IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 749 OF 2015
ALONGWITH
CIVIL APPLICATION NO. 1428 OF 2015

Shri Joseph Isharat ...Appellant
vs.
Mrs.Rozy Nishikant Gaikwad ...Respondent

Mr.Mohan Pungliya I/b. Abhishek Pungliya for Appellant.
Mr.Anil V. Anturkar, Senior Advocate with Abhay A. Anturkar I/b. Rushkesh Chandrashekhar Barge-Patil for Respondent.

CORAM : S.C. GUPTE, J.

1 MARCH 2017

(ORAL JUDGMENT) :

The second appeal challenges a judgment and order passed by the District Court at Pune in Civil Appeal No.10/2013. By the impugned judgment and order, the learned District Judge dismissed the civil appeal and confirmed the decree passed by the court of Civil Judge, Senior Division, Pune in the Respondent's suit directing the Appellant to hand over vacant and peaceful possession of the suit property to the Respondent and permanently restraining the Appellant from preventing the Respondent from entering the suit property and ordering an inquiry as to mesne profits.

2 In 1965, the Appellant (original Defendant) married a widow, who had three children from her first marriage, including the Respondent (original Plaintiff). The Plaintiff was then about 3 to 4 years old. It is the case of the Defendant that he brought up all three children, including the Plaintiff, educated them and settled them in life as his own children. The Plaintiff was trained as a nurse and worked in Delhi and thereafter, in

Saudi Arabia. She was married on 24 August 1988 with one Deepak Ghoderao, but that marriage turned out to be a bigamous marriage of the said Ghoderao and as such null and void. After a protracted litigation before a civil court as well as church authorities at Pune and Mumbai, the marriage was declared as null and void by the church authorities. It is the case of the Defendant that he purchased a property at Pimple Gurav (Dapodi) at Pune for himself with his own money but in the name of the Plaintiff. It is submitted that this property was sold by the Defendant sometime in 1996 and sum of Rs.1,10,000/- was received by the Defendant. It is submitted that in 1992, another piece of land, namely, the suit property, was purchased by the Defendant with his own money in the name of the Plaintiff. It is submitted that the documents of title were always remained with the Defendant; taxes in respect of the suit property were throughout paid by the Defendant; and the possession of the suit property always remained with the Defendant, who had been exercising all rights of ownership in respect of thereof. It is submitted that on 10 November 1995, in view of the Plaintiff's proposed marriage on 17 November 1995, the Plaintiff executed a memorandum of understanding with the Defendant acknowledging that the entire consideration of the suit property was paid by the Defendant and that he had the exclusive right to use and occupy the suit property. By this writing, the Plaintiff undertook not to raise any objection, complaint or impediment in respect of the Defendant's right over the suit property. It is submitted that the Plaintiff also executed a power of attorney after her marriage in favour of the Defendant, giving him the sole power to sell or dispose of both properties standing in her name, including the suit property. It is submitted that after the Plaintiff's return from Saudi Arabia, she raised a dispute about the suit property and claimed ownership thereof. After filing of a police complaint in that behalf, the Plaintiff filed the present suit claiming possession of the suit property and perpetual injunction against the Defendant in respect thereof. The trial court decreed the Plaintiff's suit by ordering delivery of possession and perpetual injunction against the Defendant. This order was confirmed in appeal by the District Court at Pune. Being aggrieved, the Defendant has come before this court in the present second appeal.

