

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 13.02.2020

Date of Verdict : 02.06.2020

CORAM

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

S.A.No.1447 of 2005 and
CMP.No.18904 of 2005

M.MuthuvelAppellant/5th defendant
Vs.
1. Mangayarkarasi (deceased)
2. Varalakshmi
3. RukmaniRespondents1 to3/Plaintiffs
4. Sujatha
5.Vinoth
6.Minor Prabhu,
S/o.Late P.ViswanathanRespondents4 to 6/
rep. by Court guardian Defendants 2 to 4
Smt.Vijayakumari, Advocate,
122, Addl. Law Chambers,
High Court, Chennai 600 104Respondents
(RR2 to 6 recorded as LR's of the
deceased R1 vide order of court
dated 14.12.2011 and 06.11.2013
made in SA.No.1447 of 2005 &
CMP.No.18904 of 2005 &
UCMP.No.1 of 2011, memo
presented in court dated 14.12.2011 and
memo in USR.No.7034 dated 29.10.2011)

Prayer :- This Second Appeal is filed under Section 100 of Civil Procedure Code against the judgment and decree dated 11.08.2003, in A.S.No.211 of 1999 on the file of the VII Additional City Civil Judge, Chennai confirming the judgment and decree dated 17.09.1998 in O.S.No.9369 of 1989 on the file of the I Assistant City Civil Court, Chennai.

For Appellant : Mr.S.Y.Masood
For Respondents
For R2 & R3 : Mr.C.T.Mohan
R1 : Died
R6 : Notice served
R4 & R5 : Not ready in notice

JUDGMENT

This second appeal is directed as against the judgment and decree dated 11.08.2003, in A.S.No.211 of 1999 on the file of the VII Additional City Civil Judge, Chennai confirming the judgment and decree dated 17.09.1998 in O.S.No.9369 of 1989 on the file of the I Assistant City Civil Court, Chennai.

2. For the sake of convenience, the parties are referred to as per their rankings in the trial Court.

3. The case of the plaintiffs in brief is as follows :-

3.1 The suit is filed for partition and injunction. The first plaintiff is the mother of the deceased P.Viswanathan and the second and third plaintiffs are his sisters. The first plaintiff got married with one Panchacharam in the year 1945 and he was in employment at M/s.Gillandors Abruthnot & Co and drawing a very good salary. He retired from service in the year 1975. They had birth to one son and two daughters. Her son died in the year 1986 leaving behind his mother, namely the first plaintiff, two sisters and his wife along with three minor children, namely defendants 2 to 4. The first plaintiff is the mother of the said Viswanathan and the second and third plaintiffs are her daughters. The deceased Panchacharam left only the house property and immovables namely 30 sovereigns of gold. All the properties were maintained by his son Viswanathan. The first plaintiff's husband received terminal benefits of Rs.9444/- He purchased the suit property in the name of the first defendant's husband, namely their son as benami for the benefit of the plaintiffs. In fact, their son had not paid a single paise to purchase the suit property in the name of their son P.Viswanathan. It is only a benami transaction. The suit property was purchased from one Majan Bi Ammal on 29.09.1977. All the transactions were executed by the said Panchacharam and purchased the suit property in the name of Viswanathan. In the year 1981, the said Panchacharam died leaving behind the plaintiffs and their only son, Viswanathan, namely the husband of the first defendant, who died in the year 1986.

3.2 Further stated that the plaintiffs filed suit in OS.No.2735 of 1986 on the file of the I Assistant City Civil Court, Madras for declaration declaring that she is entitled for benefit payable by the Ganishee. In fact, all the death benefits of the deceased Viswanathan were received by the first defendant and the suit property is also enjoyed by the defendants 1 to 4, which they are not fully entitled to. Under these circumstances,

the first defendant was driven out from the suit property and when the plaintiffs were leaving the suit property, they left jewels weighing 20 sovereigns in the suit house. While being so, the defendants 1 to 4 have arranged to sell the suit property in favour of the fifth defendant. Though, the fifth defendant had knowledge about the suit filed by the plaintiffs in O.S.No.2735 of 1986, he purchased the suit property for very low price of Rs.75,000/- by registered sale deed dated 30.09.1992. The defendants 1 to 4 also knew very well about their title over the property and even then they sold out the suit property without consent of the plaintiffs in favour of the fifth defendant. Therefore, they are also liable to pay means profit. Hence, the suit.

