

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

SECOND APPEAL NO. 267 OF 1993

Narsingrao s/o. Sadashiv Powar,
Aged 20 years, Occ. Agril.
R/o. Dadgi, Tq. Nilanga,
Dist. Latur.

.. APPELLANT
[Orig. Plaintiff]

VERSUS

- 1] Bhagwat s/o. Laxman Jadhav
(Since deceased through his L.Rs.)

- 1/A Kashibai w/o. Bhagwat Jadhav
Age: 70 years, Occu : Household
R/o. Dadgi Tq. Nilanga, Dist. Latur
[Deleted as per order dated
22.02.18]

- 1/B Kisan s/o. Bhagwat Jadhav
Age: 47 years, Occu : Agriculture
R/o. Dadgi, Tq. Nilanga, Dist. Latur

- 1/C Deubai w/o. Kumar Patil
Age: 50 years, Occu : Household,
R/o. Korali, Tq. Nilanga, Dist. Latur

- 1/D Ram s/o. Bhagwat Jadhav
Age: 44 years, Occu : Agriculture
R/o.Dadgi, Tq. Nilanga, Dist. Latur

- 1/E Laxman s/o. Bhagwat Jadhav
Age: 40 years, Occu : Agriculture
R/o. Dadgi, Tq. Nilanga, Dist. Latur

- 1/F Varsha w/o. Bharat Jadhav
Age: 30 years, Occu : Household,
R/o. Dadgi, Tq. Nilanga, Dist. Latur

2] Yeshwant s/o. Sadashiv Powar,
Aged 40 years, Occ. Agril.
R/o. Dadgi, now at Aurad
District Bidar (Karnataka)

.. RESPONDENTS
[Orig. Defendants]

...
Mr.H.VTungar Advocate holding for Mr.C.R.Deshpande,
Advocate for the appellant.
Mr.S.V.Chandole, Advocate holding for Mr.V.G.Sakolkar,
Advocate for the respondent nos.1B to 1E.

...
CORAM : ARUN R. PEDNEKER, J.

Reserved on : 06.07.2023

Pronounced on : 14.07.2023

JUDGMENT :

1] By way of the present Second Appeal, the appellant is challenging the judgment and order dated 01.03.1993 passed by the appellate Court i.e. 3rd Additional District Judge, Latur in Regular Civil Appeal No. 110 of 1988, so also, judgment and order dated 18th June, 1988 passed by the Civil Judge Junior Division, Nilanga in Regular Civil Suit No.7 of 1975, whereby the suit filed by the plaintiff for partition and possession of the suit property, is concurrently dismissed.

Brief facts leading to filing the present Second Appeal is as under :

2] The appellant – plaintiff filed Regular Civil Suit No.7 of 1975 for recovery of possession of the land bearing Survey No.59/A, admeasuring 5 Acres 35 Gunthas situated at village Dadgi, Taluka Nilanga to the extent of 1/2 share by way of partition. The plaintiff further prayed for declaration that sale deed dated 29.04.1966 executed by defendant no.2 in favour of the defendant no.1 is not binding on his half share and the same is null and void.

3] The plaintiff and defendant no. 2 are the members of joint Hindu family. The defendant no.2 is the plaintiff's elder brother. The suit property is the joint family property of plaintiff and defendant no.2. It was purchased under sale deed from one Tulshiram Manaji Gobade in the name of the plaintiff and defendant no.2. According to the plaintiff, the suit property was purchased from the sale proceed of the ancestral joint family property. After purchase, the plaintiff and defendant no.2 became the

owner and were in possession of the same till defendant no.2 sold it to the defendant no.1. The plaintiff was minor at the relevant time and defendant no.2 cultivated the suit property for himself and for minor plaintiff.

4] It is further the case of the plaintiff that on attaining the majority, the plaintiff came to know that the defendant without any right has sold the entire suit property to defendant no.1 under registered sale deed dated 29.04.1966. Thus, the plaintiff claimed that the sale deed be declared as in-effective to the extent of his share in the suit property. He further contended that there was no legal necessity to defendant no.2 to alienate the suit property. The plaintiff, therefore, claimed possession of property to the extent of half share over the suit property. The defendant no.2 did not file any written statement in the suit. The defendant no.1 is the only contesting defendant, who has filed his written statement in the suit.

5] It is the case of the defendant no.1 that there was no ancestral property of plaintiff and defendant no.2.

