

OM PRAKASH AND ANR.

v.

JAI PRAKASH

JANUARY 9, 1992

[N. M. KASLIWAL AND B. P. JEEVAN REDDY, JJ.]

Benami Transaction (Prohibition) Act, 1988—Section 4 read with Article 136, Constitution of India, 1950—SLP pending before the Supreme Court, whether amounts to appeal pending—Suit based on benami transaction instituted prior to the coming into force of the Act, whether barred.

Benami Transaction (Prohibition) Act, 1988—Section 4—“Shall lie”, “Shall allow” and “any property held benami”—Construction of.

Code of Civil Procedure, 1908—Order 6, Rules 1, 2, 7—Pleading—Written statement—Question of applicability of section 49 of the U.P. Consolidation of Holdings Act not averred—Whether such plea can be taken later on appeal.

The defendant-appellant No. 1 and plaintiff-respondent were brothers and defendant-appellant No. 2 was the wife of appellant No. 1.

The appellant No. 1 was in Government service ever since 1953. The plaintiff-respondent was looking after the entire agricultural property in the village.

Partition was effected during consolidation proceedings and entered in the revenue records and chaks were carved out in accordance with the share of the parties in the consolidation proceedings.

During the consolidation operation, the plaintiff-respondent did not raise any dispute that he was owner of the entire property and the names of defendants-appellants were wrongly mentioned as benami.

Later, the plaintiff-respondent filed a suit on the ground that the suit-land was purchased by him alone through 4 sale deeds dated 10.6.1968, 21.6.1968, 17.1.1976 and 23.6.1977, wherein the names of the defendants-appellants were included only as benamidar and he was the real owner of the land.

The defendants-appellants contended that they had paid their part

A of the sale consideration and the land was jointly purchased in the name of both the parties.

B The trial court dismissed the suit holding that the names of the defendants-appellants in the sale deeds were not mentioned as benami-dars and that the plaintiff-respondent did not take any objection in the consolidation proceedings.

When the plaintiff-respondent filed an appeal before the first appellate court, it reversed the judgment and decree of the trial court and decreed the suit in favour of the plaintiff-respondent.

C The second appeal filed by the defendants-appellants was dismissed by the High Court. The defendants filed a special leave petition before this Court on 15th March 1988.

D During the pendency of the special leave petition, the Benami Transactions (Prohibition of the Right to Recover Property) Ordinance, 1988 was promulgated on 19.5.1988.

The Ordinance was replaced by the Benami Transactions (Prohibition) Act, 1988, which received the President's assent on 5.9.1988.

E The defendants filed an application on 1.5.1989 for allowing them to take additional grounds made available on the basis of the aforesaid 'Benami Act'.

Thereafter special leave was granted by order dated 21.8.1989 and the parties were given liberty to file additional documents, if any, within four weeks.

F The defendants-appellants contended that the suit filed by the plaintiff-respondent was not maintainable and barred under Section 49 of the U.P. Consolidation of Holdings Act, 1954 as the point regarding the land in question being benami was never raised by the plaintiff-respondent during consolidation proceedings and the chaks were allowed to be recorded in the name of the defendant-appellants.

G The plaintiff-respondent contended that if the ratio of *Mithilesh Kumari's case*, JT. 1989(1) SC 275, was applied, it could be made available only in a case where appeal was pending before the higher Court and that no advantage could be taken by the defendants-appellants, of Section 4 of the Benami Act, as no appeal was pending on the date when the Benami Act came into force.

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On the question, whether any suit relating to benami transactions can be decreed after the coming into force of the Benami Act, this Court, allowing the appeal of the defendants,

HELD : 1.01. In a suit for recovery of benami property if any appeal is pending on the date of coming into force of Section 4, the appellate court can take into account the subsequent legislative changes. [20C]

1.02. The Law Commission's view was that the legislation replacing the ordinance should be retrospective in operation and that no locus penitentia need be given to the persons who had entered in the benami transaction in the past. [20G]

1.03. In the present case the defendants, having lost in High Court, could have approached this Court only through a special leave petition under Art. 136 of the Constitution and it is only after the grant of such special leave that the appeal could be heard. Though the special leave might have been granted subsequently on 21.8.89 but it is a fact that the Judgment and decree of the High Court had already been challenged by the defendant-appellants, and it cannot be said that no appeal was pending before this Court simply on the ground that only special leave petition was pending when the Benami Act came into force. [21C-E]

1.04. An appeal is a continuation of suit and in the present case, the appeal was pending before this Court. The suit had been filed by the plaintiff-respondent claiming that he was the real owner of the property and the names of the defendants-appellants were mentioned in the sale-deeds as benami. [21E-F]

1.05. Section 4 of the Benami Act is a total prohibition against any suit based on benami transaction and the plaintiff-respondent is not entitled to get any decree in such suit or in appeal. [21F]

Mithilesh Kumari and Anr. v Prem Behari Khare, J.T. 1989 (1) S.C. 275, referred to.