3 Mr.Pungalia, learned Counsel for the Appellant, makes the following submissions in support of the appeal:

(a) It is submitted that the applicable provisions of law concerning the Defendant's plea of purchase made nominally in the name of the Plaintiff are those that are contained in Benami Transactions (Prohibition) Act, 1988 ("Benami Act") as amended by the Benami Transactions (Prohibition) Amendment Act, 2016. Learned Counsel submits that second appeal is a continuation of the original lis between the parties by way of suit and that the prohibition contained in the Benami Act in respect of any defence on the plea that the property was held benami, shall be in accordance with the law that is applicable as on the date of hearing of the second appeal. It is submitted that the definition of "benami transaction" governing the case would be the amended definition contained in the Benami Act. It is submitted that under this definition, any property which is held by a person, being an individual, in the name of his spouse or child is excepted from the definition of "benami transaction" contained in sub-section (9) of Section 2 of the Amended Act, provided the consideration for such property has been provided or paid out of the known sources of the individual. It is submitted that this condition is satisfied by the Appellant in the present case. It is submitted that the word or expression "child", not having been defined in the Benami Act but defined in the Income Tax Act, 1961, shall have the meaning assigned to it under the latter Act. It is submitted that going by that meaning, even a step-child of an individual is included within the definition of “child”. It is submitted, accordingly, that the Plaintiff as a step-daughter of the Defendant comes within the definition of “child” and the purchase of the suit property by the Defendant in her name is not covered within the definition of “benami transaction” and thus, the plea that the right to the suit property vests in the Defendant for whose benefit the same is held by the Plaintiff, is open to the Defendant in the present suit.

(b) In the alternative, it is submitted that even under the Benami Act, as it stood prior to the Amending Act of 2016, the Plaintiff comes within the expression “unmarried daughter” referred to in clause (a) of sub-section (2) of Section 3 of the Act and the prohibition against entering into of a benami transaction does not apply to the suit transaction.

4 Under the Benami Act, as it stood on the date of the suit as well as on the date of filing of written statement and passing of the decree by the courts below, provided for the definition of a “benami transaction” under clause (a) of Section 2. Under that provision, any transaction in which property is transferred to one person for consideration paid or provided by another came within the definition of “benami transaction”. Section 3 of the Benami Act, in sub-section (1), provided that no person shall enter into any benami transaction. Sub-section (2) contained two exceptions to the prohibition contained in sub-section (1). The first exception, contained in clause (a) of sub-section (2), was in respect of purchase of property by any person in the name of his wife or unmarried

daughter. In the case of such purchase, it was to be presumed, unless the contrary was proved, that the property was purchased for the benefit of the wife or unmarried daughter, as the case may be. Simultaneously, Section 4 of the Benami Act contained a prohibition in respect of right to recover property held benami. Sub-section (1) provided 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 the real owner of such property. Sub-section (2) made provisions likewise in respect of a defence based on a plea of benami transaction. Sub-section (2) provided that 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. There was a twofold exception to this restriction. First was in respect of the person in whose name the property is held being a coparcener in a Hindu undivided family and the property being held for the benefit of the coparceners of the family. The second exception was in respect of the person, in whose name the property was held, being a trustee or other person standing in a fiduciary capacity and the property being held for the benefit of another person for whom he was such trustee or towards whom he stood in such capacity. The present suit was filed when these provisions were in operation. These provisions continued to apply even when the written statement was filed by the Defendant and the suit was heard and decreed by both the courts below. The legal provisions continued to apply even when the second appeal was filed before this court. It is only now during the pendency of the second appeal, when it has come up for final hearing, that there is a change in law. The Benami Act has been amended by the Parliament in 2016 with the passing of the Benami Transactions (Prohibition) Amendment Act, 2016. This amendment has come into effect from 01 November 2016. In the Amended Act the definition of “benami transaction” has undergone a change. Under the Amended Act “benami transaction” means (under Section 2(9) of the Act) a transaction or an arrangement 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 the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration. There are four exceptions to this rule. The first is in respect of a karta or a member of a Hindu undivided family holding the property for the benefit of the family. The second exception is in respect of a person standing in a fiduciary capacity holding the property for the benefit of another person towards whom he stands in such capacity. The third exception is in the case of an individual who purchases the property in the name of his spouse or child, the consideration being provided or paid out of the known sources of the individual. The fourth exception is in the case of purchase of property in the name of brother or sister or lineal ascendant or descendant where the names of such brother or sister or lineal ascendant or descendant, as the case may be, and the individual appear as joint owners in any document. Sub-section (1) of Section 3 contains the very same prohibition as under the unamended Act, in that it prohibits all benami transactions. Section 4 likewise prohibits suits, claims or actions or defences based on the plea of benami as in the case of the unamended Act. The submission is that under this scheme of law, step-daughter not having been defined under the Benami Act, but having been defined under the Income Tax Act, 1961, by virtue of sub-section (31) of Section 2 of the amended Benami Act, the meaning of the expression will be the one assigned to it under the Income

Tax Act. The definition of daughter under the Income Tax Act admits of a step-child within it. It is submitted that under the amended definition of "benami transaction", thus, there is a clear exception in respect of a purchase made in the name of a step-daughter by an individual provided, of course, the consideration has been provided or paid out of known sources of the individual.

