

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**SECOND APPEAL NO.386 OF 1991
WITH
CIVIL APPLICATION NO.4434 OF 2022**

- . Dattaram s/o Govindrao Kale (minor),
age about 19 years **.. Appellant**
(Original Plaintiff)

Versus

1. Manikumar Ishwarlal Lokwani,
Age: 42 years, Occu.: Govt. Service,
R/o. Nanded at present residing
at Mumbai
2. Govindrao s/o Dattaram Kale,
since deceased through L.Rs.
- 2-a] Krishna s/o Govindrao Kale,
Age: 45 years, Occu.: Agril.,
- 2-b] Gajanan s/o Govindrao Kale,
Age: 42 years, Occu.: Agril.,
- 2-c] Mahendra s/o Govindrao Kale,
Age: 35 years, Occu.: Agril.,
- 2-d] Vithal s/o Govindrao Kale,
Age: 30 years, Occu.: Agril.,
- 2-e] Shrikant s/o Govindrao Kale,
Age: 28 years, Occu.: Agril.,

All R/o. Kawtha,
Tq. & Dist. Nanded

.. Respondents
(Original Defendants)

...

Advocate for Appellant: Mr. P. G. Godhamgaonkar
Advocate for Respondent No.1: Mr. D. R. Shelke

...

CORAM: ARUN R. PEDNEKER, J.

Reserved on: 07.07.2023

Pronounced on: 13.07.2023

JUDGMENT:

1. Heard.

2. By the present second appeal, the appellant is challenging the order dated 28.02.1990, passed by the first appellate court, whereby the appellate court confirmed the order dated 21.11.1983, passed by the trial court dismissing the suit of the plaintiff / appellant filed against the defendants no.1 and 2 for setting aside the sale deed to the extent of his share in the property. The plaintiff claim for declaration that the sale deed dated 01.01.1981 executed in favour of defendant no.1, by defendant no.2, be declared null and void and not binding on the plaintiff and the plaintiff be declared owner and possessor of the suit land and further for perpetual injunction restraining the defendants from causing obstruction to the plaintiff's possession permanently.

3. While the second appeal was admitted no substantial questions of law were formulated. Thus, this court by order dated 04.02.2022, at paragraph no.2, observed as under:-

"2. However, conspicuously, the second appeal has been admitted without formulating substantial questions of law as is contemplated under Section 100 of the Code of Civil Procedure by passing one more order 'admit'. The parties to be heard on the point of such formulation of points on 14.02.2022. The appellant shall furnish substantial questions of law."

4. The appellant, accordingly, with advance notice to the other side has formulated following substantial questions of law:-

"A. Preponderating circumstances if not considered amounts to substantial question of law as held in the case of "Madanlal Vs. State of J.&K.". It aptly apply in the instant second appeal.

B. Application and scope of Benami Transactions (Prohibition) Act is not considered in this case. It ousts the defence of the defendants.

C. Express provision of bar laid U/s 8 of the Hindu Minority and Guardianship Act, 1957 is totally ignored. The mandate of Section 8 is totally ignored and thereby vital preponderating circumstance renders the impugned judgment being without jurisdiction and is void in terms of ratio laid in the case of Kashmirsingh AIR 2008 SC 1749."

The appellant submits that above substantial questions of law are also covered in grounds no.1, 2, 3 and 4. In the course of argument, he pressed for questions of law no.'B' and 'C' above.

5. As per the appellant, the facts in brief giving rise to the above substantial questions of law are as under:-

A. The plaintiff at the relevant time was the minor son of defendant no.2 – Govindrao and he is under the guardianship of his mother Shivkantabai.

B. Defendant no.2 sold the suit land to defendant no.1 by executing the registered sale deed in favour of defendant no.1 on 01.01.1981. It is contended by the plaintiff that defendant no.2 – Govindrao / father of the plaintiff, purchased the suit land in his name from Narayanrao by a registered sale deed dated 14.06.1978 and mutation was also effected in his name. It is further contended that the suit land is a property of the plaintiff and defendant no.2 – Govindrao / father of the plaintiff has no right to alienate the suit land and the alienation was made without legal necessity or for benefit of the minor plaintiff.

C. It is also further contended on behalf of the plaintiff that before alienation of the suit land permission was required to be obtained from the district court under the Hindu Minority

and Guardianship Act, 1957 (hereinafter referred as "Guardianship Act") and no such permission was obtained from the District Court by defendant no.2. Thus, he has filed the suit through his mother, who was under the guardianship of his mother in the year 1982.