4. The first defendant filed written statement and stated that except the relationship between the plaintiffs and the defendants, all the averments made in the plaint are false and frivolous. The suit property belongs to the husband of the first defendant and purchased the same by out of his own funds. It is completely false to state that only the first defendant's father Panchacharam purchased the suit property by benami transaction in the name of her husband. The husband of the first defendant was well employed and was man of means and had no difficulty also in purchasing the suit property. Therefore, the defendants have full right over the property and the plaintiffs have no title over the suit property and prayed for dismissal of the suit.

4.1 The fifth defendant filed separate written statement and stated that he purchased the suit property from defendants 1 to 4 by registered sale deed 30.09.1992 for valuable sale consideration of Rs.75000/-. After verification of all the documents and parental title deeds only, he purchased the suit property. After death of the husband of the first defendant obtained legal heir certificate and it revealed that the defendants 1 to 4 are the only legal heirs of the deceased Viswanathan. In fact, the first defendant mortgaged the suit property in favour of Vellala Cooperative Bank and borrowed loan. The recitals of the said mortgage deed clearly says that the defendants 1 to 4 alone are the legal heirs of the late Viswanathan. Therefore, the fifth defendant is the bonafide purchaser for value without notice of the alleged claim of the plaintiffs. The fifth defendant had no knowledge about the pendency of the suit between the plaintiffs and the defendants 1 to 4. Only to nullify the sale deed, the plaintiffs took stand that the earlier transaction was a benami transaction and the suit property was purchased by the husband of the first

plaintiff in the name of the husband of the first defendant, which is false. The husband of the first defendant had enough income and resources to purchase the suit property as such it is a self acquired property. It is significant to note that the plaintiffs have not whispered anything about the motive of Panchacharam to purchase the suit property in the name of his son P.Viswanathan, who was in possession and enjoyment of the suit property in his own right till his death. The defendants 1 to 4 have been in possession and enjoyment of the suit property till the sale. In fact, the suit is not filed for partition as if they are also having $\frac{3}{4}$ share in the suit property on the basis of their legal heirship for the deceased Viswanathan. In the absence of such plea, or case of the plaintiffs or in law barred and estopped from turning around and claiming share in the property as the legal heirs of the said P.Viswanathan. The second and third plaintiffs are not the legal heirs of the said Viswanathan. When the suit itself is filed on the strength of the legal heirs of the deceased Panchacharam, they cannot claim any share on the strength of the legal heirs of the said P.Viswanathan.

4.2 Further stated that the present suit is barred by order 2 Rule 2 of Code of Civil Procedure, since already the first plaintiff filed suit in O.S.No.2735 of 1986 against the first defendant and the employer of the first defendant's husband, namely Dock Labour Board on the strength of the legal heirship of her son deceased P.Viswanathan claiming a share from the terminal benefits of the deceased Viswanathan. Hence, the suit is barred by law and prayed for dismissal of the suit.

4.3 He also filed additional written statement and stated that the suit property did not even belong to the husband of the first defendant, namely P.Viswanathan and after death of her husband, the first defendant purchased the suit property by allotment from Tamil Nadu Slum Clearance Board, that too after paying the entire sale consideration by instalments. Therefore, either the husband of the first defendant or the husband of the first plaintiff never be the owner of the property.

5. In support of the plaintiffs' case, P.W.1 and P.W.2 were examined and nine documents were marked as Ex.A.1 to Ex.A.8. On the side of the defendants, they examined D.W.1 to D.W.3 and were marked Ex.B.1 to EX.B.27. On considering the oral and documentary evidences adduced by the respective parties and the submission made by the learned counsel, the trial court partly decreed the suit and declare that the first plaintiff alone entitled to have $\frac{1}{5}$ share in the suit property and in respect of the injunction, the suit was dismissed. Aggrieved by the

same, the fifth defendant alone preferred appeal suit in AS.No.53 of 1997 and the same was allowed and set aside the judgment and decree passed by the trial court and remanded the matter back to trial court for fresh trial, and insofar as other plaintiffs dismissed the suit.

