1), the High Court noted Abdul Karim (Defendant No.1) who was the best informed person to depose to the source from which the purchase money was derived did not when examined as D.W.7, specifically testify that the money had been paid from his personal fund. In cross-examination, he admitted that he had only two kathas of ancestral land with him; he had a tailoring shop in which the entire capital invested was to the tune of Rs. 1,000/- or Rs. 1,500/- only; he did not keep any accounts; he had six members of his family; his rental income was Rs. 12/- per month only. The High Court was thus right in holding that these facts admitted by Abdul Karim (Defendant No.1) presented a very "gloomy picture of Abdul Karim's financial condition and resources" and that he was not in a position to invest Rs. 4300/- for purchase of the house in question. The High Court after a survey of the other evidence on the record further came to the conclusion that Mst. Hakimunnissa had means of her own and her first husband and her son Moktadi by the first husband were well to do person. Moktadi had a big shop of tobacco, scent oil, zarda etc.

Mr. Desai, learned Counsel for the appellant assails this finding of the High Court on the ground that it was based on the oral evidence

A of Abdul Rauf (D.W. 9) and Mohd. Shafiullah (D.W. 10), who according to their own showing, had scant knowledge about the affairs of Abdul Karim, Mst. Hakimunnissa or Bibi Hazra. It was stressed that the trial court had rightly discarded the useless evidence of these witnesses.

B It is true that the evidence of these two witnesses suffered from infirmities; but the finding of the High Court on this point is not based on their evidence alone. The High Court also took into account the evidence of Bibi Hazara (D.W.13) who stated that she had received Rs. 1000/- or Rs. 1500/- as her share of the cash on the death of her mother. She was in a position to know about the financial condition of her father and mother. According to her, Abdul Karim, had given up tailoring long ago and he was running only a C petty shop of tobacco, *tikia,* hardly earning Re. 1/- or Rs. 2/- per day. Then there was the documentary evidence furnished by the sale-deed (C-1/II) dated 1-4-42, executed by Mst. Hakimunnissa whereby she sold a house to Chaudhary Kishun Chand. It was recited in this deed that in order to purchase the house in dispute she (Hakimunnissa) had to incur certain debts for payment of a part of D the consideration for the sale-deed (Exh.D/1). The sale in question was effected about 11 months earlier on May 10,1941. This recital being *ante litem motam,* was a valuable piece of evidence to show that the consideration of the sale was paid by Mst. Hakimunnissa, the apparent purchaser of the house, from her own resources.

Mr. Desai next contended that the recitals in the sale-deed (Ex.D/1) not only neutralise the effect of the recitals in the sale-deed E (Ex.C(1)-II) but also show that the money for purchasing the house must have been paid by Abdul Karim from his own pocket. Learned Counsel invited our attention to two recitals in Exh.D/1 which are to the effect :

1. "I, the executant negotiated with Abdul Karim the tenant aforesaid regarding the sale of the said house. F The said tenant on receiving the said news became ready and prepared to purchase the land and the house aforesaid. I, the executant finalised the negotiation for sale of the said house, with the said tenant and fixed the consideration money at Rs. 4,300/-."

2. "Accordingly I, the executant, have held out full assurance and satisfaction to the claimant and her husband G in respect thereof. The husband of the claimant and the claimant get this deed of sale executed having confidence in and reliance on the assurance given by me, the executant, without making enquiry about encumbrance and defect in title and without seeing the index."

This contention does not appear to be tenable. It is not proper to H tear the above recitals out of the context and read them in isolation. They must be read with the preceding and succeeding contents of the document (Ex.D/1) and also the connected recitals in the sale-deed (C-(1)-II) dated 1st April, 1942. In the latter deed, Hakimunnissa

*inter-alia* stated that she had previously taken in mortagage plot No. 216, per registered mortgage bond, dated 13-9-1940, from one Sh. Abdul Motlib, and later on she had purchased that plot, including the house, for Rs. 4300/- under the sale-deed, dated 10th May 1941 (Ex.D/1) from this Motlib. It is significant to note that Abdul Karim (Defendant No 1) had signed this deed as an attesting witness. In the deed Ex.D/1, there is a clear reference to this previous mortgage executed in favour of Mst. Hakimunnissa, and the vendor therein is repeatedly referring to Mst. Hakimunnissa as the "claimant" (creditor); and the payment of these past debts is mentioned as a reason for making the sale by the vendor Motlib. The learned judges of the High Court have rightly construed these recitals as indicative of Hakimunnissa being the real purchaser of the property.

The evidence with regard to possession of the disputed house was to the effect that Abdul Karim and Hakimunnissa were in occupation of the house both before and after the sale. Even according to the trial court "such joint possession was not at all material in the present case for determining the *benami* character or otherwise of the transaction.

No evidence whatever was led to show that there was any motive or reason for giving a *benami* character to the transaction. Abdul Karim who had special knowledge of the circumstances bearing on such motive, if any, did not say a word on this point. There was not even an oblique suggestion that Abdul Karim was heavily under debt and in order to avoid payment of such debts, he thought it fit to acquire the house in the name of his wife.

