

Smt. Prem Vati Bhandari v. Smt. Maya Wati and others
(Ashok Bhan, J.)

context of the circumstances, as narrated, punitive costs of Rs. 5,000 are also hereby imposed upon the plaintiff while accepting this appeal now.

(16) Before parting with this matter, it must also be observed that it was indeed unfortunate that the District Judge, Chandigarh, declined to intervene when moved under section 24 read with section 151 of the Code of Civil Procedure. The circumstances were clearly such as rendered such interference, at that stage, imperative. In the case of a Judicial Officer, entrusted with the duty of dealing with urgent matters, even during vacations, interests of justice render it incumbent that due care and attention be given to the merits of any matter coming up before such officer, in order to safeguard against any injustice being perpetuated by merely routine orders being passed without appreciating the gravity and importance of the point.

R.N.R.

Before : Ashok Bhan, J.

SMT. PREM VATI BHANDARI,—Appellant.

versus

SMT. MAYA WATI AND OTHERS,—Respondents.

Regular First Appeal No. 472 of 1978.

14th December, 1990.

The Benami Transactions (Prohibition) Act, 1988—Ss. 3 & 4—Suit for recovery of Benami property—Suit is not maintainable—S. 4 is retrospective in nature.

Held. no suit on behalf of the plaintiff was maintainable to enforce any right in respect of the property held benami by defendant on the ground that the plaintiff was the real owner of this property. Section 4 of the Benami Transactions (Prohibition) Act, 1988 came into force with effect from 19th May, 1988 on which date, this appeal was pending and is still pending. In view of the law laid down by the Supreme Court in *Mithilesh Kumari and another v. Prem Behari Khare*, AIR 1989 S.C. 1247, the appeal has to be allowed as S. 4 of the Act is retroactive in nature and applies to the pending suits and appeals arising out of such suits.

(Para 5)

Regular First Appeal from the decree of the Court of Senior Sub-Judge, Jullundur, dated the 28th day of February, 1978, in the Civil Suit No. 41 A of 1977, whereby a decree for declaration to the effect that plaintiff was sole owner in possession of House No. 264-R, Model Town, Jullundur was passed in favour of the plaintiff and against the defendants and the parties are left to bear their own costs :

Claim for :—

Suit for declaration to the effect that the plaintiff is sole owner in possession of House No. 264-R situated in Model Town, Jullundur bounded as below:—

North : Road

South : Harnam Singh

East : Ujagar Singh

West : Road

and defdts have no right title or interest in it.

C.M. 406/CI/81

Application on behalf of respondent No. 2 under order 41 Rule 27, read with Section 151 C.P.C. praying that the applicant/respondent No. 2 may kindly be allowed to produce the above-mentioned documents as additional evidence because the same are necessary for the proper and just decision of the appeal and for pronouncement of the judgement by this Hon'ble Court.

H. L. Sarin, Sr. Advocate with Jaishree Thakur, Advocate, for the Petitioner.

S. P. Jain, Advocate, for the Respondent.

JUDGMENT

Ashok Bhan, J.

(1) This is a defendants appeal. The facts giving rise to the present appeal, shortly stated, are as under:—

(2) One Shiv Nand father of Ved Parkash Plaintiff-respondent purchased House No. 264-R, Model Town, Jalandhar City, in the name of his wife Smt. Kamla Devi. It was alleged that the said house was purchased by his father from the government with his own money and that Kamla Devi his wife had no funds of her own

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to buy the house and was only a Benamidar for the plaintiff. Number of circumstances were stated to exist which showed the transaction to be Benami in nature.

(3) Kamla Devi sold the house on 11th June, 1973 to Smt. Prem Wati Bhandari defendant No. 2 (hereinafter referred to as the appellant) for Rs. 30,000. It was pleaded by the appellant that plaintiff Ved Parkash had no *locus standi* to file the present suit and that the house was purchased by her after paying a consideration of Rs. 30,000 before the Sub Registrar. Number of other pleas were also taken. The trial Court after framing the issues decreed the suit and gave a declaration to the effect that Ved Parkash plaintiff/respondent is the sole owner in possession of House No. 264-R, Model Town, Jalandhar. Smt. Prem Wati Bhandari the vendee from Kamla Devi has come up in appeal to this Court.

(4) Learned counsel for the appellant has contended that in view of the coming into force of The Benami Transactions (Prohibition) Act, 1988 (hereinafter referred to as the Act), the present appeal has to be allowed as Section 4 of this Act which prohibits the filing of a suit to recover the property held Benami is retroactive in nature. For this proposition he has relied upon a Supreme Court decision reported as *Mithilesh Kumari and another v. Prem Behari Khare* (1). In this case while interpreting the Act and Section 4 of the Act, the apex Court held as under:—

“As defined in Section 2(a) of the Act “benami transaction” means any transaction in which property is transferred to one person for a consideration paid or provided by any other person. A transaction must, therefore, be benami irrespective of its date or duration. Section 3, subject to the exceptions, states that no person shall enter into any benami transaction. This section obviously cannot have retrospective operation. However, Section 4 clearly provides that no suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person shall lie, by or on behalf of a person claiming to be real owner of such property. This naturally relates to past transactions as well. The expression “any property

(1) A.I.R. 1989 S.C. 1247.