6. The trial court thereafter framed issues as directed by the first appellate court and allowed the suit insofar as partition is concerned and dismissed the prayer for permanent injunction. Aggrieved by the same, the fifth defendant preferred appeal suit in AS.No.211 of 1999 before the VII Additional City Civil Court, Chennai and the same was also dismissed and confirmed the judgment and decree passed by the trial court. Aggrieved by the same, the fifth defendant preferred this second appeal.

7. At the time of admission of the second appeal, the following substantial questions of law were framed:

(i) When presumption in law is that the person in whose name the property stands is the real owner and the plaintiffs failed to rebut the presumption by placing evidence regarding source of money motive, nature and possession and dealing with the property after purchase and non production of title deeds whether the courts below are correct in upholding the claim of Benami transaction by the plaintiffs on the basis of oral evidence of one of the Vendor regarding payment of consideration of sale as no oral evidence can be let in to contradiction the recital in the sale deed under section 92 of Evidence Act.

(ii) When the suit was decreed earlier for partition of 1/5th share of the first plaintiff and the plaintiff did not file any appeal against it and that the fifth defendant only filed AS.No.53 of 1997 challenging the said decree for partition of 1/5th share and the lower appellate court remanded the suit with the direction of frame two additional issues whether the courts below are correct in granting a decree for 3/4th share contrary to the scope of the order of remand dated 23.12.1997.

(iii) When the lower appellate court failed to frame points for determine while is mandatory under Order 41 Rule 31 CPC whether the judgment of the lower appellate court is sustainable in law?

8. The learned counsel for the fifth defendant submitted that the suit itself is barred by limitation. Originally the suit property was purchased by registered sale deed dated 29.09.1977 by the husband of the first defendant. The husband of the first defendant died on 27.01.1986, whereas the suit is filed on 12.09.1986. The plaintiffs conveniently filed suit after the death of the husband of the first plaintiff and also the death of the husband of the first defendant. The first defendant's husband died on 27.01.1986. The first plaintiff's husband died in the month of July 1981. Further submitted that the suit property was purchased only from the income of the first defendant's husband, since he was employed in Dock Labour Board and he was drawing very good salary and at the time of purchasing the suit property, he had enough source of income to purchase the suit property. Therefore, Benami Act could not at all apply and it is directly hit by provisions under Section 4 sub-clause (1) of Prohibition of Benami Property Transactions Act, 1988

9. Per contra, the learned counsel for the respondents submitted that the suit was filed in the year 1986, and the application to declare the plaintiffs as pauper was filed. Thereafter the said application was allowed and the suit was taken on file. Though the trial court decreed the suit as if the first plaintiff alone got 1/5 share among the defendants 1 to 4 in respect of the suit property, however it was remanded back to trial court by the first appellate court for framing the issues in respect of other plaintiffs' shares as they are the legal heirs of the said Panchacharam, namely the husband of the first plaintiff. Thereafter, the trial court framed proper issues and allowed the suit insofar as partition is concerned and declared that the plaintiffs 1 to 3 are entitled to have their $\frac{3}{4}$ share in the suit property along with the first defendant. The plaintiffs categorically proved that the suit property was purchased only from the income of the husband of the first plaintiff as well as the father of the second and third plaintiffs. It is nothing but benami transaction and at the time of purchase of the suit property, namely on 29.09.1977 the husband of the first defendant had no income and there was absolutely no sources of income to purchase the property. The first plaintiff's husband was in employment at M/s. Gillandors Abruthnot & Co for very good salary of Rs.600/- per month and he was retired on 28.04.1975 with a terminal benefit of Rs.9444/-. Only from the terminal benefits and savings, the suit property was purchased by the husband of the first plaintiff on 29.09.1977 from one, Majan Bi Ammal for valid sale consideration. In this regard, he relied upon the following judgments and prayed for dismissal of the

appeal.