D. The suit was not contested by the father of the plaintiff and the suit proceeded ex parte against him. The suit was contested by defendant no.1, who was also a minor through his real mother Meerabai, who filed his written statement and resisted the claim of the plaintiff on the ground that the suit land though purchased in the name of the plaintiff by his father i.e. defendant no.2 under the sale deed dated 14.06.1978, but the sale deed was a nominal sale deed and the plaintiff has no right and interest in the suit land. The suit land is not purchased from the ancestral nucleus or

joint hindu family property. It was the self acquired property of defendant no.2 and he is competent to alienate it. Therefore, no question arises as to the legal necessity of the joint family for purchase of suit property as contended by the plaintiff.

E. It is further contended by the defendant no.1 that the defendant no.1 is a bonafide purchaser. The possession of the suit land was also delivered to defendant no.1 and that defendant no.2 does business of purchasing and selling the lands and that in order to escape from liability from loss, intentionally got the sale deed nominally in the name of the plaintiff and the suit is filed in collusion with wife of defendant no.2. On the basis of the pleadings of the parties, the trial court formulated following issues and answered accordingly:-

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Issues

(1) Does Plaintiff prove his title to the suit land as well as possession over it ?

(2) Does he prove the alleged obstruction into his possession by Defendants ?

(3) Does he prove that the alienation of the suit land by Defendant No.2 to Defendant No.1 is without legal necessity and for the benefit of the joint Hindu family ?

(4) Do defendant No.1 prove that the suit land is self acquired property of Defendant No.1 ?

(5) Do Defendant No.1 prove that he is bonafide purchaser ?

(6) Whether Plaintiff is entitled to declaration as sought for ?

(7) Whether he is entitled to injunction ?

(8) What order and decree ?

My findings

(1) Not proved

(2) Not proved

(3) Not proved

(4) Proved

(5) Proved

(6) Not proved

(7) Not proved

(8) As per order below"

F. The trial court held that the plaintiff has no title or possession over the suit property and that the property was the self acquired property of defendant no.2. The trial court did not accept that the suit property was purchased from the funds received from the mother of the plaintiff. The document, sale deed itself indicates that the defendant no.2 - Govindrao is shown to be the guardian of the plaintiff. It is admitted position that defendant no.2 - Govindrao alienated the suit land to defendant no.1, who was also a minor under the guardianship of his mother Meerabai and the only dispute between the plaintiff and the contesting defendant no.1 is with regard to the exclusive ownership of the suit land.

G. The trial court held that the suit land was purchased by defendant no.2 – Govindrao from his own income and it was a self acquired property although the said property was purchased in the name of the minor, the minor cannot be held to be the exclusive owner of the suit land and since it is not the case of the plaintiff that the suit land was purchased from the ancestral nucleus or from joint hindu family and, thus, the suit land cannot be called as the separate property of the minor. The said order passed by the trial court was challenged before the appellate court. The appellate court by judgment and order dated 28.02.1990 dismissed the appeal with costs. The appellate court formulated following points for consideration:-

“

Issues

(1) Whether the Plaintiff was the absolute owner of the land or it was the

self acquired property of the Defendant No.2 ?

(2) Whether the sale-deed dated 1st January 1981 is void for want of legal necessity or permission of the District Court ?

My findings

(1) The suit land was the self acquired property of the Defendant No.2.

(2) No"

H. The appellate court on examination of the material on record held that the suit land was the self acquired property of defendant no.2 and that there was no question to get permission from the District Court under the Guardianship Act to alienate the suit property. The appellate court held that defendant no.2 has business of selling and purchasing of land. That the plaintiff does not become the owner of the land on the basis of his name being shown in the sale deed.

I. The appellate court held that the plaintiff is neither the owner nor in possession of the suit land and, therefore, it is held that the sale deed cannot be cancelled and dismissed the suit with costs.

6. The appellant has preferred the second appeal and contends that the second appeal involves substantial question of law as regards violation of the Prohibition of Benami Property Transactions Act, 1988 [*hereinafter referred as "Benami Transactions (Prohibition) Act"*] and submits that the defence of defendant no.1 is oust. He relies upon the judgment of Mithilesh Kumari and another Vs. Prem Behari Khare, AIR 1989 SC 1247 (1) and contends that the Benami Transactions (Prohibition) Act has retrospective effect and that under section 26 of the Benami Transactions (Prohibition) Act read with section 7 of the said Act an inquiry has to be conducted as to the nature of the transaction and that the tribunal constituted under the Act, has the

authority to decide, whether the transaction is a benami or not. The learned counsel relies upon section 2(9)(b)(iii) of the Benami Transactions (Prohibition) Act and submits that the present transaction is hit by the Benami Transactions (Prohibition) Act. He further submits that the issue raised in the second appeal, could not be raised before the courts below as the Benami Transactions (Prohibition) Act came in force in the year 1988.

