

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Judgment: 22.03.2011*

+ **RSA No.53/2011 & CM. Nos. 5887-88/2011**

MANOJ GUPTA Appellant
Through: Mr.P.N.Dham, Advocate.

Versus

MRS MANJU RANI & OTHERS. Respondents
Through: Nemo.

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

INDERMEET KAUR, J. (Oral)

1 This appeal has impugned the judgment and decree dated 28.01.2011 which had endorsed the findings of the trial Judge dated 23.02.2010 whereby the suit filed by the plaintiff Manoj Gupta seeking declaration to the effect that the sale deed dated 01.06.1984 registered on 02.06.1984 be declared null and void had been dismissed.

2 The contention of the plaintiff is that his great grandfather had purchased the property i.e. property bearing No. 13/99, Subzi Mandi, Bahadurgarh, Haryana against a sale consideration of Rs.5,000/- on 11.05.1943 which was duly registered. Dr. Mahabir Prasad who was the grandfather of the plaintiff represented himself to be the owner of the suit property and had sold it to

defendants No. 1 & 2 vide registered sale deed dated 01.06.1984.
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Contention is that this could not have been done as the plaintiff was the co-owner in the property and Dr. Mahabir Prasad could not sell this property vide the aforementioned document.

3 In the written statement, the defence was that the jurisdiction of the civil Court is barred; the provision of Section 4 of the Benami Transactions (Prohibition) Act, 1988 is attracted; the sale deed dated 11.05.1943 was in the name of Dr. Mahabir Prasad Gupta; he had every right to sell the property; present suit is not maintainable; limitation was also taken as a ground.

4 Trial Judge had framed three preliminary issues. They read as under:-

- “(i) Whether the present case is maintainable in the present form?*
- (ii) Whether this Hon’ble Court has the jurisdiction to entertain and try the present suit.*
- (iii) Whether this suit is barred by limitation?”*

5 Issues No. 1 & 3 were decided against the plaintiff and in favour of the defendants. On the question of jurisdiction, it was held that the issue requires evidence; it was left undecided; other issues were decided against the plaintiff.

6 The first appellate court while dismissing the suit has modified the findings. They read as under:-

“9. Before we proceed to examine whether the suit of the plaintiff was not maintainable in view of the provisions of Benami Transaction (Prohibition) Act, 1988 or that whether the Act is prospective in operation or not, I find it appropriate to consider the other two issues first. Ld. Trial Court while deciding preliminary issue No. 3 has held that suit of the plaintiff is barred by limitation as such suit was inter alia dismissed on the question of limitation whereas the question of limitation is a mixed question of law and fact and thus on this aspect suit cannot be held to be barred by limitation without taking evidence.

10. Now, taking up the question as to the maintainability of the suit. The Ld. Counsel for the appellant has relied upon the judgments of Hon’ble Supreme Court Virjlal J. Ganatra Vs. Heirs of Parshottam S. Shah reported in 1996 (1) Apex Court Journal 399 (SC) wherein the Hon’ble Supreme Court has held that the Section 4 of Benami Transaction (Prohibition) Act, 1988 is applicable

prospectively. It has been contended by the Ld. Counsel for the appellant that the Id. Trial Court has erred in law by holding that suit of the plaintiff was barred under the provisions of Section 4 of the Benami Transaction (Prohibition) Act). Since the sale deed in question was executed in the year 1984 and as per the pronouncement of Hon'ble Supreme Court in Viraj Lal J. Gantara' case (supra) Act of 1988 has no application on present suit. It was contended that finding of trial court that Act applies retrospectively is not legally correct in view of catena of judgments of Apex Court on this issue.

11. On the other hand, it has been contended on behalf of the Ld counsel for the respondent that the provisions of Section 4 of the Benami Transaction Act 1988 would not be applicable prospectively in the pending cases but whether a fresh suit has been brought or the defence in respect of Benami Transaction is to be taken then the same is barred.

12. It appears that in 1989 in Mithilesh Kumari v. Prem Behari Khare AIR 1989 SC 1247 Apex court has held that "Benami Transactions (prohibition) Act 1988", by Appellate Court & suit would not be maintainable in view of retroactive operation of Act. However Above Padmini Chandrasekharan AIR 1966 SC 238 when it was held that provisions of Benami Transactions (prohibition) Act are not retrospective & suit on behalf of person claiming to be real owner of property to enforce right against property held benami prior to coming into force of S.4(1). There after this legal position was reaffirmed in Probodh Chandra Ghosh v. Urmila Dassi AIR 2000 SC 2534. However in facts of these judgments it was noted that suit was already pending when Act of 1988 was enacted & it was held that Act is prospective in 19-5-1988....."