(i) C.Gangacharan Vs. C.Narayanan reported in (2000) 1 SCC 459

(ii) G.Mahalingappa Vs. G.M.Savitha reported in (2005) 6 SCC 441

10. Heard Mr.S.Y.Masood, learned counsel for the fifth defendant, and Mr.C.T.Mohan for the plaintiffs.

11. The case of the first plaintiff is that she is the mother of the husband of the first defendant and the second and third plaintiffs are unmarried sisters of him. The first plaintiff married with one Panchacharam and gave birth to two female child and one male child, namely, plaintiffs 1 and 2 and the deceased husband of the first defendant. Admittedly, the husband of the first plaintiff was working in private concern and received a sum of Rs.600/- as monthly salary and he was retired from service in 1975 and received a sum of Rs.9444/- as terminal benefits. The suit property was purchased in the year 1977 by registered sale deed dated 29.09.1977 from Majan Bi Ammal. The employment details of the husband of the first plaintiff were marked as Ex.A.1 and Ex.A.2. Whereas the husband of the first defendant was employed in Dock Labour Board and he had very good income from his employment. Therefore, on his own income, the suit property was purchased in the year 1977. The first plaintiff already filed suit in O.S.No.2735 of 1986 on the file of the I Assistant City Civil Court, Chennai against the first defendant and the Dock Labour Board claiming share in the terminal benefits of her son late Viswanathan, namely the husband of the first defendant and pleaded that she has share in the suit property and perfected to reserve her right to file a suit in future. Therefore, the fifth defendant specifically pleaded that the present suit is clearly barred under Order 2 Rule 2 of CPC. Even then, the trial court did not frame any issue in this regard in respect of maintainability of the suit. Therefore, though the trial court declared the suit in favour of the first plaintiff as if she is entitled for 1/5 share in the suit property, the first appellate court remanded the matter for fresh trial directing the trial court to frame issue with regard to maintainability of the suit.

12. Again, the trial court framed additional issues as directed by the first appellate court and tried the suit. In the suit filed by the first plaintiff in O.S.No.2735 of 1986, there was a compromise between them and the first plaintiff received amount insofar as her share from the terminal benefits of the deceased son. The plaintiffs examined P.W.2, namely the vendor of the suit property, and she categorically deposed that the suit property was purchased by the husband of the first plaintiff for sale consideration of Rs.7,000/-. The husband of the first plaintiff only paid sale consideration to her husband by two payments i.e. Rs.4,000/- and Rs.3,000/-. The first defendant never entered into the witness box and deposed to prove the purchase of the suit property by her husband. It was stated that she was ill and she was unable to depose, but documents were produced to substantiate their stand. Further, the husband of the first plaintiff was retired from service in the year 1975 and he also received a monthly salary of Rs.600/- and thereafter he received a sum of Rs.9,444/- as his terminal benefits. Thereafter in the year 1977, the suit property was purchased in the name of the husband of the first defendant. Therefore, the trial court rightly concluded that the entire transaction is binami in nature and the husband of the first plaintiff purchased the suit property in the name of their son, namely the husband of the first defendant.

13. Further, the first defendant never stated that the suit property was purchased from the money obtained by selling her jewels, whereas by marking Ex.B8, it was stated that the sale consideration was paid by selling the jewels. In fact, she categorically stated in the written statement that the entire sale consideration was paid from the income of the husband of the first defendant. The second and third plaintiffs are daughters of the first plaintiff and were also unmarried daughters at the time of filing the suit. Therefore, the trial court rightly allowed the suit and declared that the plaintiffs are entitled to have their $\frac{3}{4}$ share in the suit property.

