

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

RSA No.2188 of 2016(O&M)

Date of decision:23.5.2016

Jawahar Singh and others

....Appellants

VERSUS

Tejinder Singh and others

.....Respondents

CORAM: HON'BLE MRS. JUSTICE REKHA MITTAL

1. Whether reporters of local newspapers may be allowed to see judgment?
2. To be referred to reporters or not?
3. Whether the judgment should be reported in the Digest?

Present: Mr. M.L. Saggar, Senior Advocate with
Mr. Rohit Joshi, Advocate for the appellants.

REKHA MITTAL, J.

The present appeal has been directed against the consistent findings recorded by the Courts below whereby suit filed by the appellants was dismissed vide judgment and decree dated 09.10.2013 passed by the Civil Judge (Junior Division), Chandigarh and the appeal preferred by the unsuccessful plaintiffs came to be dismissed by the Additional District Judge, Chandigarh vide judgment and decree dated 23.10.2015.

Jawahar Singh and Baldev Kaur filed a suit for declaration that they are the real owners of 20% share in site No.373, Sector 37-D, Chandigarh and the building constructed thereon which was purchased by the plaintiffs in an auction held on 21.02.1983 and stands in the name of defendant No.1 as benami owner in the record of the Estate Office, Chandigarh. Further relief has been sought to restrain defendant No.2 against issuance of no objection certificate for transfer of 20% share by

defendant No.1 and restraint against defendant No.3 from registering the deed of transfer to be presented by defendant No.1 and defendant No.1 to be restrained from transferring, mortgaging, collecting rent of 20% share of the property in dispute.

On due consideration of pleadings of the parties, issues framed for determination, evidence adduced on record and rival submissions made by counsel for the parties, the learned trial Court rejected claim of the appellants/plaintiffs primarily on the ground that the suit is barred by Section 4 of the Benami Transactions (Prohibition) Act, 1988 (in short 'the Act'). As has been noticed hereinbefore, the findings recorded by the trial Court have been affirmed in appeal on material aspects of the case without any variance.

Counsel for the appellants has assailed the judgments passed by the Courts below by making two-fold submissions. The first contention raised by counsel is that as the transaction in question pertains to the year 1987 before the Act came into force, the said Act having not been given retrospective operation, the provisions of the Act would not debar the appellants to claim that the transaction in question qua share of respondent No.1 is a benami one. In support of his contention, he has referred to judgment of Hon'ble the Supreme Court of India R. Rajagopal Reddy (dead) by LRs and others Vs. Padmini Chandrasekharan (dead) by LRs, AIR 1996 SC 238.

Another submission made by counsel, in the alternative, is that the transaction in question is not hit by provisions of Section 4 of the Act in view of the provisions of sub-Section (3)(b) thereof. It is argued with vehemence that the Courts below have failed to interpret the

provisions of the Act in right perspective and as a result fallen into serious error in law by rejecting claim of the appellants.

I have heard counsel for the appellants, perused the paper-book particularly the judgments passed by the Courts below.

Before dealing with the submissions made by counsel for the appellants, it may be pertinent to take note of the provisions of Section 4 of the Act, germane to the controversy, reads as follows:-

“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) No defence based on any right in respect of any property held benami, whether against the person in whose name the property is held or against any other person, shall be allowed in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property.

(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.”

The provisions of Section 3, 5 and 8 of the Act came into force w.e.f. 05.09.1988 and the remaining provisions came into force on 19th day of May, 1988. Indisputably, the transaction in question pertains to the year 1987 and thus relates to the period before the Act came into force.

The matter with regard to retroactivity of the Act to benami transactions came for adjudication before Hon’ble the Supreme Court in Mithilesh Kumari Vs. Prem Behari Khare, AIR 1989 SC 1247. Hon’ble

the Apex Court in para 22 of the judgment has held that Section 4 clearly provides that 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 real owner of such property. This naturally relates to past transactions as well. It has further been held that in its sweep, Section 4 envisages past benami transactions also within its retroactivity.

