

# THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Appellate Jurisdiction)

DATED : 7<sup>th</sup> March, 2022

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**SINGLE BENCH: THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE**

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RSA No.03 of 2018

**Appellant** : Ashok Kumar Subba

**versus**

**Respondents** : Bimal Kumar Jain & Another

Appeal under Section 100 of the  
Code of Civil Procedure, 1908

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**Appearance**

Mr. Sajal Sharma, Advocate for the Appellant.

Mr. S.S. Hamal, Advocate for the Respondent No.1.

Mr. Vivek Anand Basnett, Advocate (Legal Aid Counsel) for the  
Respondent No.2.

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## J U D G M E N T

Meenakshi Madan Rai, J.

**1.** In this Regular Second Appeal, the following substantial questions of law were formulated for determination;

- A. Whether a Court can pass a Decree declaring a party to be the absolute owner of the suit premises and give him right, title and interest over the same by virtue of a registered document which is an Agreement for Sale?*
- B. Whether the non-filing of a Written Statement by the Defendant No.1 to the Counter-Claim filed by the Defendant No.2 would constitute admission by the Defendant No.1?*
- C. Whether the prayer for declaration of title of the suit property in favour of the Plaintiff is barred by Limitation when the Plaintiff admits that a Sale Deed was executed and presented for registration more than five years before the date of filing of the original Suit?'*

**2.** At the outset, when the matter was taken up for hearing by this Court, Learned Counsel for all the parties in mutual agreement submitted that the only substantial question that was required for determination herein was "Question No.B" *supra*. In light of the said submissions, the discussions and decision of this Court shall hereafter be confined to the substantial question of law framed in "B" reflected *supra*.

**3.(i)** Learned Counsel Mr. Sajal Sharma opening his arguments for the Appellant submitted that the Appellant on being impleaded as a party to the Title Suit, as Defendant No.2, on his prayer, in his Written Statement and Counter-Claim averred that he was the absolute owner of the land which he had purchased and constructed a five and a half storeyed building which houses the suit property as well. That, the Defendant No.1-the Respondent No.2 (*herein*) had no independent income as established by the document, Annexure D2-1, her Affidavit, disclosing that she was a housewife and was thus not in a position to either purchase land or construct a building thereon. That, the Respondent No.2 failed to file any response to the Appellant's Counter-Claim and to deny his averments, she merely filed an Evidence-on-Affidavit in an attempt to establish that she was the owner of the land and building in which the suit property was housed. That, her lack of response to the Counter-Claim by way of written averments tantamounts to admission of the stand of the Appellant. Consequently, her Evidence-on-Affidavit in which she asserts that she is the absolute and rightful owner of the suit property is beyond the ambit of consideration by this Court. That apart, Learned Counsel sought to convince this Court that the Appellant for his part was a businessman with income accruing from his lottery business and other business sources. The lottery business admittedly, was registered in the joint names of the Appellant and the Respondent No.2. Counsel for the Appellant admitted that there is no paper trail of the income of the Appellant from any source or investments made by him to establish his financial ability to purchase the land and building claimed by him as *benami* property however, that in the absence of written averments by Respondent No.2

contradicting his stand, reliefs as sought by him in the Counter-Claim ought to be granted to him.

**(ii)** Learned Counsel Mr. S.S. Hamal, for the Respondent No.1, *per contra* contended that both the Courts below had come to a concurrent finding which brooks no interference in consideration of the failure of the Appellant to fortify his claims of ownership of the land and the building on it. It is his contention that the dispute between the Respondent No.2 and the Respondent No.1 had, in fact, already been settled when the Appellant sought to be impleaded as a party to the Title Suit at that juncture, claiming ownership of the suit property, sans documents of registration. That, it is an admitted fact that the entire building was registered in the name of the Respondent No.2 as also the land on which it stood, thereby indicating her ownership. She had sold the suit premises to Respondent No.1. That, although subsequently, a claim of the building being *benami* property was raised by the Appellant, he failed to prove this aspect in terms of Section 2 of the Prohibition of Benami Property Transactions Act, 1988, hence his case requires no consideration.