14. The learned counsel for the fifth defendant specifically contended that the entire transaction is hit by Section 4(1) of Prohibition of Benami Property Transactions Act, 1988 and as such the suit itself is not maintainable. The learned counsel for the plaintiffs submitted that the suit was filed on 12.09.1986 with the pauper suit application, and after allowing the application filed by the plaintiffs to declare them as pauper, the main suit was taken on file in the year 1989, whereas the said Act came into force in the year 1988 and as

such the Act is not applicable to the case on hand. In this regard, he relied upon the judgment in the case of C.Gangacharan Vs. C.Narayanan reported in (2000) 1 SCC 459, the head note of which is extracted hereunder:

A. Benami Transactions (Prohibition of the Right to Recover Property) Ordinance, 1988 - S.4(3)(b) - Property held in the name of a person as a trustee - Appellant sending money from abroad to respondent for purchasing immovable property in the name of appellant but respondent purchasing property in his own name and in the name of his brothers - Suit filed by appellant for possession of the property or its market value - Suit decreed - High Court finding that the property was being held in the name of respondent as a trustee, appellant was the beneficial owner and the case was governed by S.82 of Trusts Act - In view of the categorical finding of High Court, held, respondent cannot invoke provisions of the Ordinance / Act to contend that recovery of possession of the property was prohibited thereunder - Moreover, since the proceedings for execution of the decree in favour of the appellant was pending when the Ordinance came into force, Ordinance/Act, which is not retrospective in operation, will not apply in this case - Trusts Act, 1882, S.82.

B. Benami Transactions (Prohibition of Right to Recover Property) Ordinance, 1988 - S.1 - Retrospectivity - Neither the Ordinance nor the Act which replaced it retrospective in operation - Hence not applicable to pending proceedings

15. He also relied upon the judgment in the case of G.Mahalingappa Vs. G.M.Savitha reported in (2005) 6 SCC 441, the head note of which is extracted hereunder:

A. Benami Transactions (Prohibition) Act, 1988 - S.4(2) - Nature of the Act and its applicability - The Act, held, is prospective except to a certain extent S.4(2) is retrospective to the extent that after its commencement the bar on the plea of defence postulated therein would apply even in respect of a past benami transaction - In the present case, father purchasing property in the name of his minor daughter from his own funds - Subsequently, daughter filing a suit for declaration of her title to, and for recovery of possession, of the said property - Defendant father in

his written statement taking the plea of benami and claiming himself to be the real owner of the suit property - Thereafter, the Act coming into effect - In such a case, S.4(2), held, not applicable - Hence, the father was fully entitled to raise, and substantiate the plea of benami.

B. Benami Transactions (Prohibition) Act, 1988 - S.3(2) - Presumption under, that the property purchased in the name of wife or unmarried daughter was for the benefit of the wife or the daughter - Nature of - Held, rebuttable by production of evidences or other materials - Statute Law - Presumptions

C. Benami Transactions (Prohibition) Act, 1988 - Ss. 2(a), 3(2) and 4(2) - Concurrent findings of fact recorded by trial court and first appellate court that the transaction was benami in nature - Scope of interference by High Court in second appeal, with such findings - Where such findings were found to be rendered on consideration of the pleadings and on oral and documentary evidence on record and neither perverse nor without any reason nor suffering from non-consideration of any important evidence or admission of any party, interference therewith by High Court in second appeal, held not justified - Civil Procedure Code, 1908 - S.100.

16. In the above judgments, the Hon'ble Supreme Court of India held that the suit was filed long before the coming into force of the Prohibition of Benami Property Transactions Act, 1988. Therefore, the provisions under Section 4(2) of the said Act is not applicable to the present case. In the case on hand, the husband of the first plaintiff had paid the entire sale consideration to purchase the suit property and it was categorically proved by the vendor, PW2, and her witness as follows:

WEB COPY

முதல் வாதியின் கணவருக்கு மொத்தம் ரூ.70000/- க்கு சொத்தை
விற்பதாகவும், அதற்கு முதல் வாதியின் மகன் பணம் கொடுக்கவில்லை
முதல் வாதியின் கணவர்தான் கிரய பணம் கொடுத்தார். சாரி பதிவாளர்
அலுவலகத்துக்கு சென்று கையெழுத்துப் போட்டு பணம் வாங்கியதாகவும்,
பஞ்சாட்சரம் பணம் கொடுத்தவர் விஸ்வநாதன் பணம் கொடுக்கவில்லை. தன்
கணவர் அப்துல்லா தற்போது இல்லை. முதலில் ரூ.4000/-ம் அதன் பின்
ரூ.3,000/- வாங்கியதாகவும், தன்னுடைய வீட்டுக்காரர் தொகையை வாங்கி
தன்னிடம் கொடுத்தார் /

