
(2002) 03 AP CK 0033
In the Andhra Pradesh High Court
Case No : CRP No. 5207 of 1999

Akinipalli Shankaraiah

APPELLANT

Vs

Akinipalli Lingaiah

RESPONDENT

Date of Decision : 07-03-2002

Acts Referred:

Benami Transactions (Prohibition) Act, 1988 — Section 4(2)

Citation : (2002) 3 ALD 94 : (2002) 3 ALT 308

Hon'ble Judges : J. Chelameswar, J

Bench : Single Bench

Advocate : B. Nalin Kumar, for the Appellant; Bankatlal Mandhani, for the Respondent

Final Decision : Allowed

Judgement

1. Aggrieved by the order dated 29th September 1999 passed in I.A.No.228 of 1999 in O.S.No.13 of 1998, on the file of the learned Senior Civil Judge, Huzurabad, the petitioner therein preferred this revision.

2. The petitioner herein is the plaintiff in the above mentioned suit. The said suit was laid for recovery of possession of suit schedule property from the respondent, who is none other than the brother of the petitioner, and also for mesne profits. In the said suit, the respondent set up a defence that he, in fact, purchased the suit schedule property though the title deed, was obtained in favour of the petitioner and therefore disputed the right of the petitioner to claim the relief such as the one sought by the petitioner in the suit. In substance, the respondent set up a plea of "benami".

3. In the background of the above mentioned defence, the petitioner herein filed the above said I.A., under Order XVI, Rule 16 of the CPC read with Section 4(2) of the Benami Transactions (Prohibition) Act 1988 (hereinafter referred to as "the Act") praying that portion of the written statement insofar as it pertains to the plea of "benami" by the defendant (respondent herein) be struck off. The trial

court by the impugned order dismissed the above said I.A., purporting to be relied upon a judgment of this Court reported in D. Mutyalu Vs. G. Kanakam, .

4. Section 2(a) of the Act defines "benami transaction", which reads as follows:

"benami transaction" means any transaction in which property is transferred to one person for a consideration paid or provided by another person;"

5. Section 3 of the Act prohibits the benami transactions with certain exceptions enumerated in Sub-section (2) thereof the entering into any benami transaction itself is made a punishable offence under Sub-section (3).

6. However, Section 4 of the Act prohibits the right to recover property held benami. Section 4 reads as follows:

"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.

(3) Nothing in this section shall apply,--

(a) where the person in whose name the property is held in a coparcener in a Hindu undivided family and the property is held for the benefit of the coparceners in the family; or

(b) where the person in whose name the property is held is a trustee or other person standing in a fiduciary capacity, and the property is held for the benefit of another person for whom he is a trustee or towards whom he stands in such capacity."

7. The case of the respondent precisely is one of the benami transactions. Learned counsel for the petitioner - Sri B. Nalin Kumar argued that the lower court clearly misunderstood the ratio decidendi of the judgment of this Court reported in D. Mutyalu 's case (supra). In fact, the position of law, insofar as Section 4 of the Act is concerned, was authoritatively pronounced by the Apex Court in R. Rajagopal Reddy (dead) by L.Rs. and others Vs. Padmini Chandrasekharan (dead) by L.Rs., .

8. The Supreme Court in the above mentioned judgment held that Section 4(1) of the Act has no application to the suit which was filed prior to coming into force of Section 4 of the Act i.e., 19.5.1988. Insofar as Section 4(2) of the Act is concerned, a defence of benami, which was otherwise available to a defendant in a suit, till coming into the force of Section 4 of the Act, is no more available to the defendant, if such a defence is taken by the above mentioned cut-off date

i.e., 19.5.1988, in other words, the written statement is not filed by that date.

9. Debarring of such a defence with effect from the cut-off date as held by the Supreme Court does not mean that Section 4(2) is retrospective in operation. The relevant portion of the judgment of the Supreme Court reads as follows: (para 13)

"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 19th May, 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 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(2) 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 picture....."

10. Coming to the judgment of this Court reported in D. Mutyalu's case (supra) which was relied upon by the trial court in dismissing the above said I.A., my learned brother Justice S.R. Nayak in turn also relied on the same judgment of the Supreme Court mentioned above. It was a case where the plaintiff sought a finding by the trial Court that the defendant was not entitled to adduce evidence in support of his plea of benami transaction, the trial Court recorded such a finding. Aggrieved by the same, a revision was preferred to this Court. From the

reported judgment, it appears, it was a suit filed in the year 1984 i.e., long prior to coming into force of Section 4 of the Act.

11. While allowing the revision the learned Judge has held as follows insofar as the issue involved in the case on hand.

"I do not find any necessity to pronounce the opinion of the Court upon the two contentions raised by the learned Counsel for the revision petitioners because in my considered opinion in view of the law laid down by the Apex Court in the aforementioned two decisions in *R. Rajagopal Reddy v. P. Chandrasekharan* and *Nand Kishore v. Sushila* the revision petition is entitled to be allowed on a short ground. There is no dispute that in the instant case the house property was purchased by the brother of the revision petitioner in the name of Jala Rama Murthy by virtue of a sale deed dated 11.1.1978 and Jala Rama Murlhy executed estoppel Kharamama dated 16.1.1978. Both these transactions took place quite anterior to the date on which the Act came into force. If that is so as held by the Apex Court in the aforementioned two decisions - *R. Rajagopal Reddy v. P. Chandrasekharan* and *Nand Kishore v. Sushita* the prohibition contained in Sub-section (2) of Section 4(2) of the Act is not applicable. In that view of the matter the very basis on which the application is ordered is not available to the Court. On that shortground the civil revision petition is allowed and the order under revision is set aside and application IA No. 1896 of 1993 is rejected. No costs."

12. From the above it can be seen that the disputed transaction was of the year 1978 i.e., long prior to coming into force of the Act and the suit is also of the year 1984 though the learned Judge did not record a clear finding whether the defence of benami transaction was taken by the date of coming into force of the Act or not, I presume that such a defence must have been taken by the date of coming into force of the above mentioned Act, otherwise the decision would not be in conformity with the law declared by the Supreme Court in the earlier cited judgment (*supra*).

13. It can be seen clearly from the judgment of the Supreme Court that it is not sufficient that the transaction must have been anterior to the date of the commencement of Section 4(2) of the Act, but the defence of benami must also have been taken prior to 19.5.1988.

14. In the background of the above mentioned legal position applying the principle of law as laid down by the Supreme Court to the facts of the present case, I have no alternative but to hold that the impugned order cannot be sustained as the present suit itself is filed in the year 1998, the defendant could not have taken the plea of benami transaction.

15. In the result, the civil revision petition is allowed, but in the circumstances of the case, without costs.