2.01. The expression "shall lie" in Section 4(1) and "shall allow" in Section 4(2) of the Benami Act are prospective and shall apply to present (future stages) and future suits, claims or actions only. [20B]

2.02. The expression "any property held benami" is not limited to any particular time, date or duration. [20C]

A 3. No foundations were laid in the written statement nor any issue was raised by the defendants-appellants, on the question of applicability of Section 49 of the U.P. Consolidation of Holdings Act. The defendants-appellants cannot be allowed to take such plea. [19H-20A]

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 3552 of 1989.

B From the Judgment and Order dated 24.11.87 of the Allahabad High Court in Second Appeal No. 2719 of 1987.

J.P. Goyal, R.C. Verma, M.R. Bidsar and K.K. Gupta (NP) for the Appellants.

C O.P. Rana and Girish Chandra for the Respondent.

The Judgment of the Court was delivered by

D **KASLIWAL, J.** This appeal by special leave is directed against the Judgment of Allahabad High Court dated 24.11.1987. The plaintiff-respondent filed a suit on the ground that the land purchased through 4 sale deeds dated 10.6.1968, 21.6.1968, 17.1.1976 and 23.6.1977 were purchased by him alone and he was the real owner of said land. The name of the defendants/appellants were included in the said sale deeds only as benamidar. The defendants-appellants took the plea that they had paid their part of the sale consideration and the land was jointly purchased in the name of both the parties. It may be noted that the defendant-appellant Om Prakash and plaintiff-respondent Jai Prakash are brothers and defendant-appellant No. 2 Smt. Satyawati is the wife of appellant Om Prakash. It has come on record that the appellant No. 1 Om Prakash was in Government service ever since 1953 and the plaintiff-respondent was looking after the entire agricultural property in the village. Consolidation proceedings also took place in the village and during the consolidation operation partition had been effected in the revenue records and chaks had been carved out in accordance with the share of the parties. At that time no dispute was raised by the plaintiff-respondent that he was owner of the entire property and the names of defendants-appellants were wrongly mentioned as benami.

G The learned trial court arrived at the conclusion that the names of the defendants-appellants in the sale deeds were not mentioned as benamidars and further held that the claim of the plaintiff-respondent could not be accepted as no objection had been taken by him even during the consolidation proceedings. The suit as such was dismissed by the trial court by Judgment dated 24.1.1987. The plaintiff aggrieved against the judgment of

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the trial court, filed an appeal. The first appellate court reversed the Judgment and decree of the trial court and decreed the suit in favour of the plaintiff. The second appeal filed by the defendants was dismissed by the High Court. The defendants aggrieved against the Judgment and decree of the High Court filed special leave petition before this Court on 15th March, 1988. During the pendency of the special leave petition, the Benami Transactions (Prohibition of the right to recover property) Ordinance, 1988 was promulgated by the President of India on 19.5.1988. The said ordinance was replaced by the Benami Transactions (Prohibition) Act, 1988 (Hereinafter called the 'Benami Act'). The Act received the assent of the President of India on 5.9.1988. The defendants filed an application on 1.5.1989 for allowing them to take additional grounds made available on the basis of the aforesaid 'Benami Act'. Thereafter special leave was granted by this court by order dated 21.8.1989 and it was directed that printing of record is dispensed with and appeal will be heard on the special leave petition paper books. The parties were given liberty to file additional documents if any within four weeks and the appeal was directed to be listed on 13.12.1989 for hearing. Pending disposal of the appeal, the parties were directed to maintain status quo as existing on that day.

In the above circumstances, the matter came up for hearing before us.

Though there is no specific order of this Court allowing the application dated 1.5.1989 filed by the appellants for raising additional grounds, the same shall be deemed to have been allowed as the special leave petition was granted subsequently on 21.8.1989 after hearing both the parties. In any case, we further make it clear that we had permitted the defendants/appellants to argue additional grounds made available to them under the 'Benami Act', which admittedly came into force after the filing of the special leave petition in this Court.