5 The central question before the court in this behalf is, whether or not these amended provisions apply to the suit transaction, the suit transaction itself having been executed prior to the amendment and the suit also having been filed and defence raised as well as the suit decreed by the courts below before the amended act was introduced.

6 Mr.Pungalia submits that it is the duty of the court, whether it is trying original proceedings or hearing an appeal therefrom, to take notice of the change in law pending the action and to give effect to the same. It is submitted that when a legislature says no suit would be "entertained" or "instituted" or no defence shall be "raised", any change in law may not affect pending actions and there may be a case of only a prospective application of such change in law. It is submitted, however, that if the law provides that after the commencement, no suit shall be "disposed of", or no decree shall be "passed", or no defence shall be "allowed", as the expressions in Section 4 of the Benami Act provide, the change in law applies even to pending proceedings and must be taken judicial notice of by civil courts. Learned Counsel relies on the Supreme Court decision in the case of **United Bank of India, Calcutta vs. Abhijit Tea Co.Pvt.Ltd.**[1] Learned Counsel also relies on the Supreme Court

1 **(2000) 7 SCC 357**

judgment in the case of **Dayawati vs. Inderjit**[2] and submits that laws affecting matters of procedure have always been retrospective. But that does not mean that there was an absolute rule of inviolability of substantive rights. It is submitted that if the new law speaks in a language, which, expressly or by clear intendment, applies to pending matters, the trial court as well as the court of appeal must have regard to the intention so expressed and give effect to such law even after the judgment of the court of first instance. To the same effect, learned Counsel submits, are the observations of the Supreme Court in the case of **Laxmi Narayan Guin vs. Niranjan Modak**[3]**.**

7 What is crucial here is, in the first place, whether the change effected by the legislature in the Benami Act is a matter of procedure or is it a matter of substantial rights between the parties. If it is merely a procedural law, then, of course, procedure applicable as on the date of hearing may be relevant. If, on the other hand, it is a matter of substantive rights, then *prima facie* it will only have a prospective application unless the amended law speaks in a language "*which expressly or by clear intention, takes in even pending matters.*". Short of such intendment, the law shall be applied prospectively and not retrospectively.

8 As held by the Supreme Court in the case of **R.Rajagopal Reddy vs. Padmini Chandrasekharan**[4]**,** Section 4 of the Benami Act, or for that matter, the Benami Act as a whole, creates substantive rights in favour of benamidars and destroys substantive rights of real owners who are parties to such transaction and for whom new liabilities are created

2 **AIR 1966 SC 1423 (V 53 C 277)**
3 **AIR 1985 SC 111**
4 **(1995) 2 SCC 630**

under the Act. Merely because it uses the word "it is declared", the Act is not a piece of declaratory or curative legislation. If one has regard to the substance of the law rather than to its form, it is quite clear, as noted by the Supreme Court in **R.Rajagopal Reddy**, that the Benami Act affects substantive rights and cannot be regarded as having a retrospective operation. The Supreme Court in **R.Rajagopal Reddy** also held that since the law nullifies the defences available to the real owners in recovering the properties held benami, the law must apply irrespective of the time of the benami transaction and that the expression "shall lie" in Section 4(1) or "shall be allowed" in Section 4(2) are prospective and apply to the present (future stages) as well as future suits, claims and actions only. These observations clearly hold the field even as regards the present amendment to the Benami Act. The amendments introduced by the Legislature affect substantive rights of the parties and must be applied prospectively.

