

(1988) 08 KL CK 0023
In the High Court Of Kerala
Case No : C.R.P. No. 1161 of 1988

C. Narayanan

APPELLANT

Vs

Gangadharan

RESPONDENT

Date of Decision : 02-08-1988

Acts Referred:

Benami Transactions (Prohibition of the Right to Recover Property) Ordinance, 1988 —
Section 2, 2(1), 4
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 10, 47
General Clauses Act, 1897 — Section 6
Trusts Act, 1882 — Section 82

Citation : AIR 1989 Ker 256

Hon'ble Judges : K.P. Radhakrishna Menon, J

Bench : Single Bench

Advocate : P.N.K. Achan, for the Appellant; C.P.D. Nair, for the Respondent

Final Decision : Allowed

Judgement

K.P. Radhakrishna Menon, J.—The defendant in O.S. No. 349/83 on the file of the Subordinate Judge, Palghat is the revision petitioner.

2. The respondent instituted the suit for recovery of the property in dispute on the strength of title. The suit has been decreed, accepting the case of the plaintiff that the property belongs to him although it stands in the name of the petitioner-defendant. The petitioner-defendant has been found to be only a benamidar. A reference in this connection to the following excerpts from the judgment of this Court in (by this judgment this Court disposed of the appeal where the decree sought to be executed was under attack) is relevant, (at p. 330 of AIR).

"There is no evidence in this case to show that the plaintiff wanted to benefit the defendants when he provided funds for purchase of landed properties. On the other hand, the evidence is overwhelming in this case to the effect that money was sent by the plaintiff to the defendant in O.S. No. 349 of 1983 for the specific

purpose of purchasing landed properties in the name of the plaintiff, but, instead, he purchased the properties in the name of himself and his other brothers with the fund so provided by the plaintiff. Therefore it has to be held that the plaintiff is the beneficial owner and he is entitled to recover possession of the plaintiff schedule properties from the defendants in these suits. In our view this is a case where Section 82 of the Indian Trust Act squarely applies."

3. Section 82 of the Trusts Act gives statutory recognition to benami transactions. In a transaction covered by this section the transferee holds the property for the benefit of the person paying or providing the consideration. It therefore follows that when once it is proved that the consideration for the transaction flowed from a person other than the transferee, than that person who provided the consideration and not the transferee, is the real owner of the property. A benami transaction does not vest any title in the benamidar but vests the title in the real owner. It is true that when the benamidar is in possession of the property standing in his, name, he is in one way a trustee for the real owner, "he is only a name lender or an alias for the real owner," That is why it is always said that "where a transaction is once made out to be a mere benami, it is evident that the benamidar absolutely disappears from the title. His name is simply an alias for that of the person beneficially interested." (See *Controller of Estate Duty, Lucknow Vs. Aloke Mitra*, The Supreme Court further observed that the cardinal distinction between a trustee known to English law and a benamidar lies in the fact that a trustee is the legal owner of the property standing in his name and cestui quo trust is only a beneficial owner, whereas in the case of a benami transaction the real owner has got the legal title although the property is in the name of the benamidar. It is by now a well settled proposition that the real owner can always deal with the property without reference to the benamidar.

4. It is in this backdrop the dispute between the parties requires to be decided. The execution petition from which this revision arises, according to the petitioner-judgment-debtor, is not maintainable in view of the prohibition contained in Section 2(1) of The Benami Transactions (Prohibition of the Right to Recover Property) Ordinance, 1988, for short, the Ordinance.

5. I shall read the section.

"2(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."

The section says 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 claimed to be the real owner of such property. This section thus prohibits the institution of suit, preferring of "claim" or "action" to enforce any right, the real owner in a benami transaction is having in respect of any property standing in the name of

benamidar. What then is the scope and effect of this section which contains prohibitive words.

6. Before we go into this aspect, it is necessary to understand the principle governing prohibitive words in a statute. There cannot be any dispute that prohibitive words in a statute are rarely directory. They are indicative of the intention of the Legislature that the Legislature wanted the Section to be mandatory. There cannot be any difference in regard to this principle although the statute does not provide for penalty for disobedience. (See Statutory Construction, Crawford, 1940 edn., para 263).

7. The right to recover property held benami, after the coming into force of Section 2, cannot be enforced through court, because no suit, claim or action to enforce any right in respect of any property held benami against the benamidar shall lie by or on behalf of the real owner of such property.

8. The learned counsel for the respondent however, argues that proceedings for execution of a decree though passed in a benami suit, cannot be said to be a "suit", "claim" or "action" to enforce any right in respect of any property held benami; contemplated u/s 2 and if that be so, the execution petition is maintainable in law. If it is held otherwise, the executing court which cannot go behind the decree ordinarily, will be able to go behind the decree and give the relief to the petitioner which was specifically denied to him by the trial court, the counsel submits. It is not as if there is no substance in this argument. It may in this connection be borne in mind the well-settled principle, that "a court executing a decree cannot go behind the decree; it must take the decree as it stands, for the decree is binding and conclusive between the parties to the suit". (See Topanmal Chhotamal Vs. Kundomal Gangaram and Others, .