**(iii)** Learned Counsel for the Respondent No.2, while reiterating the submissions made by Learned Counsel for the Respondent No.1, contended that the claim of *benami* transaction raised by the Appellant is not buttressed by law. That, during the cross-examination of the Appellant, he had admitted that the Respondent No.2 took cash credit facility of above Rupees One Crore and that she alone had repaid the Loan taken for purchase of the land and construction of the building. In the face of such admission, nothing further remains for determination as the Appellant's source of income has not been divulged. That, to the

contrary, Exhibit D1-1 reveals the registration of a Firm "Golma Trading Agency" in the name of the Respondent No.2 and establishes the fact of her independent income. Exhibit D1-3 is the Trade License in her name and Exhibit D1-4 reveals that she was running a hotel in the said building, besides income accrued to her from the lottery business in which she was a 50% stakeholder, which has been admitted by the Appellant. Relying on the ratio of the Delhi High Court in ***Brij Prakash Gupta vs. Ashwini Kumar***<sup>1</sup>, Learned Counsel contended that where Evidence-on-Affidavit is filed without pleadings by one party, the objecting party has to put forth its objections in writing, this was not complied with by the Appellant. That, although in the Counter-Claim the Appellant avers that he purchased the entire building, however, strangely he sought for only a declaration that he is the absolute owner of the scheduled property which is a flat covering an area of 21 feet x 21 feet. That, as no documents have been filed to establish the income of the Appellant nor any documents exhibited to indicate his purchase of the suit property or his ownership of it, the Appeal deserves a dismissal.

**4.** The submissions of Learned Counsel for the parties were heard at length and considered. Pleadings, evidence as also all documents relied on by the parties and the impugned Judgment has been perused.

**5.(i)** The factual background of the dispute is that the *Respondent No.1 (hereinafter referred to as R-1)* in this Appeal, filed a Title Suit for Declaration, Injunction and Consequential Reliefs valued at Rs.10,000/- (Rupees ten thousand) only, being Title Suit No.412 of 2013, against the *Respondent No.2* herein, as the *Defendant No.1 (hereinafter referred to as R-2)* as also the

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<sup>1</sup> [2020 (209) AIC (Delhi High Court), dated 06.02.2020]

*United Bank of India, Gangtok Branch as the Defendant No.2; the Authorized Officer of the United Bank of India, Gangtok Branch as the Defendant No.3; and the District Magistrate, East, as the Defendant No.4.*

**(ii)** Before the Learned Trial Court, R-1 contended that R-2 had constructed a five storeyed RCC building on a plot of land measuring 0.05 acres in Gangtok. The suit premises measuring 21 feet x 21 feet situate in the building was sold to him, by R-2, for a consideration value of Rs.19,80,000/- (Rupees nineteen lakhs and eighty thousand) only. An Agreement for Sale, Exhibit 1, dated 27.03.2008 was drawn up between the R-1 and R-2 and duly registered before the Office of the Sub Registrar, Gangtok, East Sikkim, however, the Sale Deed document remained unregistered due to the File being misplaced in the said Office. From 2008 onwards, R-1 remained in continuous peaceful possession and enjoyment of the suit premises. On 14.03.2013, he learned that a Notice was served on R-2 by the Office of the Defendant No.4, under Section 13(2) of the SARFAESI Act, 2002. Pursuant thereto, Defendant No.3 served a Notice on R-2 informing her that the Defendant No.4 had advised them to take physical possession of the building, which she with her tenants was to vacate by 20.03.2013. R-1 claimed that as he had purchased the suit premises *bona fide*, hence the Notice issued under the SARFAESI Act, 2002, to R-2 was not applicable to him. His prayers in the Plaintiff *inter alia* sought a declaration that the Agreement of Sale, dated 27.03.2008 is a valid and legal Agreement, binding on the R-2 and the Appellant impleaded as Defendant No.2, in the Title Suit, vide an amended Plaintiff.

**(iii)** The R-2 filed her Written Statement denying and disputing the claims made by R-1. Her stand was that Exhibit 1 was only an Agreement for Sale and the property in question had not been sold outright. The entire amount of Rs.19,80,000/- (Rupees nineteen lakhs and eighty thousand) only, had not been paid by R-1 to her. She also made a Counter-Claim wherein she contended that R-1 was a non-Sikkimese and not permitted to purchase the suit property rendering Exhibit 1 a void document. That, consequently he was instead required to pay monthly rent at the rate of Rs.30,000/- (Rupees thirty thousand) only and enter into a fresh Tenancy Agreement. She *inter alia* prayed that Exhibit 1 be declared null and void.

**(iv)** The Appellant, impleaded as Defendant No.2, in the Title Suit, claimed to have purchased the land and constructed the building on it with income from his lottery business and was its owner. He denied the ownership of R-2 over the land and building and the suit property contending that she had no wherewithal to purchase the properties. According to him, Exhibit 1 was void as R-1, a non-Sikkimese, was prohibited from purchasing tribal land, the community to which the Appellant belonged. That, in the absence of a registered Sale Deed, R-1 was in illegal occupation of the suit premises. He also claimed to be the *karta* of his family thus R-2 could not have alienated the property without his consent. He thereby sought a Decree declaring him as the absolute owner of the Scheduled property and recovery of possession thereof with a Decree for eviction against R-1 from the Scheduled property.

