
(1995) 07 GAU CK 0026
In the Gauhati High Court
Case No : Civil Revision No. 195 of 1990

Haridhan Banerjee

APPELLANT

Vs

Bhadrawati Goswami and Others

RESPONDENT

Date of Decision : 20-07-1995

Acts Referred:

Benami Transactions (Prohibition) Act, 1988 — Section 4
Civil Procedure Code, 1908 (CPC) — Section 47

Citation : AIR 1996 Guw 84

Hon'ble Judges : S.L. Saraf, J

Bench : Single Bench

Advocate : B.K. Goswami and T. Goswami, for the Appellant; N.M. Lahiri, G.N. Sahenwalla, A.K. Goswami and N. Choudhury, for the Respondent

Judgement

S.L. Saraf, J.—This is an application u/s 115 of the CPC against an order passed on 2-4-90 by the Asst. District Judge, Jorhat in Misc. Case No. 50 of 1989 which arose out of money execution case No. 6/1989 allowing the objection u/s 47 of the CPC and dismissing the execution case No. 6 of 1989.

2. Heard Mr. B. K. Goswami, learned Senior Advocate for the petitioner and Mr. G. N. Sahenwalla, learned counsel for the Respondent.

3. The facts in short are as follows.

4. The plaintiff entered into a partnership with the defendants Nos. 1 and 2 to do business under the name and style of "Scientific Supply House" the defendant No. 3. The case of the plaintiff is that the defendant No. 2 was the son of defendant No. 4 who in fact negotiated the terms and conditions of the partnership agreement. The defendant No. 4 also kept the accounts of the firm and also presided over the meetings of the firm. He also supplied capital to the firm if necessity arose. In short the defendant No. 4 was de facto partner of the partnership firm. Subsequently by a letter dated 11-4-75 the plaintiff submitted his resignation from the partnership. The said letter of resignation was accepted

by the respondent firm and its other partners including the respondent No. 4 with effect from 31-8-75 and it was decided that the plaintiff shall be entitled to the refund of his share money to the firm and the profit if any in the said firm. The amount calculated was a sum of Rs. 22,704.68 p. The plaintiff claimed his dues from the partnership firm. However the partnership firm and its partners did not make any payment. In such circumstances, the plaintiff filed a suit before the Assistant District Judge, Jorhat. The matter was heard by the District Judge on 15-7-86 who passed a decree for Rs. 30,404.25 which included principal amount and the interest. The plaintiff waited for two years for realisation of its decretal amount from the defendant. On their failure to make payment in terms of the decree in the year 1989 the plaintiff filed an application for execution before the Assistant District Judge, Jorhat. The Respondents Nos. 2 and 4 instead of making any payment filed two objection applications in the year 1989 and raised objection on the basis of the provisions of Benami Transaction (Prohibition) Act, 1988. The objection taken was that the decree passed by the Asstt. District Judge was a nullity and as such the Executing Court should not pass any order in terms of the execution application. The defendants Nos. 2 and 4 relied on the judgment of Supreme Court, Mithilesh Kumar and Another Vs. Prem Behari Khare, According to the submission of the respondents Nos. 2 and 4 the said decision of the Supreme Court was applicable in the facts of the case. As per submission of the respondent after passing of the Benami Transaction Act of 1988 the decree has become nullity and it cannot any longer be enforced against the respondent. The Executing Court accepted the above submission of the respondent and stated that the Act of 1988 had retrospective effect and as such the decree was a nullity and the same cannot be enforced against the respondents Nos. 2 and 4 any longer. Mr. Sahenwalla appearing for the respondents Nos. 2 and 4 has strenuously argued before me that the decree was in fact a nullity inasmuch as there was allegation in the plaint that the defendant No. 2 was benamidar of Respondent No. 4. As such it was directly hit by the Benami Transaction (Prohibition) Act, 1988 and the Executing Court rightly took, notice of the same and did not execute the decree. I have gone through the provisions of Benami Transaction (Prohibition) Act, 1988 and I have also considered the decision of the Supreme Court reported in Mithilesh Kumar and Another Vs. Prem Behari Khare, and the decision of the Supreme Court reported in R. Rajagopal Reddy and Others (deceased by legal representatives) Vs. Padmini Chandrasekharan (deceased by legal representatives), . The Supreme Court in Mithilesh Kumar and Another Vs. Prem Behari Khare, had held that the Act had a retrospective effect that any suit for declaring certain property held in Benami could no longer be entertained in view of the provisions of the Act, 1988. In my opinion the said decision does not help the respondents Nos. 2 and 4 inasmuch as in the instant case it was neither a pending suit nor a pending appeal. The suit was already decreed and no appeal preferred. At the time of passing of the decree there was no infirmity/ or illegality in the decree. It was not a nullity. It was a valid and proper decree passed by a competent Court. Prior to the Act of 1988, Benami Transactions were accepted as part of the Indian