No capital can be made out of the circumstance that the negotiations for the purchase of the house were carried out by Abdul Karim and a sum of Rs. 1700/- towards the part of the price was paid before the Sub-Registrar by him. It is in evidence that Hakimunnissa was a *Pardanishin* lady, and naturally therefore it was her husband who used to look after her affairs. Neither the actual delivery of Rs. 1700/- before the Sub-Registrar by Abdul Karim, nor the recitals made in Ex.D/1 could be accepted as evidence of Abdul Karim being the real purchaser. He was acting only as an agent of his *Pardanishin* wife. For the same reasons, no significance can be attached to the fact that the sale-deed remained in the custody of the husband.

Learned Counsel next referred to the two mortgage deeds, Exhs. C-1 and C(1)-1, dated 6th January, 1948 and 26th July, 1948, respectively, executed by Abdul Karim in favour of Abdul Latif (Defendant No. 3). Emphasis was laid on the fact that Abdul Latif was the son-in-law of Abdul Karim and the husband of Bibi Hazra (Defendant No. 2). We have also adverted to the discussion of this evidence in the judgment of the Sub-ordinate Judge. In agreement with the High Court, we think, that this evidence also is not of a clinching character; firstly, Abdul Latif was not only the husband of Bibi Hazra, he was also the nephew of Abdul Karim; secondly, these mortgages were brought into existence after the controversy had arisen. Bibi Hazra had alleged that these transactions had been brought about by

A her husband calendestinely in collusion with her father. In this connection, it is note-worthy that on the death of Hakimunnissa, her husband had also acquired 4 annas share in it. There was, therefore, ground to suspect that Abdul Karim, taking advantage of his being a sharer in the house, brought into existence these mortgages in collusion with his nephew, to grab the entire property of Mst. Hakimunnissa.

B Learned Counsel further referred to a certified copy of the order, dated 22-11-1950 (Ex.E.1) and urged that this order whereby Mst. Hakimunnisa is claim of her being the real owner of the attached house was dismissed, was a weighty piece of evidence admissible under s. 13 of the Evidence Act, and, taken in conjunction with the judgment, dated 22-11-1950, *vide* Ex.E(1)1 and the recitals in the deed, was sufficient to show that Mst. Hakimunnissa was only a *benamidar* C of her husband.

It is common ground that the house in question, at one time, belonged to Abdul Motlib and he had rented it out to Abdul Karim, the original owner, Motlib, had mortgaged a part of this house to one Fakira Lal Sahu on 28-9-1947. Sahu filed a money suit against four persons (1) Abdul Karim; (2) Mst. Hakimunnissa (3) Bibi Khatoon and (4) Sh. Motlib *inter-alia* for the recovery of rent with interest D for the period, 21-3-1941 to 20-3-1942. The suit was partly decreed against Abdul Karim alone and was dismissed as against Hakimunnissa by the Munsiff on 1-3-1943 *vide* Exh.I-II. Abdul Karim's appeal against that decree was dismissed and the decree of the trial court with some modification, was maintained. Sahu then took out execution of his decree against the judgment-debtor, Abdul Karim. Mst. Hakimunnissa filed an application under s.47 (under 0.21, r.57,) E of the Code of Civil Procedure claiming that the attached house in plot 216 was her exclusive property and her husband had no right or interest in it. Her application was dismissed by the Munsiff on 22-11-1943 with the finding that Mst. Hakimunnissa was only a *benamidar* of the judgment debtor, Abdul Karim. Her appeal against that order was disallowed by the Appellate Court on 21-2-1944 *vide* Ex. 10.

F Mr. Desai very fairly conceded that this order, dated 22-11-1943, did not operate as *res judicata* because the Munsiff was not competent to decide the subsequent suit from which the present appeal has arisen; but he urged that this order had become final because no suit under Order 21, Rule 103 of the Code of Civil Procedure was filed by Mst. Hakimunnissa to establish her right, and, as such, this order, even if not conclusive, was a very efficacious and presumptive proof of the G fact that Mst. Hakimunnissa was merely a *benamidar* in respect of the house in dispute.

The contention is attractive but does not stand a close examination. It is to be borne in mind that Mst. Hakimunnissa died only a few months after the dismissal of her appeal, before the limitation for H filling the suit under Order 21, Rule 103 had run out. Assuming this evidence was admissible under s.13 of the Evidence Act, it was inconclusive and had been out-weighed by the other determinative circumstances and the preponderating probability that the purchase money came from Mst. Hakimunnissa and not from Abdul Karim.

The judgment Exh.E(1)-1 in the rent suit filed in 1949-50 by Abdul Karim against Sh. Mohd. Yakub with regard to a shop attached to the disputed house could not, as rightly observed by the High Court, be used against Mst. Hakimunnissa who was not a party to those proceedings.

Defendant No. 2 had also brought on the record some rent receipts and Municipal receipts, A(2)-II to A(5)--II. Ex. A-II stands in the name of Mst. Hakimunnissa. It evidences payment of platform tax by her to the Municipality. It is true that the date on it was not decipherable; but it was obvious that this document concerned the disputed house and related to a period when Mst. Hakimunnissa was alive. This evidence further strengthened the conclusion that Mst. Hakimunnissa in her life time, and, after her death, her daughter Bibi Hazra, were in enjoyment of and dealing with the house in dispute as owners thereof.

Keeping in view the totality of the circumstances and the probabilities of the case, we have no hesitation in holding that the plaintiffs-appellants had failed to prove that Mst. Hakimunnissa in whose name the sale-deed (Ex.D/1) stood, was not the real purchaser but only a *benamidar* of her husband.

In the result, we affirm the decision of the High Court and dismiss this appeal with costs.

S.B.W. *Appeal dismissed.*