**(v)** On the basis of the pleadings of the parties, the following Issues were settled for determination by the Learned Trial Court;

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- 1) *Whether the Defendant No.1 is the absolute owner of suit property being the purchaser of the same with her own monetary source?; (onus on defendant no.1)*
- 2) *Whether the document 'agreement for sale' dated 27.03.2008 between the plaintiff and defendant no.1 is null and void and against the law of the land?; (onus on defendant no.2)*
- 3) *Whether the suit property was purchased by defendant no.2 from his earnings in the Benami of his wife, def. no.1? (onus on defendant no.2);*
- 4) *Whether the defendant no.2 has locus standi to file the counter claim against the plaintiff with respect to the suit premises? (onus on defendant no.2)'*

**6.(i)** Issue No.3 was taken up first for convenience and the Learned Trial Court observed that the Appellant was unable to prove that the suit property was purchased by him from his earnings *benami* for the R-2. In Issue No.4, the Learned Trial Court observed that apart from the fact that the Appellant is the husband of R-2, there were no documents to indicate that he had purchased the land and constructed the five and a half storeyed RCC building thereon, this Issue was decided accordingly. In Issue No.1, the Learned Trial Court opined that the Appellant simply stating that he had purchased the property in the name of the R-2 would not suffice to establish his ownership as registered documents existed in the name of the R-2. For Issue No.2, while discussing Revenue Order No.1 of 1917, the Learned Trial Court observed that the Order provides that sale shall not be made of "*Bhutia, Lepcha*" land to any other community but did not include 'Tribal' in it. That, there was no illegality in Exhibit 1 conferring ownership on the R-1 neither was he barred from purchasing and holding the suit property, hence, the Issue stood decided against the Appellant. The Counter-Claim of the Appellant stood dismissed and R-1 was allowed the reliefs claimed.

**(ii)** The Appellant herein was also the Appellant before the Learned First Appellate Court, which agreed with the findings of the Learned Trial Court in all the Issues and concluded that there was

no infirmity, impropriety and illegality in the Judgment and Decree rendered by the Learned Trial Court, hence the instant Appeal.

**7.(i)** Taking up the substantial question of law "B" formulated for determination herein, in the first instance Order VIII Rule 6A of the CPC provides for filing of Counter-Claim by the Defendant, which the Appellant has done in the Title Suit. However, once this right has been exercised, it is the duty of the Defendant to produce documents upon which relief is claimed or relied upon by him as is evident from the provisions of law extracted hereinbelow. Order VIII Rule 1A(1) of the CPC reads as under;

**"1A. Duty of defendant to produce documents upon which relief is claimed or relied upon by him.—(1)** Where the defendant bases his defence upon a document or relies upon any document in his possession or power, in support of his defence or claim for set-off **or counter-claim**, he shall enter such document in a list, and shall produce it in Court when the written statement is presented by him and shall, at the same time, deliver the document and a copy thereof, to be filed with the written statement.

**(2)** .....

**(3)** .....

**(4)** ....."

Admittedly, the Appellant has filed no supporting documents of ownership although he has relied on documents Exhibit D2-1 to Exhibit D2-106, these are largely correspondence pertaining to the lottery business and accounts thereof which in no way indicate either his ownership over the disputed property, or his individual income or the specifics of the income from which the land and building was purchased by him. The Appellant, on the basis of a document which was not exhibited (*being Annexure D2-1*) would have this Court assume that R-2 had no ostensible means of an independent income, while in the same breath in his evidence admitting that the lottery business was registered in their joint names and income accrued to the business. This would lead to the

inevitable assumption as urged by Learned Counsel for the R-2 that she had an equal share in the proceeds of the business.

**(ii)** While addressing the argument of Learned Counsel for the Appellant that by non-filing of Written Statement by R-2 to the Counter-Claim of the Appellant, she has admitted the Appellant's averments, this Court is aware of the legal position that a Written Statement must deal specifically with each allegation of fact in the Plaint. When a Defendant denies any such fact, he cannot do so evasively but must respond to the allegation specifically. Should the denial of fact not be specific but evasive, the fact shall be taken to be admitted. The same rule applies in the case of an assertion made in a Counter-Claim and a denial in the Written Statement to the Counter-Claim as apparent from the provisions of Order VIII Rule 3 and Order VIII Rule 6G of the CPC. However, I hasten to add that it is also established law that the Plaintiff or the Defendant (*filing a Counter-Claim*) has to establish their own case by a preponderance of probability and cannot rely on the weaknesses of the case of the opposite party, his case must stand on its own strength. The Appellant has failed on this count.