The defendant no.2 had purchased the suit land from original owner Tulshiram Manaji Gobade and defendant no.2 alone had paid entire consideration amount to Tulshiram. According to defendant no.1, the name of the plaintiff was inserted in the sale deed dated 25.02.1966 and he was nominal purchaser shown in the sale deed and thus the plaintiff had no concern with the suit land. It is further contended by defendant no.1 that defendant no.2 had to repay a loan amount and he was in need of money and thus sold the suit land in favour of the defendant no.1 for consideration of Rs.4800/- and executed registered sale deed dated 29.04.1966. Thus, the defendant no.1 is claiming his ownership and possession over the suit land since then. According to him, the plaintiff has no right or concern with the suit land. The mother of plaintiff and defendant no.2 was alive on the date of filing of the suit and she was not party to the suit. The suit of the plaintiff is time barred. The same is filed in collusion with defendant no.2.

6] On the basis of the pleadings of the parties, the trial Court formulated the following issues :

	ISSUES	FINDINGS
1.	Does the plaintiff prove that he and deft. no.2 are the members of the joint Hindu family ?	Yes
2.	Does plaintiff prove that the suit property is joint family property and it is purchased by deft. no.2?	No.
3.	Does the deft.No.1 prove that the suit land was exclusively purchased by deft. no.2 and he was in possession on the basis of sale deed executed by deft.no.2 in respect of suit land?	Yes
4.	Does the plaintiff prove that the suit land purchased by himself and deft.no.2 from the nucleus of their ancestral property ?	No
5.	Does the pltf. prove that the possession of the deft. is illegal ?	No
6.	Does pltf. prove that the defts. refused to deliver the possession of the suit land in the month of Dec.1971 ?	Question does not arise.
7.	Does pltf. prove his title in respect of the suit land on the basis of partition ?	No.
Additional issues		
1.	Whether the deft.No.1 proves that the alienation made in his favour by respondent no.2 was for legal necessity?	

2.	Whether the mother of the pltf. and deft. No.2 is a necessary party to the suit ? If yes, what is effect.	These issues do not survive
3.	Whether pltf's claim is barred by limitation?	
4.	What order or decree ?	The suit is dismissed.

On the basis of the aforesaid issues, the findings are recorded by the trial Court.

7] The trial Court held that the plaintiff has not proved that the suit property is joint family property. The trial Court held that the plaintiff was not able to prove that there was any nucleus of the joint family property from which they have purchased the suit property. The trial Court further held that there was no evidence that any ancestral property was in existence at the time of purchase of the suit property. The plaintiff has also failed to produce revenue records of any ancestral property to show that the family owned ancestral property. The plaintiff has also not produced any sale deed about selling ancestral property. Thus, the trial Court held that the suit property was the self

acquired property of the defendant no.2 and that the plaintiff was minor and he was mentioned as nominal owner in the sale deed but the defendant no.2 is the real owner of the suit property. The trial Court held that the plaintiff was minor at the time of purchase of suit property and that there was no question of providing the amount by the plaintiff and it is only for love and affection, his name is entered in the sale deed. Thus, the trial Court held that defendant no.1 has proved that the suit land was exclusively purchased by the defendant no.2. The trial Court further held that defendant no.1 has proved his possession over the suit property on the basis of the sale deed executed by the defendant no.2 and that he is in lawful possession of the suit land. The trial Court further held that since the suit property was self acquired property of the defendant no.2, there was no issue of selling the suit property for legal necessity, thus, dismissed the suit.

8] The plaintiff challenged the order passed by the trial Court before the Appellate Court. The Appellate Court

on consideration of the material framed following points for consideration :

	Points	Findings
1.	Whether the defendant No.1 has proved that suit property was exclusively owned by the defendant No. 2 ?	Yes
2.	If the answer to the point No.1 is in negative then whether the defendant No.1 has proved that property was sold to him by defendant No.2 for legal necessity of the Joint Hindu Family?	Does not survive
3.	If the answer to the point No.1 is in negative the, whether the mother and the sister of the plaintiff were the necessary parties to the suit ?	Does not survive
4.	Whether the suit is barred by limitation ?	No.
5.	What order ?	As per final order.

The learned Appellate Court dismissed the appeal filed by the appellant.

9] The present Second Appeal was thereafter filed by the appellant and the same was admitted by this Court on 29th September, 1993 on the following substantial questions of law :

II] That, the learned both the Courts below did not consider the very material aspect of this case which is evidence from the record that the suit land has been purchased by the plaintiff and defendant No.2 jointly and the sale deed which is the sufficient evidence to establish the joint ownership has been not considered by the Court below.

IV] That, the contesting defendant / respondent No.1 has amended his written statement and contended that the alienation of the suit land by defendant No.2 in his favour was for legal necessity. The learned District Judge in Appeal No. 138/80 has remanded the case for framing the issue about legal necessary alongwith the other issues, but the learned Civil Judge, has answered these additional issues "DOES NOT SURVIVE", thus the very purpose of remanding the case has been frustrated.