held benami" is not limited to any particular time, date or duration. Once the property is found to have been held benami, no suit, claim or action to enforce any right in respect thereof shall lie. Similarly, sub section (2) of S. 4 nullifies the defences 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 in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property. It means that once a property is found to have been held benami, the real owner is bereft of any defence against the person in whose name the property is held or any other person. In other words in its sweep S. 4 envisages past benami transactions also within its retroactivity. In this sense the Act is both a penal and a disqualifying statute. In case of a qualifying or disqualifying statute it may be necessarily retroactive. For example when a Law of Representation declares that all who have attained 18 years shall be eligible to vote, those who attained 18 years in the past would be as much eligible as those who attained that age at the moment of the law coming into force. When an act is declaratory in nature the presumption against retrospectivity is not applicable. Acts of this kind only declare. A statute in effect declaring the benami transaction to be unenforceable belongs to this type. The presumption against taking away vested right will not apply in this case inasmuch as under law it is the benamidar in whose name the property stands, and law only enabled the real owner to recover the property from him which right has now been ceased by the Act. In one sense there was a right to recover or resist in the real owner against the benamidar. *Ubi jus ibi remedium*. Where there is a right, there is a remedy. Where the remedy is barred, the right is rendered unenforceable. In this sense it is a disabling statute. All the real owners are equally affected by the disability provision irrespective of the time of creation of the right. A right is a legally protected interest. The real owner's right was hitherto protected and the Act has resulted in removal of that protection."

"When the law nullifies the defences available to the real owner in recovering the benami property from the benamidar the law must apply irrespective of the time of the

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benami transactions. The expression "shall lie" in Section 4(1) and "shall be allowed" in Section 4(2) are prospective and shall apply to present (future stages) and future suits, claims or actions only. This leads us to the question whether there was a present suit between the plaintiff-respondent and the defendant-appellant on the date of the law coming into force. We have noted the dates of filing the suit and judgments of the Courts below. On the date of the Section 4 of the Act coming into force, that is, 19th May, 1988 this appeal was pending and, of course, is still pending. Can the suit itself be said to be pending?"

In view of this authoritative pronouncement of the apex Court no suit on behalf of the plaintiff was maintainable to enforce any right in respect of the property held benami by Kamla Devi defendant on the ground that the plaintiff was the real owner of this property. Section 4 of the Act came into force with effect from 19th May, 1988 on which date, this appeal was pending and is still pending. In view of the law laid down by the Supreme Court in *Mithilesh Kumari's case* (supra), the appeal has to be allowed as section 4 of the Act is retroactive in nature and applies to the pending suits and appeals arising out of such suits.

(5) Before I part with this judgment, I would notice an argument which has been raised by the learned counsel for the plaintiff-respondent. Learned counsel for the respondent has argued that under Section 3(1) of the Act no person shall enter into any benami transaction but sub section (2) creates an exception to sub section (1) of the Act which provides that 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 in the present case the property was purchased in the name of the wife Smt. Kamla Devi by Shiv Nand father of the plaintiff and hence this Act will not prohibit the suit by the real owner for recovery of property held benami in the name of wife or daughter. I do not find any substance in this submission firstly because even if the property is purchased in the name of wife or unmarried daughter still the character of transaction remains to be benami and is not taken out of the purview of section 2(a) of the Act which defines "benami transaction" as any transaction in which property is transferred to one person for a consideration paid or provided by another person. Sub section (2) of Section 3 of the Act, no doubt creates an exception to the effect that property can be purchased by any person in the name of his wife or unmarried daughter

but this does not mean that the rigour of section 4(1) of the Act which bars the filing of a suit, claim or action to recover such a property is taken away. Section 3(1) of the Act provides that no person shall enter into any benami transaction and further sub section (3) of section 3 of the Act provides 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. What is saved by sub section (2) of section 3 of the Act is that a person can buy the property benami in the name of his wife or unmarried daughter but he shall not be punishable under sub section (3) of Section 3 of the Act but this does not mean that plaintiff retains the right to recover the property from benami-holder by filing a suit.

(6) Section 4 of the Act is a disqualifying section which prohibits the right to recover the property held benami and there is no exception in this section similar to sub section (2) of section 3 of the Act. Moreover, as has been held by the Supreme Court in *Mithilesh Kumari's case* (supra), section 3 of the Act is prospective in nature whereas Section 4 of the Act is retrospective in operation. This is evident from sub section (3) of Section 1 of the Act which provides that Sections 3, 5 and 8 would come into force with effect from September 5, 1988, i.e. the day on which the Act received the assent of President of India whereas the remaining provisions including section 4 would be deemed to have come into force with effect from 19th day of May, 1988, that is prior to the Presidential assent of the Act. It can be examined from another angle. A person can purchase the property under Sub section (2) of section 3 of the Act benami in the name of his wife or unmarried daughter but the right of the real owner to recover the property from benami-holder has been eliminated by Section 4 of the Act. Earlier, there was a right to recover or resist the claim for the real owner against the benamidar but now that remedy stands barred and the right rendered unenforceable as has been held by the apex Court in *Mithilesh Kumari's case* (Supra). It is a disabling statute and all the real owners are equally affected by the disability provision provided in Section 4 of the Act. Hence, I find no force in the submission of learned counsel for the respondent.

(7) In view of my finding recorded above, I would not go into the factual merits of this case. Appeal is accepted, judgment and decree of the trial Court is set aside and the suit filed by the plaintiff-respondent is dismissed with no order as to costs.