**(iii)** It is an admitted fact that R-2 chose not to file a Written Statement to the Counter-Claim of the Appellant and thus did not comply with the mandate of law. It is also an admitted fact that the Appellant in support of his Written Statement and Counter-Claim filed Exhibit D2-1 to Exhibit D2-106. No reference whatsoever was made to these documents during the course of arguments before this Court. In any event, the Exhibits reveal that they are of no assistance to the Appellant even to establish a *prima facie* case. Annexure D2-1 being a document which the Appellant chose not to exhibit, cannot be relied on or considered by this

Court. The Appellant has filed no document to fortify his claim of purchase and ownership of the building and the land on which it stood. On this point, the Hon'ble Supreme Court in ***Union of India and Others vs. Vasavi Cooperative Housing Society Limited and Others***<sup>2</sup> held *inter alia* as follows;

**"19.** The legal position, therefore, is clear that the plaintiff in a suit for declaration of title and possession could succeed only on the strength of its own title and that could be done only by adducing sufficient evidence to discharge the onus on it, irrespective of the question whether the defendants have proved their case or not. We are of the view that even if the title set up by the defendants is found against (*sic* them), in the absence of establishment of the plaintiff's own title, the plaintiff must be non-suited."

(Emphasis supplied)

**(iv)** It would now be relevant to consider the consequence of non-filing of defence either by way of Written Statement to a Plaintiff or Written Statement to a Counter-Affidavit. In ***Modula India vs. Kamakshya Singh Deo***<sup>3</sup>, the Hon'ble Supreme Court was considering the nature and scope of the rights available to a Defendant whose "*defence has been struck out*" in the particular context of the West Bengal Tenancy Act, 1956. The consequences of non-filing of a Written Statement under the CPC was also considered. It was held *inter alia* as under;

**"19.** To us it appears that the basic principle that where a plaintiff comes to the court he must prove his case should not be whittled down even in a case where no defendant appears. It will at once be clear that to say that the court can only do this by looking at the plaintiff's evidence and pleadings supplemented by such questions as the court may consider necessary and to completely eliminate any type of assistance from the defendant in this task will place the court under a great handicap in discovering the truth or otherwise of the plaintiff's statements. For after all, the court on its own motion, can do very little to ascertain the truth or otherwise of the plaintiff's averments and it is only the opposite party that will be more familiar with the detailed facts of a particular case and that can assist the Court in pointing out defects, weaknesses, errors and inconsistencies of the plaintiff's case.

**20.** We, therefore, think that the defendant should be allowed his right of cross-examination and arguments. But we are equally clear that this right should be subject to certain important safeguards. The first of these is that the defendant cannot be allowed to lead his own evidence. ...."

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<sup>2</sup> AIR 2014 SC 937

<sup>3</sup> AIR 1989 SC 162

It was concluded *inter alia* as follows;

"24. ....the defendant, subject to the exercise of an appropriate discretion by the court on the facts of a particular case, would generally be entitled:

(a) to cross-examine the plaintiff's witnesses; and

(b) to address argument on the basis of the plaintiff's case.

**We would like to make it clear that the defendant would not be entitled to lead any evidence of his own nor can his cross-examination be permitted to travel beyond the very limited objective of pointing out the falsity or weaknesses of the plaintiff's case. In no circumstances should the cross-examination be permitted to travel beyond the legitimate scope and to convert itself virtually into a presentation of the defendant's case either directly or in the form of suggestions put to the plaintiff's witnesses.**

25. For reasons mentioned above, we allow the appeal and restore the suit before the trial Judge for being proceeded with in the light of the above conclusions. We direct that the costs of this appeal will form part of the costs in the suit and will abide by the result thereof."