Jurisprudence. Subsequent to the passing of the Act, 1989 or decree which was legal and valid would not become invalid and illegal decree in absence of any specific provisions of any act of Parliament or State Legislature. The Provisions of Benami Transaction (Prohibition) Act of 1988 does not in any way touch the decree which has been passed legally and validly. The judgment of Mithilesh Kumari does not help the respondents Nos. 2 and 4 whatsoever. The said decision makes the Act of 1988 retrospective only in relation to pending suit and not to non-executed decrees passed in suits. In any event the said judgment reported in Mithilesh Kumar and Another Vs. Prem Behari Khare, has now been overruled by a decision of the larger Bench of the Supreme Court in R. Rajagopal Reddy and Others (deceased by legal representatives) Vs. Padmini Chandrasekharan (deceased by legal representatives), The Supreme Court has held in paragraph 11 at page 631 (of SCC) : (At Pp. 1429-30 of AIR) as follows :

"The Act was enacted to effect the then existing right of the real owners of properties held by others benami. Such an Act was not given any retrospective effect by the legislature. In this respect clear legislative intention seen from the words no such claim suit or action shall lie in Section 4(1) meaning thereby no such suit claim or action shall be permitted to be filed or entertained or admitted to the portals of any Court for seeking such a relief after the coming into force of Section 41. The word lie in connection with the suit claim or action having not been defined by the Act going by the dictionary meaning it would mean that such suit claim or action to get any property declared benami will not be admitted on behalf of such plaintiff or applicant against the defendant concerned in various names the property is held on and from the date on which the prohibition against entertaining of such suits comes into force. The view that Section 4(1) would apply even to such pending suits which were already filed and entertained prior to the date when the section came into force and which has the effect of destroying the then existing right of plaintiff in connection with the suit property cannot be sustained in the case of the clear language of Section 4(1). The legislature in its wisdom has not expressly made Section 4 retrospective. Then to imply by necessary implication that Section 4(1) would have retrospective effect and would cover pending litigation filed prior to coming into force of the section would amount to taking a view which would run counter to the legislative scheme, and intent projected by various provisions of the Act. It is, however, true as held by the Division Bench of the Supreme Court in Mithilesh Kumar and Another Vs. Prem Behari Khare, that on the express language of Section 4(1) any right inhering in the real owner in respect of any property held Benami would get effaced into prior to the coming into operation of Section 4(1) and hence after Section 4(1) applied no suit can lie in respect to such past Benami Transaction. To that extent the Section may be retrospective. But from this it does not logically follow that the then existing rights got destroyed even though the suits by real owners were filed prior to coming into operation of Section 4(1) they would not survive."

5. In view of the aforesaid decisions of the Supreme Court I hold that the decree

is legal and valid decree and the order of the executing Court is set aside. The Executing Court is directed to execute the decree in terms of the decree.

6. The matter is disposed of. There will be no order as to costs.