The matter again came up for consideration before the Apex Court in R. Rajagopal Reddy's case (supra) decided on 31.01.1995. In this case, the Court reconsidered the judgment in Mithilesh Kumari's case (supra) wherein the Apex Court has held that though Section 4(1) is not expressly made retrospective by the legislature, by necessary implication, it appears to be retrospective and would apply to all pending proceedings wherein right to property allegedly held benami is in dispute between the parties and that Section 4(1) will apply at whatever stage the litigation might be pending in the hierarchy of the proceedings. Hon'ble the Supreme Court held that the view taken that Section 4(1) would apply even to such pending suits which were already filed and entertained prior to the date when the Section came into force and which has the effect of destroying the then existing right of the plaintiff in connection with the suit property cannot be sustained in the face of the clear language of Section 4(1). It has to be visualized that the legislature in its wisdom has not expressly made Section 4 retrospective. Then to imply by necessary implication that Section 4 would have retrospective effect and would cover pending litigations filed prior to coming into force of the Section would amount to taking a view which would run counter to the legislative scheme and intent

projected by various provisions of the Act to which they have referred earlier. It is, however, true as held by the Division Bench that on the express language of Section 4(1) any right inhering in the real owner in respect of any property held benami would get effected once Section 4(1) operated, even if such transaction had been entered into prior to the coming into operation of Section 4(1), and hence after Section 4(1) applied, no suit can lie in respect to such a past benami transaction. To that extent the Section can be retroactive. To highlight this aspect, the Court has given an illustration. If a benami transaction has taken place in 1980 and a suit is filed in June, 1988 by the plaintiff claiming that he is the real owner of the property and defendant is merely a benamidar and the consideration has flown from him then such a suit would not lie on account of the provisions of Section 4(1).

No doubt, the judgment in R. Rajagopal Reddy's case (supra) has saved the litigation initiated before the Act came into operation from retrospective operation of the Act but it has not saved the benami transactions which had already taken place but were sought to be challenged after the Act came into operation. In this context, reference to the observations made by the Court in para 11 in R. Rajagopal Reddy's case (supra) is pertinent:-

“Bar against filing, entertaining and admission of such suits would have become operative by June, 1988 and to that extent Section 4 (1) would take in its sweep even past benami transactions which are sought to be litigated upon after coming into force of the prohibitory provision of Section 4(1); but that is the only effect of the retroactivity of Section 4(1) and nothing more than that. From the conclusion that Section 4 (1) shall apply even to past benami transactions to the aforesaid extent, the next step taken by the Division Bench that therefore, the then existing rights got destroyed and even though suits by real owners were filed

prior to coming into operation of Section 4 (1) they would not survive, does not logically follow.”

In the case at hand, the suit to challenge the alleged benami transaction of 1987 was instituted in the year 2005. Keeping in view the enunciation of law laid down in R. Rajagopal Reddy's case (supra), the appellants cannot escape from bar/prohibition created under the Act by taking recourse to what has been held by Hon'ble the Supreme Court. Counsel for the appellants referred to the judgment of Hon'ble the Supreme Court in R. Rajagopal Reddy' case (supra) without clearly understanding the ratio laid therein. In this view of the matter, the appellants cannot derive any advantage to their contention from the aforesaid judgment to contend that as the transaction in question pertains to the period prior to the Act came into operation, the same would not be hit by the provisions of Section 4 thereof.

This brings the Court to the second contention that the transaction in question is saved by sub-Section (3)(b) of Section 4 of the Act, the plea of the appellants is misconceived and merits outright rejection. The Courts below, on a detailed consideration of the matter, have rightly refused to accept plea of the appellants that Tejinder Singh-respondent is either holding the property as a trustee of the appellants or he stands in a fiduciary capacity vis-à-vis the appellants in order to accept the plea that the transaction in question falls within the purview and ambit of clause (b) of sub-Section (3) of Section 4 of the Act that is in the nature of a proviso to Section 4. Counsel for the appellants is not in a position to make any substantial argument as to how respondent No.1 who is admittedly nephew of appellant No.1 can be said to have any fiduciary

relationship with the appellants. Analyzed from any angle, I do not find any error much less illegality in the concurrent findings recorded by the Courts below when otherwise no question of law much less a substantial one arises for adjudication.

For the foregoing reasons, the appeal fails and is accordingly dismissed in *limine*.

MAY 23, 2016
'D. Gulati'

(REKHA MITTAL)
JUDGE