17. Therefore, both the courts below held that the entire transaction in question was benami in nature. While being so, the fifth defendant raised plea that in view of the introduction of the Prohibition of Benami Property Transactions Act, 1988, the entire transaction is hit under Section 4(2) of the said Act. Therefore, whether the first plaintiff is entitled to raise plea in view of the introduction of Prohibition of Benami Property Transactions Act, 1988 and whether the Act was retrospective in operation, Section 2(a) defines the benami transaction which means any transaction in which the property is transferred to one person for consideration paid or provided by another person. Section 3(1) and (2) of the said act read as follows:

3. Prohibition of benami transactions- (1) No person shall enter into any benami transaction. (2) Nothing in sub-section (1) shall apply to the purchase of property by any person in the name of his wife or unmarried daughter and it shall be presumed, unless the contrary is proved, that the said property had been purchased for the benefit of the wife or the unmarried daughter.

Section 4 of the said Act prohibits the rights to recover the property held benami, which 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) 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.

18. In this regard, the learned counsel for the plaintiffs relied upon the judgment in the case of G.Mahalingappa Vs. G.M.Savitha reported in (2005) 6 SCC 441, wherein it is held as follows:

16. Since in this case, we are concerned with the question whether the appellant was entitled to raise the plea of benami in his defence in view of the bar imposed in Section 4(2) of the Act, let us now confine ourselves to the bar imposed in Section 4(2) of the Act of taking this plea in his defence and to the question of retrospective operation of this section or this provision is prospective in operation.

17. Now, therefore, the question arises is whether under section 4(2) of the Act, defence can be allowed to be raised 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 or on behalf of a person claiming to be real owner of such property. As noted already, this question cropped up for decision before this Court in the case of Mithilesh Kumari and Another Vs. Prem Behari Khare 1989 (2) SCC 95. In fact, the retrospective operation of this provision, as noted herein earlier, was answered in the affirmative in the aforesaid decision. However, the correctness of that decision was doubted and an order was passed by this Court subsequently referring this question of retrospectivity for decision to a 3-Judges Bench of this Court. In the case of R.Rajagopal Reddy (Dead) by LRs. And Ors. Vs. Padmini Chandrasekharan (Dead) by LRs. 1995 (2) SCC 630, S.B. Majmudar, J. (As His Lordship then was) writing the judgment for the Three Judges Bench could not agree with the views expressed in Mithilesh Kumari's case and held that the Act was prospective in nature and it has no retrospective operation excepting certain observations made in respect of some cases

which would be mentioned hereinafter. In paragraph 10 it was observed as follows:-

"though the Law Commission recommended retrospective applicability of the proposed legislation, Parliament did not make the Act or any of its sections retrospective in its wisdom.". Thereafter on a careful consideration of the provisions made under sections 3 and 4 of the Act, it was observed:

"A mere look at the above provisions shows that the prohibition under Section 3(1) is against persons who are to enter into benami transactions and it has laid down that no person shall enter into any benami transaction which obviously means from the date on which this prohibition comes into operation i.e. w.e.f. 5/9/1988. That takes care of future benami transactions. We are not concerned with sub-section (2) but sub-section (3) of Section 3 also throws light on this aspect. As seen above, it states that whoever enters into any benami transaction shall be punishable with imprisonment for a term which may extend to three years or with fine or with both. Therefore, the provision creates a new offence of entering into such benami transaction. It is made non-cognizable and bailable as laid down under sub-section (4). It is obvious that when a statutory provision creates new liability and new offence, it would naturally have prospective operation and would cover only those offences which take place after Section 3(1) comes into operation." (Underlining is ours).

18. In paragraph 11 of the said decision of this Court, the Supreme Court further observed

"On the contrary, clear legislative intention is seen from the words "no such claim, suit or action shall lie", meaning thereby no such suit, claim or action shall be permitted to be filed or entertained or admitted to the portals of any court for seeking such a relief after coming into force of Section 4(1). " (underline is ours).