7. However, the judgment relied upon by the learned counsel for the appellant in **Mithilesh Kumari** (supra), has been overruled by 3 Judges bench judgment of the Hon'ble Supreme Court in the case of **R. Rajagopal Reddy (Dead) by Lrs. and others Vs. Padmini Chandrasekharan (Dead) by Lrs, (1995) 2 SCC 630**. The Hon'ble Supreme Court, at paragraphs no.10. 11 and 12 has held as under:-

"10...Section 3 which is the heart of the Act imposes the required prohibition of benami transactions. It reads as under:

"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.

(3) 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.

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), an offence under this section shall be non-cognizable and bailable."

A mere look at the above provisions shows that the prohibition under Section 3(1) is against persons who are to enter into benami transaction which obviously means from the date on which this prohibition comes into operation i.e. with effect from 5-9-1988. That takes care of future benami transactions...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. In fact Saikia, J. speaking for the Court in Mithilesh Kumari case has in terms observed at page 635 of the report (SCC p. 107, para 22) that Section 3 obviously cannot have retrospective operation. We respectfully concur with this part of the learned Judge's view. The real problem centres round the effect of Section 4(1) on pending proceedings wherein claim to any property on account of it being held benami by other side is on the anvil and such proceeding had not been finally disposed of by the time

Section 4(1) came into operation, namely, on 19-5-1988. Saikia, J. speaking for the Division Bench in the case of Mithilesh Kumari gave the following reasons for taking the view that though Section 3 is prospective and though Section 4(1) is also 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 parties and that Section 4(1) will apply at whatever stage the litigation might be pending in the hierarchy of the proceedings:

- (1) ...
- (2) ...
- (3) ...
- (4) ...
- (5) ...
- (6) ...

11. Before we deal with these six considerations which weighed with the Division Bench for taking the view that Section 4 will apply retrospectively in the sense that it will get telescoped into all pending proceedings, howsoever earlier they might have been filed, if they were pending at different stages in the hierarchy of the proceedings even up to this Court, when Section 4 came into operation, it would be apposite to recapitulate the salient feature of the Act. As seen earlier, the preamble of the Act itself states that it is an Act to prohibit benami transactions and the right to recover property held benami, for matters connected therewith or incidental thereto. Thus it was enacted to efface the then existing right of the real owners of properties held by others benami. Such an Act was not given any

retrospective effect by the legislature. Even when we come to Section 4, it is easy to visualise that sub-section (1) of Section 4 states 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 shall lie by or on behalf of a person claiming to be the real owner of such property. As per Section 4(1) no such suit shall thenceforth lie to recover the possession of the property held benami by the defendant. Plaintiff's right to that effect is sought to be taken away and any suit to enforce such a right after coming into operation of Section 4(1) that is 19-1988, shall not lie. The legislature in its wisdom has nowhere provided in Section 4(1) that no such suit, claim or action pending on the date when Section 4 came into force shall not be proceeded with and shall stand abated. 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)...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. To highlight this aspect we may take 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). 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.

12. So far as Section 4(2) is concerned, all that is provided is that if a suit is filed by a plaintiff who claims to be the owner of the property under the document in his favour and holds the property in his name, once Section 4(2) applies, no defence will be permitted or allowed in any such suit, claim or action by or on behalf of a person claiming to be the real owner of such property held benami. The disallowing of such a defence which earlier was available, itself suggests that a new liability or restriction is imposed by Section 4(2) on a pre-existing right of the defendant. Such a provision also cannot be said to be retrospective