9 That brings us to the alternative submission made by Mr.Pungalia. It is submitted that even under the law as it stood prior to its amendment in 2016, the Plaintiff being an unmarried daughter of the Defendant, the purchase made by the Defendant in her name is excepted from the prohibition of benami transactions within the meaning of Section 3 of the Benami Act, as it then stood. This argument has two aspects. One, whether the Plaintiff was married as on the date of the suit transaction, that is to say, as on the date of the purchase of the suit property, her marriage with Ghoderao being null and void and *non-est* on account of Ghoderao being already married. And second, as far as the expression "daughter" is concerned, whether a step-daughter is included in it independent of the definition "child" in the Income Tax Act, 1961 (since that was not the mandate of the law at the relevant date). Though the first

point is debatable, I am willing to concede that the Plaintiff was not married on the date of the purchase by the Defendant. The real difficulty arises on the second aspect. What we have to consider here is, whether the expression “daughter” as understood by the Benami Act, as it then stood, takes within its sweep a step-child. By ordinary connotation, and also having regard to the provisions of the Benami Act and applying the rule of purposive interpretation, the expression would ordinarily take within its fold only a natural born daughter as also an adopted daughter. There is no scope for including a step-daughter within its meaning. It is not in dispute that the Plaintiff did not qualify either as a natural daughter or an adopted daughter of the Defendant.

10 Mr.Pungalia, however, refers to the definition of 'daughter' in Black’s Law Dictionary. He also relies on a decision in the case of **Murphy vs. Ingram**[5] and a Division Bench of our court in the case of **Shaikh Ahmed Shaikh Mohamed Ashraf vs. Bai Fatma**[6]**.** Black’s Law Dictionary defines “daughter” as a parent's female child; female child in a parent-child relationship. This decision would take within its hold only natural born or adoptive daughter. The decision of **Murphy vs. Ingram** has no bearing on the controversy before us. In that case, the court was construing the expression “child” in Section 212(4) of the (English) Income Tax Act, **1952**. The question before the court was whether after her marriage, the daughter ceased to be a child for the purposes of Section 212(4) of that Act. The court held that a married daughter did not cease to be a child. To the same effect is the decision in the case of **Shaikh Ahmed Shaikh Mohamed Ashraf.** Here the question was whether the expression “child” used in Section 488 of the Criminal Procedure Code has anything to do

5 **1973 1 Ch. Page 434**

6 **AIR (30) 1973 Bom.48**

with the age of the child. The court held that the expression "child" may be used sometime in a context which would suggest that the expression refers to a young child. Where the word "child", however, is used with reference to parentage, it means descendant of the first degree, a son or a daughter, and has no reference to age. None of these judgments has any bearing on the controversy before us. The controversy before us is whether or not the step-daughter is included in the expression "daughter" in Section 3 of the Benami Act, as it stood prior to its amendment. The answer, we have noted above, is clearly in the negative.

11 In the view that I have taken, there is no need to consider the further question as to whether the Defendant, in the present case, has proved the source of his income through which the consideration is paid for the suit property. The whole edifice of the Defendant's argument is based on the retrospective applicability of the Amended Act or the expression "daughter" even otherwise including a 'step-daughter'. Since this very foundation is untenable, the edifice must fall.

12 Learned Counsel alternatively submits that this parent-child relationship at least conveys a fiduciary relationship between the Defendant and the Plaintiff bringing the suit transaction within clause (b) of sub-section (3) of Section 4 of the Benami Act as it then stood. Learned Counsel submits that this aspect of the matter was not considered by either of the courts below. In the first place, it is pertinent to note that it was not the case of the Defendant in his written statement or even in his appeal before the lower appellate court that there was any fiduciary relationship coming within clause (b) of Section 4(3) of the Benami Act between the parties. But more importantly, the averments, such as they were in the

written statement, may at the most suggest that it was the Defendant who held such position of trust or fiduciary capacity. It cannot be suggested that the Plaintiff was either a trustee or a person standing in a fiduciary capacity, *vis-a-vis* the Defendant, holding the property for the benefit of the Defendant. There is, accordingly, no merit whatsoever in this contention.

13 In the premises, there is no merit in the appeal. The second appeal is, accordingly, dismissed. No order as to costs.

14 On the application of learned Counsel for the Appellant, the ad-interim relief granted by this court in favour of the Appellant on 16 September 2015 is continued for a period of four weeks.

15 In view of the disposal of the appeal, the civil application does not survive and the same is also disposed of.

(S.C. GUPTE, J.)