9. The argument, though at first blush is meaningful, still has to be tested in the light of the content of Section 2 of the Ordinance. The proceeding for execution cannot be treated as "suit". Could it then be treated as "claim" or "action" within the meaning of the Section? Neither of these expressions has been defined. It has therefore become necessary to give these words apposite meanings and to accomplish this, we always have to keep in mind the purpose and subject-matter of the statute. (See Crawford). The learned author has further observed that "the meaning of any word, however, will always depend upon the legislative intent, and the meaning intended by the legislature should prevail, even though it be contrary to common usage or to technical significance".

10. Having understood the principle in regard to construction of words or expressions which are not defined in the statute, let us try to define these words. In the Concise Oxford Dictionary the meaning of the word "claim" is this : "Demand for something as due; (lay claim to) right, title, to thing, right to make demand on person". Blacks" Law Dictionary - "to demand as one's own, to assert". (2) "under statute authorising the court to order a bill of particulars of the "claim" of either party, "claim" is co-extensive with "case" and embraces all

causes of action and all grounds of defence, the pleas of both parties, and pleas in confession and avoidance, no less than complaints and counter claims". In the context in which this word is used it can safely be said to carry the meanings, namely the right of a person to lay claim in assertion of his title or right to property before a court of competent jurisdiction. Now coming to the word "action": This word has been given the following meaning by Halsbury. "Action is a proceeding by which one party seeks in a court of justice, to enforce some right against, or to restrain the commission of some wrong by another party. More concisely it may be said to be 'the legal demand of a right' or the mode of pursuing a right to judgment. It implies the existence of parties, of an alleged right, of an alleged infringement thereof (either actual or threatened) and of a court having power to enforce such a right". That this meaning has been accepted by courts in India is clear from the decision of the Punjab High Court in *Bharat Bank v. General Insurance Co. Ltd.* AIR 1951 P&H 97. Another shade of meaning that should be noticed is this : "The legal and formal demand of one's right from another person or party made and insisted on, in a court of justice". Blacks" Law Dictionary. The word "action" in the Section therefore can be given the meaning given to this word in Halsbury's Laws of England.

11. The execution proceedings from which this revision arises therefore can either be treated as a "claim" or an "action" within the meaning of Section 2.

12. A question immediately would arise, and it is this: Could the execution petition be said to be a "claim" or an "action", (within the meaning of Section 2 to enforce any right in respect of any property held benami? It should be conceded that the execution petition, going by the meanings given to the words "claim" or "action" in any event, is an "action" to enforce a right, held by the decree-holder.

13. But according to the decree-holder, this right is one emanating from the decree concluding the rights of parties to the suit. That right, the learned counsel argues, cannot be equated with "any right in respect of any property held benami". Could this argument be taken cognizance of, we have to consider in this context. This argument can be appreciated only if we understand what a "decree" means. The essential elements of a decree, as defined in C.P.C. are :

(1) There must be an adjudication by a court, determining the rights of the parties with regard to all or any of the matters in controversy in the suit.

(2) Such a determination must be a conclusive determination.

(3) Such adjudication must have been given in a suit, and

(4) There must be a formal expression of the adjudication.

Having understood the meaning of "decree" defined in C.P.C. thus, let us see what controversy the parties could get determined by the decree which is sought to be executed. Accepting the ease of the decree-holder plaintiff, the court found that the judgment-debtor petitioner is holding the property in dispute benami for

the decreeholder. It is for the enforcement of this right, discernible from the decree, the respondent has preferred the execution petition. If that be so, the above argument of the counsel must be held to be without any substance. The same therefore is rejected.

14. Viewed from another angle also the above argument of the counsel for the respondent is not sustainable. The "claim" or "action" that is prohibited is the "claim" or "action" to enforce any right in respect of any property held benami. The words "in respect of" in their widest sense mean "relating to" or "with reference to". (See *Tolaram Relumal and Another Vs. The State of Bombay*, . Another shade of meaning is "attributable". (See *State of Madras Vs. Swastik Tobacco Factory, Vedaranyam*, Having regard to the object sought to be achieved by Section 2, and the context in which, the words are used, the meaning "with reference to" or "relating to" can be adopted. So understood the words "action to enforce any right in respect of any property held benami" must be held to include, a petition to execute the decree, the subject-matter of which is the property held benami by the petitioner-benamidar, for the real owner, the respondent. It should, in this connection, be noted that on the suit being decreed, the property till then "held benami", will not cease to be one "held benami" unless and until the decree is executed and the relationship of benamidar and real owner till then existed, between the parties, is extinguished. It is also significant to note that till the decree passed in a suit of the nature in hand is executed and property taken delivery of, the property cannot be said to be held not benami, because under law the person who had paid the consideration for the transaction under which the property is held, for all practical purposes is treated as the real owner on whose behalf alone the benamidar is in possession of the property. The possession of the benamidar in law is the possession of the real owner.