19. In the same paragraph the Supreme Court observed:

" With respect, 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 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 we 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 effaced once Section 4(1) operated, even if such transaction had been entered into prior to the coming into operation of Section 4(1), and henceafter Section 4(1) applied no suit can lie in respect to such a past benami transaction. To that extent the section may be retroactive."

20. In our view, similar is the position in law on the question of retrospectivity of section 4(2) of the Act.

21. Finally, this Court in the aforesaid decision held that the decision in Mithilesh Kumari & Anr. Vs. Prem Behari Khare erred in taking the view that under Section 4(2), in all suits filed by persons in whose names properties are held no defence can be allowed at any future stage of the proceedings that the properties are held benami cannot be sustained. It was also held that Section 4(2) will have a limited operation even in cases of pending suits after Section 4(2) had come into force, if such defences are not already allowed. The decision in R. Rajagopal Reddy (Dead) by LRs. And Ors. Vs. Padmini Chandrasekharan (Dead) by LRs. 1995 (2) SCC 630 which overruled the decision of two Judges Bench in the case of Mithilesh Kumari and Anr. Vs. Prem Behari Khare 1989 (2) SCC 95 was also approved by this Court in the cases of Prabodh Chandra Ghosh Vs. Urmila Dassi AIR 2000 SC 2534 and C. Gangacharan Vs. C. Narayanan AIR 2000 SC 589. In view of the aforesaid, this question is, therefore, no longer res integra.

22. Therefore, we are now to consider in this case whether the facts disclosed would indicate that even

after coming into force of the Act the defence under Section 4 can be available. Admittedly, the transaction in question was registered on 24th August, 1970. The suit was filed on 5th of July 1984 which was long before coming into force of the Act. It is an admitted position that the written statement in the suit taking plea of benami was also filed by the appellant long before the Act had come into force. Therefore, it was not a case where Section 4(2) of the Act will have a limited operation in the pending suit after Section 4 (2) of the Act had come into operation. It is true that the judgment of the trial court was delivered after the Act had come into force but that could not fetter the right of the appellant to take the plea of benami in his defence. Since the Act cannot have any retrospective operation in the facts and circumstances of the present case, as held by this Court in the aforesaid decision, we are therefore of the view that the appellant was entitled to raise the plea of benami in the written statement and to show and prove that he was the real owner of the suit property and that the respondent was only his benamidar.

19. In the case on hand, even before the said Act, the suit was filed and therefore the suit is very much maintainable and Section 4 (2) of the said Act is not applicable to the case on hand. Further, the Hon'ble Supreme Court of India held that it is not permissible to the High Court in the second appeal to come to contrary findings of its own only on the basis of arguments of learned counsel without considering the findings of the trial court as well as the first appellate court. The High Court in the second appeal is not entitled to interfere with the concurrent findings of fact arrived at by the courts below until and unless it is found that the concurrent findings of fact are perverse and not based on the sound reasoning.

20. Therefore, this Court does not find that the concurrent findings of the fact arrived at by the courts below are either perverse or without any reason or based on the non consideration of important piece of evidence or admission of some of the parties. Therefore, this Court is of the view that there is absolutely no warrants to interfere with the concurrent findings of fact arrived at by the courts below, which rendered on consideration of pleadings as well as the oral and documentary evidence on record. Accordingly, this Court is of the considered opinion that no substantial questions of law are involved in the second appeal. Be that as it may, all the substantial questions

of law formulated by this Court in this Second Appeal, are answered in favour of the plaintiffs and as against the defendants.

21. In the result, the second appeal stands dismissed. Consequently, connected miscellaneous petition is closed. No costs.

Sd/-
Asst.Registrar

/true copy/

Sub Asst. Registrar

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To

1. The VII Additional Judge, City Civil Court, Chennai
2. The I Assistant Judge City Civil Court, Chennai.
3. The Section Officer, V.R. Section, Madras High Court, Chennai.

S.A.No.1447 of 2005

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