(Emphasis supplied)

(v) Although R-2 failed to file her response to the Counter Claim of the Appellant however her defence was not struck down, there is no order for proceeding *ex parte* against her. The ratio above gives R-2 an indefeasible right to cross-examine the Appellant which was rightly exercised by her. However, in light of the limited scope provided to R-2 by the Judgment *supra* by virtue of which R-2 would not be entitled to lead any evidence of her own and is also required to limit her cross-examination to the extent of pointing out the falsity or weaknesses of the Appellant's case, we may now traverse the cross-examination of the Appellant while he deposed as Defendant No.2 in the Title Suit. He has admitted in his cross-examination conducted by Learned Counsel for the R-2 that, "*.....It is not a fact that there are no documents to show that I had purchased the suit property and constructed the building thereon. ....*" Pausing here for a moment, it is pertinent to reiterate that despite such a positive assertion in his cross-examination he was unable to garner his claim with documentary evidence. He further stated as follows;

*'.....It is true that nowhere in exbt-D2-201 have I mentioned about the reason for my having purchased and registered the suit property in the name of defendant no.1.*

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.....It is true that a lottery business run by me in the name and style of "Bindya Agency", the def. no.1 also had partnership of 50%. .....It is true that in exbt-D2-201, I have not mentioned as to from whom the suit land was purchased. .....It is true that in the year 2005 when the loan was availed from the Union Bank of India, the same was availed in the name of Def. no.1. I was a guarantor for the said loan. It is true that the loan was availed for the purpose of converting the RCC structure standing in the suit land into a hotel. .....It is true that the final settlement amount with the bank to avoid the property from being auctioned was not paid by me. **It is true that the loan amount amounting to almost 1.10 crores approximately was cleared by the def. no.1. Witness volunteers to say that def. no.1 had cleared the same by selling his property for which he had not given any consent. ....'**

(Emphasis supplied)

While admitting that R-2 paid off the entire loan towards which she sold his property, the Appellant led no evidence to indicate which property of his R-2 had sold off to make good the payment of the loan. He further stated as under,

".....It is true that a hotel by the name of 'Golmaheem' was registered in the name of def. no.1 as the sole proprietor and the same was being run by her which was subsequently leased out. ....**It is not a fact that I had not purchased suit land and constructed a five and half storied building solely out of my own earnings.** It is not a fact that the def. no.1 had an independent source of income and the suit land was purchased and subsequently the 5 and a half storied building was constructed by her. ...."

(Emphasis supplied)

Despite these categorical claims by the Appellant during cross-examination, it is reiterated that he had no document to buttress his claims of ownership, hence, even if the evidence of R-2 is to be blindsided by this Court in view of the ratio of the Hon'ble Supreme Court above, the Appellant has failed to establish even a *prima facie* case. The cross-examination conducted by R-2 has therefore demolished the stand of the Appellant in totality.

**8.** We may now relevantly refer to the provisions of the Benami Transactions (Prohibition) Amendment Act, 2016, in view of the assertion made by the Appellant in his Evidence-on-Affidavit that the purchase of the land was made *benami* by him and the building constructed by him which also included the property sold to the R-1. In this context, Section 2(9)(A)(a) and Section 2(9)(A)(b) of the Act reads as follows;

"2. *Definitions.*—.....

.....

(9) "*benami* transaction" means,—

(A) a transaction or an arrangement—

(a) where a property is transferred to, or is held by, a person, and the consideration for such property has been provided, or paid by, another person; and

(b) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration,

except when the property is held by—

Section 2(9)(A)(b)(iii) of the Act provides as follows;

".....

(iii) any person being an individual in the name of his spouse or in the name of any child of such individual and the consideration for such property has been provided or paid out of the known sources of the individual;

....."

The Appellant has not drawn the attention of the Learned Courts below or this Court to any document relied on by him to reveal a paper trail of his income and the subsequent transactions. In the absence of any documentary evidence, the mere statement of the Appellant that he was the purchaser of the property cannot be treated as gospel truth neither can the property be said to be *benami* in view of the nonfulfilment of the afore-extracted provisions of law.

9. What emanates from the entire discussions above is that the non-filing of a Written Statement by the R-2 (Defendant No.1) to the Counter-Claim filed by the Appellant (Defendant No.2) may be said to constitute an admission but she is permitted to demolish the case of the Appellant by way of cross-examination by pointing out the weaknesses or falsity of the Appellant's case and to that extent to defend her case as held in *Modula India supra* and which R-2 has done to her advantage herein. The substantial question of law is determined accordingly.

**10.** In conclusion, the concurrent findings of the Learned Trial Court and the Learned First Appellate Court brook no interference.

**11.** Appeal dismissed and disposed of.

**12.** Pending applications, if any, also stand disposed of.

**13.** No order as to costs.

**14.** Copy each of this Judgment be sent forthwith to the Learned First Appellate Court and the Learned Trial Court, for information.

**( Meenakshi Madan Rai )**

**Judge**  
07.03.2022