Learned counsel appearing on behalf of the defendants-appellants had contended that the suit filed by the plaintiff-respondent was not maintainable and barred under Section 49 of the U.P. Consolidation of Holdings Act, 1954 as the point regarding the land in question being benami was never raised by the plaintiff-respondent during consolidation proceedings and the chaks were allowed to be recorded in the name of the defendants-appellants. So far as this objection under Section 49 of the U.P. Consolidation of Holdings Act is concerned, no foundations were laid in the written statement nor any issue was raised. The High Court was thus right in holding that in the facts of this case, no foundation had been laid for the applicability of Section 49 of the U.P. Consolidation of Holdings Act. We see no error in the order of the High Court in taking the aforesaid view and we also hold that the defendants-

A appellants cannot be allowed to take such plea for which no foundation was laid in the pleadings.

B The next important and formidable question which arises for consideration is whether any suit relating to benami transactions can be decreed after the coming into force of the Benami Act. This Court in *Mithilesh Kumari and Anr. v. Prem Behari Khare*, J.T. 1989 (1) SC 275, has already held that the expression "shall lie" in Section 4 (1) and "shall allow" in Section 4 (2) of the Benami Act are prospective and shall apply to present (future stages) and future suits, claims or actions only. The expression "any property held benami" is not limited to any particular time, date or duration. In a suit for recovery of benami property if any appeal is pending on the date of coming into force of Section 4, the appellate court can take into account the subsequent legislative changes. Section 4 of the Benami Act reads as under :-

D "(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.

E "(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."

F In the case of *Mithilesh Kumari* this Court considered the 1/30th report of the Law Commission submitted to the Government on August 14, 1988. Benami Transaction (Prohibition) Bill, 1988 was drafted after getting the report and the Bill was introduced in the Rajya Sabha on 31st August, 1988 and then the Bill was passed. The Law Commission devoted several pages to justify retrospective legislation and its view was that the legislation replacing the Ordinance should be retrospective in operation and that no locus penitentia need be given to the persons who had entered in the benami transaction in the past. Learned counsel appearing for the respondent was unable to convince us to take a different view from that already taken by this Court in *Mithilesh Kumari's* case.

H It was vehemently contended by the learned counsel for the plaintiff-respondent that even if the ratio of *Mithilesh Kumari's* case is applied, it can be made available only in a case where appeal was pending before the higher Court. It was contended that in the present case, only special leave petition

filed on 15th March, 1988 was pending at the time when the Benami Act came into force. It was pointed out that the Ordinance was promulgated on 19.5.1988 and the Benami Act received the assent of the President on 5.9.1988. It was thus contended that no appeal was pending on 19.5.1988 or 5.9.1988 as the special leave was granted much after on 21.8.1989 and thus no advantage can be taken by the defendants-appellants of Section 4 of the Benami Act as no appeal was pending on the date when the Benami Act came into force.

We find no force in the above contention of the learned counsel for the plaintiff-respondent. Special leave petition was filed against the Judgment of the High Court on 15.3.1988 and special leave was granted on 21.8.1989 after hearing both the parties. In the present case the defendants having lost in High Court could have approached this Court only through a special leave petition under Art. 136 of the Constitution and it is only after the grant of such special leave that the appeal could be heard. Though the special leave might have been granted subsequently on 21.8.1989 but it is a fact that the Judgment and decree of the High Court had already been challenged by the defendant-appellants and it cannot be said that no appeal was pending before this Court simply on the ground that only special leave petition was pending when the Benami Act came into force. There is a clear prohibition under Section 4 of the Benami Act that no suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property. It is well settled that an appeal is a continuation of suit and in the present case the appeal was pending before this Court. There is no manner of dispute that the present suit had been filed by the plaintiff-respondent claiming that he was the real owner of the property and the names of the defendants-appellants were mentioned in the sale deeds as benami. In our view, Section 4 of the Benami Act is a total prohibition against any suit based on benami transaction and the plaintiff-respondent is not entitled to get any decree in such suit or in appeal.

As a result of the above discussion, we allow this appeal, set aside the Judgment and decree of the High Court and dismiss the suit. In view of the fact that the suit is dismissed on account of legislative change brought about during the pendency of the appeal in this Court, there would be no order as to cost.

V.P.R.

Appeal allowed.