or retroactive by necessary implication. It is also pertinent to note that Section 4(2) does not expressly seek to apply retrospectively. So far as such a suit which is covered by the sweep of Section 4(2) is concerned, the prohibition of Section 4(1) cannot apply to it as it is not a claim or action filed by the plaintiff to enforce right in respect of any property held benami. On the contrary, it is a suit, claim or action flowing from the sale deed or title deed in the name of the plaintiff. Even though such a suit might have been filed prior to 19-5-1988, if before the stage of filing of defence by the real owner is reached, Section 4(2) becomes operative from 19-5-1988, then such a defence, as laid down by Section 4(2) will not be allowed to such a defendant. However, that would not mean that Section 4(1) and Section 4(2) only on that score can be treated to be impliedly retrospective so as to cover all the pending litigations in connection with enforcement of such rights of real owners who are parties to benami transactions entered into prior to the coming into operation of the Act and specially Section 4 thereof. It is also pertinent to note that Section 4(2) enjoins that no such defence "shall be allowed" in any claim, suit or action by or on behalf of a person claiming to be the real owner of such property. That is to say no such defence shall be allowed for the first time after coming into operation of Section 4(2). If such a defence is already allowed in a pending suit prior to the coming into operation of Section 4(2), enabling an issue to be raised on such a defence, then the Court is bound to decide the issue arising from such an already allowed defence as at the relevant time when such defence was

allowed Section 4(2) was out of the picture. Section 4(2) nowhere uses the words: "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 to be raised or continued to be raised in any suit." With respect, it was wrongly assumed by the Division Bench that such an already allowed defence in a pending suit would also get destroyed after coming into operation of Section 4(2)..."

8. The Hon'ble Supreme Court in the case of R. Rajagopal Reddy, has held that the plaint would not lie under section 4(1) of the Benami Transactions (Prohibition) Act for a claim to enforce any right in respect of any property held benami, against the person in whose name the property is held after coming into effect of the Act, even if the transactions were prior in point of time. Also under section 4(2) of the Act if a suit is filed by plaintiff who claims to be owner of the property on the basis of ownership document and claims ownership on the basis that the property is in his name, after the coming in force of the Act no defence would be permitted or allowed in any such suit, claim or action by or on

behalf of the person claiming to be the real owner of such property held benami. Section 4(2) restricts the defence of a pre-existing right. Such a provision the Hon'ble Supreme Court has held in the case of R. Rajagopal Reddy (supra), cannot be retrospective or retroactive by necessary implication. However, what is prohibited is the defence to be taken on that day when the act came into force. Thus, even if the transaction is prior in point of time, defence based by the owner of the property who holds the property benami in the name of some other person is not permissible under section 4(2) of the Benami Transactions (Prohibition) Act after the Act comes into force.

9. In the instant case, the defence is taken much prior to the coming into force of the Benami Transactions (Prohibition) Act and the defence once allowed cannot be subsequently taken away. The defence was taken in the year 1982 much before the act came into force.

10. For ready reference, Section 4 of the Prohibition of Benami Property Transactions Act, 1988, is quoted below:-

"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."

11. In the instant case, the defence of benami transaction by defendant no.2 in favour of plaintiff is taken by the person (defendant no.1), who has purchased the property before the act came into force. On the date of the act coming into force there was no property in the name of the plaintiff, as such, whether a plea of declaration

of ownership on the basis of sale deed in its favour prior to the coming into force of the Benami Transactions (Prohibition) Act can be maintained by the plaintiff against the purchaser of the property from the real owner who purchased the property benami in the name of the plaintiff, is itself doubtful. However, I have not entered into a full discussion on this issue as the same is not required to be considered. Suffice to say that the defence was taken by defendant no.1 of benami transaction by defendant no.2 in favour of the plaintiff and that the defendant no.2 being the real owner of the property was entitled to sell the suit property to the defendant no.1 was taken much prior to the coming into force of the Benami Transactions (Prohibition) Act and in view of the judgment of the 3 Judges bench of R. Rajagopal Reddy (supra), the defence of benami transaction taken prior to the coming into the act is available and the Benami Transactions (Prohibition) Act is not retroactive to that extent.

The Prohibition of Benami Property Transactions Act, 1988 is not applicable to the instant case. Question of Law raised at paragraph no.4(B) is answered accordingly.

12. The next Question of Law raised by the learned counsel for the appellant that the permission was required to be taken under section 8 of the Guardianship Act from the mother of the appellant is also not tenable in view of the fact that the property is the self acquired property of defendant no.2 and the appellant plaintiff had no right in the suit property, thus the question of taking permission from the district court under section 8 of the Guardianship Act does not arise.

13. In view of the same, both the substantial Questions of Law raised in the second appeal at paragraph no.4(B) and (C) (*supra*) are answered against the appellant and the second appeal is dismissed. Pending civil application is also disposed of.

[ARUN R. PEDNEKER, J.]