VIII] That, as property hold by a minor can not be sold without the permission of the District Court as per the provisions of Section 29 of the Guardian and Wards Act 1890 but unfortunately the said point has not been considered by the courts below. Thus the sale transaction in favour of defendant No.1 by the defendant No.2 is void. Therefore no ownership rights have been validly transferred to the defendant No.1.

VIII-A] It is the contention of defendant

no.1 that, the suit land has been purchased by defendant no.2 Yeshwant from Tulshiram in the year 1965. The defendant no.1 had supplied the amount of consideration to purchase the suit land and he obtained the money decree from Yeshwant for the said amount. Thus the transaction as claimed by the defendant no.1 is a Benami transaction.

VIII-B] That, it is the case of the defendant no.1 that the entire amount of consideration that was paid to Vendor namely Tulshiram by defendant No.2 Yeshwant only. But the name of plaintiff has been written in the sale deed as nominal one, and it was written only due to the insistence by the mother of the plaintiff. Actually the plaintiff was having no concern with the transaction, similar averments are in the written statement of the defendant no.1. Thus the contention of the defendant no.1 is that the plaintiff is not the real purchaser. In view of these averments in the written statement and in the evidence of the defendant no.1, the transactions in question appear to be benami.

VIII-C] That as per the provisions of sec.4 of the Benami Transactions [Prohibition] Act, 1988. The deft. no.1 can not take the defence of Benami Transaction and he has no right to claim the property in question, by contending that his vendor was the holder of the land as benami.

VIII-D] That, the learned Civil Judge Junior

Division Nilanga has decreed the suit on 18/6/1988, and the Regular Civil Appeal No. 41/88 has been preferred before the District court on 4/8/1988. The appeal being the continuation of the suit was pending on 5th September 1988, the date on which the Benami Transactions [Prohibition] Act, 1988 came in force. The said material aspect of this case has not been considered by the lower appellate court. The non-consideration of this fact has resulted in miscarriage of justice to the present appellant.

10] As regards question no. II is concerned above, the suit land has been purchased in the name of the plaintiff and defendant no.2 jointly. However, the finding of both the Courts is that at the relevant time the plaintiff was a minor and that there was no nucleus or ancestral joint family property from which the amount was received to purchase the suit property. There was no evidence whatsoever that the family owned ancestral property, as such, the Court held that the property is not the ancestral property. The suit property is held to be purchased by the defendant no.2. As such, the question of law no. II, does not arise for consideration.

11] As regards question no. IV is concerned, since both the Courts below have held that the suit property is individual property of the defendant no.2 and not a joint family property, the issue of sale of the suit property for legal necessity does not survive, therefore, the substantial question of law No.IV does not survive for consideration.

12] As regards question no. VIII is concerned, the issue as regards the property held by a minor cannot be sold without permission of the District Court as per the provisions of Section 29 of the Guardian and Wards Act, 1890, it is to be noticed that the property in question is not held to be that of the minor as he was merely a nominal owner. Since the property is exclusively purchased by the defendant no.2, there is no impediment for the defendant no.2 to sell the suit property.

13] As regards question nos. VIII-A, VIII-B, VIII-C and VIII-D are concerned, all these questions relate to Benami Transactions [Prohibition] Act, 1988, however, in the case of **R.Rajagopal Reddy**

it is being held that defence of Benami Transactions [Prohibition] Act, 1988 is prohibited only after the said Act came into force.

14] The Hon'ble Supreme Court in the case of **R.Rajagopal Reddy [Dead] by Lrs and others Vs. Padmini Chandrasekharan [Dead] by LRS** reported in [1995] 2 SCC 630 at paragraph nos.10, 11 and 12 has held that 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)..."

15] It is the contention of the appellant – plaintiff

that the appeal being the continuation of the suit and Benami Transactions [Prohibition] Act, 1988 came into force on 5th September, 1988 the prohibition contained in the Act was applicable to the pending appeal. This Court in the case of **Dattaram Govindrao Kale [minor] Vs. Manikumar Ishwarlal Lokwani & others** in Second Appeal No.386 of 1991 in para no.8 and 11 has held thus :

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.

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.

16] In view of the judgment of the 3 Judges Bench of **R.Rajagopal Reddy** [supra], and in the case of **Dattaram Govindrao Kale** [supra] the defence of benami transaction taken prior to the Act coming into force is available and the Benami Transactions [Prohibition] Act is not retroactive to that extent.

17] In view of the same, the substantial questions of law Nos. VIII-A, VIII-B, VIII-C and VIII-D do not arise for consideration.

18] In view of the above, the present Second Appeal
is dismissed.

[ARUN R. PEDNEKER]
JUDGE

DDC