15. The intention of the legislature in enacting S. 2 is not in any way different from what is stated above, is established by the special circumstances stated hereunder. A reference in this connection to the recommendations of the Law Commission is profitable. The Law Commission has stressed the need to bring in the enactment prohibiting the right of recover property held benami. This recommendation of the Law Commission is incorporated in its 57th report. Relevant portion therefrom reads : -

"6.33. Recommendation.-- In the light of the above discussion, we recommend the enactment of a separate law containing the following legislative provisions : -

(1) No suit 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 be instituted in any court by or on behalf of a person claiming to be the real owner of such property.

(2) In any suit, 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 court by or on behalf of a person claiming to be the real owner of such property".

It is clear from the above excerpt that the Law Commission wanted the statute to contain a provision prohibiting only the filing of the suit, thus suggesting prospective operation to the statute. But in Section 2 of the Ordinance not only "suit" but also "claim" and "action" to enforce any right in respect of any property held benami is prohibited. If suits alone had been prohibited as recommended by the Law Commission, the position perhaps would have been different. Then enforcement of the right of the real owner in respect of the property held benami by instituting suit alone could be said to be prohibited. Addition of the words "claim" or "action" along with the word "suit" in Section 2 in deviation of the recommendation of the Law Commission, would indicate that alter the coming into force of the enactment, no proceedings for recovery of property held benami at the instance of the real owner is possible. A reference in this connection to the preamble is relevant, it starts off with these words "An Ordinance to prohibit the right to recover property held benami and for matters Connected therewith or incidental thereto". is true that the preamble of a statute is not an essential part of the statute but "it is an excellent aid to the construction of an ambiguous statute or statutes of doubtful meaning; or as has been said, it is a key to the construction of a statute and should be resorted to unlock the minds of its makers". (See Crawford). If, therefore, any one entertains any doubt as to whether a petition to execute a decree in a benami suit will also fall within the mischief of Section 2, he is absolved from that doubt by the preamble which makes it clear that the object of the enactment is to prohibit the right to recover property held benami.

16. The learned counsel for the respondent then argued that the Section 4 read along with clause (b) of sub-section (3) of Section 2 makes it clear that Section 2 has no retrospective operation; It has only prospective operation and therefore the rights of parties already determined by the passing of the decree cannot be reopened. Section 4(1) which is relevant here, reads : -

"4(1) Section 82 of the Indian Trusts Act. 1882 (2 of 1882), Section 66 of the Code of Civil Procedure, 1908 (5 of 1908) and Section 281A of the Income Tax Act, 1961 (43 of 1961), are hereby repealed". Clause (b) of Sub-section (3) of Section 2 reads :-

"3, Nothing in this section shall apply,--

(a)

(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 toward whom he stands in such capacity".

Dilating on this aspect the learned counsel argues that the transaction which was

considered in the suit was one coming u/s 82 of the Trusts Act and therefore the petitioner who holds the property on behalf of the respondent must be treated as a trustee or one standing in a fiduciary capacity and if that be so the pleas of the petitioner based on Section 2, is liable to be rejected. There is no substance in this argument. It should in this connection be remembered that it is well established principle that though a benami transaction is treated as one recognised u/s 82 of the Trusts Act the benamidar cannot be treated as a trustee or a person standing in a fiduciary capacity because the property does not vest in him but vests only in the real owner. Benamidar acts only as an ostensible owner in the place of the real owner. That there is difference between a trustee or other person standing in a fiduciary capacity and the benamidar who is recognised as a trustee u/s 82 is evident from the fact that even after the coming into force of the Ordinance there is no prohibition in initiating any of the proceedings contemplated u/s 2(1) in respect of property held by a trustee or other person standing in a fiduciary capacity whereas after the coming into force of the Ordinance no person can claim the benefit or Section 82 of the Indian Trusts Act. To put it differently Section 82 stands repealed by implication by Section 2 of the Ordinance. Section 4(1) of the Ordinance repealing Section 82, in my judgment, is inserted *ex abundanti cautela*. The repealing provision has made it impossible for a person claiming to be the real owner to institute suit for recovery of properties, relying on Section 82, against a person in whose name he has purchased the properties, and thereby defeat the object sought to be achieved by the Ordinance. These provisions do indicate a contrary intention within the meaning of Section 6 of the General Clauses Act and if that be so, no right of the real owner recognised u/s 82, in my view, has been preserved. The question therefore is not whether Section 2 has retrospective operation or not, but whether the Section extinguishes the right of a real owner over the property held benami on the coming into force of the Ordinance. In my judgment, the Ordinance puts an end to the said right and therefore after the coming into force of the Ordinance, persons claiming to be real owners are prohibited from recovering properties held benami.

17. The execution petition therefore is liable to be dismissed. I accordingly dismiss the same.

The C.R.P., for the reasons stated above, is allowed. No costs.