13. In view of the aforesaid judgment, it becomes clear that any suit with claim of right inhering in the real owner in respect of any property held benami would not be enforceable after the enactment of the Act of 1988 even if such transaction had been entered into prior to 19-5-1988 (date of enactment of Act) and no suit could be filed on the basis of such a plea after 19-5-88. Expression "perspective operation" of the Act in this context means that in case any suit to enforce the right in the property held benami if pending, prior to the Act but in case any suit brought after the enactment of period prior to the enactment of Act will not be entertainable on account of the fact that law has come into being prohibiting the enforcement of any right in benami property.

14. In present case suit was filed year 2009 though in respect of transaction/sale deed dt. 1-06-84, which is pertaining to period prior to enactment of Benami Transaction (Prohibition) Act, 1988 but since suit is filed after Act came into force, therefore, in the light of the aforesaid judgment, I find no hesitation to hold that the Ld. Trial Court was correct in holding in the facts of the case that the provisions of Section 4 of Benami Transaction (Prohibition) Act applies to the present facts of the case and the sale deed in favour of Sh. Mahabir Prasad Gupta qua the title of the suit property cannot be challenged by way of the present suit and thus, the suit of the plaintiff is not maintainable in view of Section 4 of the Benami Transaction (Prohibition) Act, 1988.

15. In view of the discussion made herein above on the issue No. 1 that the

suit of the plaintiff is barred under the provisions of Section 4 of the Benami Transaction (Prohibition) Act. I find that Ld. Trial Court correctly took the view and rightly dismissed the suit of the appellant on this ground. Accordingly, the result of the aforesaid discussion is that the present appeal stands dismissed warranting no interference of the orders of the Ld. Trial Court of dismissing the suit of the plaintiff. Consequently, the present appeal has not merits and is hereby dismissed. There shall be no orders as to cost."

7 This finding does not call for any interference. The Court had rightly held that the provisions of Section 4 of the Benami Transaction (Prohibition) Act, 1988 are attracted. Relevant would it be to quote the said provision. It reads as under:-

"4. Prohibition of the right to recover property held benami. -

(1) No suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property.

(2) XXXXXXXXXXXX

(3) Nothing in this section shall apply. -

(a) Where the person in whose name the property is held is a coparcener in a Hindu undivided family and the property is held for the benefit of the coparceners in the family; or

(b) Where the person in whose name the property is held is a trustee or other person standing in a fiduciary capacity, and the property is held for the benefit of another person for whom he is a trustee or towards whom he stands in such capacity."

8 Contention of the appellant is that his case comes under the exception of Section 4(3)(a). This submission is without any force. This has neither been urged nor pleaded anywhere in the plaint. It has not been the case of the plaintiff that he is a coparcener in a Hindu undivided family and as such provisions of Section 4 are not attracted. Admittedly the sale deed dated 11.05.1943 was in the name of grandfather of the plaintiff i.e. Dr. Mahabir Prasad. He had executed a registered sale deed dated 01.06.1984 in favour of defendants No. 1 & 2. Present suit seeking declaration that the

said sale deed dated 01.06.1984 is null and void was clearly not maintainable and rightly held by the courts below.

9 This is a second appeal. Substantial questions of law have been embodied at page 16 of the memo of appeal. They read as under:-

1. *Whether Section 4 of the Benami Transaction (Prohibition) Act, 1988 is applicable in the present case wherein the appellant has alleged in the para 1 to 3 of the civil suit No. 284/2009 that the property in question was purchased by grate grandfather for the appellant in the name of his son Dr. Mahavir Pershad Gupta in the year 1943 which has been denied by the respondent in para 2 of the written statement but admitted that grate grandfather Sh. Chander Bhan only appeared before Sub-Registrar concerned for payment of consideration amount on behalf of Dr. Mahavir Pershad Gupta which was duly recorded by the Registrar by making endorsement in the sale deed that Shri Chander Bhan appeared and made the payment.*
2. *Whether section 4 of the Benami Transaction (Prohibition) Act, 1988 is applicable and can be decided as preliminary issue without leading evidence by the parties.*
3. *Whether Section 4 of the Benami Transaction (Prohibition) Act, 1988 assertions must be proved by the respondent who has alleges benami in the written statement and cannot be decided without leading evidence and as such the suit cannot be dismissed on preliminary issue at preliminary stage.*

10 No such substantial question of law has arisen. There is no merit in this appeal. Appeal as also pending applications are dismissed in limine.

INDERMEET KAUR, J.

MARCH 22, 2011

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