

(2001) 08 BOM CK 0005

In the Bombay High Court

Case No : Civil Rev. Application No. 941 of 1994

Bhaurao Laxman Honde

APPELLANT

Vs

Namdeo Laxman Honde

RESPONDENT

Date of Decision : 27-08-2001

Acts Referred:

Benami Transactions (Prohibition) Act, 1988 — Section 3, 4, 4(2), 5, 8

Citation : (2001) 08 BOM CK 0005

Hon'ble Judges : A.P. Deshpande, J

Bench : Single Bench

Advocate : V.D. Sapkal, for the Appellant; P.S. Pawar for V.S. Bedre, for the Respondent

Judgement

A.P. Deshpande, J.—The petitioner/plaintiff filed the suit, against the defendant for declaration of ownership and possession of the suit property, bearing Civil Suit No. 341/1988. The plaintiff and the defendant are the real brothers. The plaintiff has founded his suit on the document of title viz. sale deed dated 18-4-1955 under which he claims to have purchased the said property from one Shri Ramchandra Hari Chothe, under a registered sale deed and it is this document of title on which the claim of ownership is founded. The suit was instituted on 21-10-1988. The defendant No. 1 filed his Written Statement on 20-2-1989. In the Written Statement, the defendant No. 1 categorically pleaded that though the sale-deed has been executed by the vendor in the name of the plaintiff, the defendant No. 1 is the real owner as the transaction was a benami transaction. The defendant No. 1 has pleaded that it is he who has paid the consideration and he is the real owner. To substantiate the factum of payment by him, the defendant No. 1 has also averred that his wife was present in the Office of the Sub-Registrar and she paid the money on his behalf.

2. A bare perusal of the pleadings, the moot issue was as to whether the transaction in question was a benami transaction or real transaction. The Benami Transactions (Prohibition) Act, 1988 came into force on 5th September, 1988 and

only the provisions of Sections 3, 5 and 8 have come into force on 9th May, 1988. Section 3 of the said Act prohibits benami transactions subject to certain exceptions. Section 4 prohibits right to recover property held benami. In the present case. Section 4, sub-section (2) is material and the same reads thus :

"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. What needs to be noticed is that sub-section (2) of Section 4 prohibits a defence being raised, based on any right, in respect of any property held benami. The defence of benami transaction has been raised in the instant case by filing a Written Statement on 20-2-1989 i.e. after the coming in force of the Act [Section 4, sub-section (2)]. It appears that the plea of benami transaction is raised in ignorance of Section 4(2). Be that as it may, Section 4(2) operates with full vigour in the present case.

4. Realising that the only defence set up by the defendant would not be sustained, an attempt is made to retract from the admissions made in the Written Statement about the transaction being benami, the defendant No. 1 being the real owner and the plaintiff being a benamidar and at its place the new plea, is sought to be introduced. The proposed amendment does not reveal as to how the defendant No. 1 is claiming ownership and what is the source of his title but vaguely contends that he is the owner of the property without indicating the source of the title. The amendment application was opposed by the plaintiff and it was contended that the defendant No. 1 cannot be permitted to amend the Written Statement which would permit him to circumvent the bar of Section 4(2) of the Act. It is further contended that the defendant No. 1 cannot be permitted to withdraw admissions made by him in his Written Statement to the effect that the plaintiff is a benamidar and the defendant No. 1 is the real owner. It is the submission of the petitioner that having realised that the defence of benami transaction would fail as there is no other defence raised in the Written Statement, with an ulterior motive, amendment application came to be filed. At this juncture, it won't be out of place to mention few facts.

5. It is the case of the plaintiff that he purchased the property in the year 1955 under registered sale deed and his name was already mutated in the revenue records. The defendant No. 1 was working in Police Department and after his retirement came back to his native place and requested the plaintiff to permit him to occupy the suit premises and it is in this fashion the defendant No. 1 was inducted in the suit property. It is the case of the defendant No. 1 that he being in Police Department, thought it risky to purchase the property in his name and purchased it in the name of the plaintiff and the transaction is a benami transaction; he being the real owner and the plaintiff a benamidar. It is in this narrow compass, the parties pleaded and issues came to be framed on 19.1.1994. It is only when the matter reached the stage of evidence, an

amendment application is moved. The trial Court allowed the application by a cryptic order. The only reason that is put forth by the learned trial Judge, is that the said amendment is just and necessary in view of Section 4(2) of the Benami Transactions (Prohibition) Act, 1988. The reason put forth by the learned trial Judge is indeed absurd to say the least. The trial Court says that as a result of Section 4(2) of the Act, he is permitting the amendment. The legislative intent in enacting Section 4(2) is to foreclose all defences in regard to benami transactions and the Act prohibits benami transactions. If the logic of the trial Court is to be accepted, a person is being permitted by allowing amendment to circumvent section 4(2) of the Act. The trial Court has not dealt with the issue as to whether could a party be permitted to withdraw the admissions or displace the admissions made by him. It is the submission of the learned counsel for the petitioner Shri V. D. Sapkal that the admissions made by the defendant about the transaction being Benami transaction cannot be permitted to be withdrawn. He relies on the judgment of the Apex Court reported in *Heeralal Vs. Kalyan Mal and Others*, . The Supreme Court relied on its earlier decision of a Bench of three Judges, in the case of *Modi Spinning and Weaving Mills Co. Ltd. and Another Vs. Ladha Ram and Co.*, . It observed that the said judgment is a clear authority for the proposition that once the written statement contains an admission in favour of the plaintiff, by amendment such admission of the defendant cannot be allowed to be withdrawn. If such withdrawal is allowed, it would amount to totally displacing the case of the plaintiff and which would cause irretrievable prejudice to the plaintiff. The Supreme Court also noticed judgment reported in 1995 AIR SCW 2277 in the case of *Akshaya Restaurant vs. P. Anjanappa*, and observed that the said judgment by the learned two Judges of the Apex Court proceed on an assumption that it was the settled law that even the admission can be explained and even inconsistent pleas could be taken in the pleadings. The Supreme Court held that the decision of three Member Bench of the Apex Court reported in AIR 1977 SC 680 was unfortunately not brought to the notice of the Judges who delivered the judgment in the case of *Akshaya Restaurant vs. Anjanappa*, 1995 AIR SCW 2277 and, as such, said judgment must be held to be per incuriam. The Apex Court held that permitting withdrawal of admission and permitting raising of inconsistent plea is not permissible in law. In view of the pronouncement by the Apex Court, the issue is no longer res integra.

6. In my opinion, by granting the application for amendment, filed by the defendant No. 1, the Court has permitted the defendant No. 1 to withdraw the vital admissions and also permitted to set up an altogether new case thereby granting premium to the defendant No. 1 in defiance of the legislative intent contained in Section 4 of the Benami Transactions (Prohibition) Act, 1988. In my opinion, the amendment application ought to have been rejected. The defendant No. 1 ought not to have been permitted to amend the Written Statement. It is relevant to note that during the pendency of this Revision Application, proceedings on the file of the trial Court were stayed and hence the matter has not progressed thereafter. In view of the facts of the present case and for the

reasons set out hereinabove, I quash and set aside the order passed by the learned Civil Judge, Junior Division, Newasa dated 25-7-1994 on Exh.35 in RCS No. 341/88, permitting amendment to the written statement.

7. Rule is made absolute accordingly, with no order as to costs.

8. Shri V. D. Sapkal, the learned counsel for the petitioner, at this stage, requested that the trial may be expedited as the suit is quite old. I direct the trial Court to decide the suit as expeditiously as possible and I hope that the suit would be disposed of within a period of six months from today.