
(1998) 09 KL CK 0009
In the High Court Of Kerala
Case No : C.R.P. No. 916/97 I

Kalliani and Others

APPELLANT

Vs

K.V. Kunhi Madhaviamma and Others

RESPONDENT

Date of Decision : 26-09-1998

Acts Referred:

Benami Transactions (Prohibition) Act, 1988 — Section 2, 2(1), 4
General Clauses Act, 1897 — Section 6
Trusts Act, 1882 — Section 7, 82

Citation : (1999) 1 RCR(Civil) 367

Hon'ble Judges : S. Sankarasubban, J

Bench : Single Bench

Advocate : R. Bhaskaran, for the Appellant; P.K. Suresh Kumar, for Respondents Nos. 1 to 4, 6 and 7 and K.V. Sohan, for the Respondent

Judgement

S. Sankarasubban, J.—This C.R.P. is filed against the order in E.P. 75/1996 in O.S. 2/1974 on the file of the Munsiff's Court, Koyilandy. The Respondents in the execution petition are the Petitioners in the revision. The suit was filed for an injunction restraining the Defendants in the suit from entering into the plaint schedule property. There was another suit for recovery of possession of a building situated in the plaint schedule property. Both suits were decreed by the trial Court. In appeal, the first Appellate Court reversed the Judgments of the trial Court. But this Court by judgment and Decree dated 17 the Benami Transactions th November 1987 restored the Decree of the trial Court.

2. As already stated, the Decree in O S. 2/1974 was for an injunction restraining the Defendants from entering into the plaint schedule property. The case of the Plaintiff: was that violating the injunction order the legal representatives of the Defendants encroached into the plaint schedule property and constructed a basement of a house in that property. The Defendants have also cut and removed a Jack-fruit tree and a Pathiri tree from that property. The action of the Respondents in the E.P. was a clear violation of the Decree passed against them. This was countered by the Defendants by stating that they are the legal

representatives of the original Defendant. The Decree passed was a personal Decree. Hence, it cannot be executed against the legal heirs of the first Defendant. Necessary pleadings to execute a Decree for injunction is not made in the petition. There was a house in the plaint schedule property, which was in the possession of the Defendants till a Decree was passed in O.S. 2/1974, According to the Petitioners, both the suits were governed by Benami Transactions (Prohibition) Act, hereinafter referred to as "the Act". As a matter of fact, the execution petition in O.S. 72/1974 was dismissed because it was a benami transaction. The Petitioners further contended that the present E.P. is also barred by the Act and hence further proceedings cannot be proceeded with. On a consideration of the objections, the court below rejected the objections and allowed the petition, it is against that the present revision is filed.

3. So far as the first contention that they are legal heirs of the original Defendant and therefore not bound by the Decree is concerned, the decision of this Court reported in *Rajappan v. Sankardn Sudhakaran* 1997 (1) KLT 748 is answer to the above argument. Thus the Petitioners cannot contend that because they are legal heirs of original Defendant the Decree is not binding on them.

4. The next question is whether the provisions the Act are not applicable. Both sides agree that in the suit the contention was taken that the Defendant was in possession benami for the Plaintiff. The Act came into force on 19th May 1988. The second appellate Decree in this case was passed in 1987. Thus, before the Act came into force, the Decree has been passed. The question is whether the execution petition is barred by the provisions of Section 4 of the Act. The learned Counsel for the Petitioners brought to my notice the decision of Radhakrishna Menon, J. in *Narayanan Gangadkaran* 1988 (2) KLT 307. In that case, the learned Judge took the view that proceeding in an execution of a Decree is an action coming u/s 2(1) of the Benami Transactions (Prohibition of the Right to Recover Property) Ordinance. The learned Judge went on to hold that the Act had retrospective operation and hence the rights of parties already determined are extinguished. The Court held that, 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. 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.

5. In this context it is worth-noting that in *Mithilesh Kumar and Another Vs. Prem Behari Khare*, the Supreme Court held that the Act has retrospective operation. But, the said decision was considered again in the decision reported in *R. Rajagopal Reddy and Others (deceased by legal representatives) Vs. Padmini Chandrasekharan (deceased by legal representatives)*, by which the decision in *Smt. Chandrakantaben Modi and Narendra Jayantilal Modi Vs. Vadilal Sapalal Modi and Others*, was overruled and it was held that Section 4 was not retrospective and that the pending cases has to be disposed of without being

influenced by the Act. The Court made the following observations with regard to Section 82 of the Indian Trusts Act:

...the Act by Section 7 has effected a repeal of Section 82 of the Indian Trusts Act and while repealing this provision no different intention appears from the Act to affect any right, privilege or liability acquired u/s 82 by either side or any pending proceedings regarding such obligation or liability. Therefore, such pending proceedings will have to be continued or enforced as if the repealing Act had not been passed. A conjoint reading of Section 82 of the Indian Trusts Act and Section 6(b), (d) and (e) of the General Clauses Act clearly enjoins that if Suits are pending wherein the Plaintiff:s have put forward claims under the then existing Section 82 of the Indian Trusts Act such proceedings are to be continued by assuming that the repealing of Section 82 of the Indian Trusts Act has not been effected in connection with such pending proceedings...where a, statutory provision which is not expressly made retrospective by the legislature seeks to effect vested rights and corresponding obligations of parties, such provision cannot be said to have any retrospective effect by necessary implication.

Going by the above dictum of the Supreme Court, it becomes clear that any person who has obtained a right u/s 82 of the Indian Trusts Act before the commencement of the Act such right cannot be defeated by the coming into force of the section because it is not retrospective. Thus, the Supreme Court held that where a suit is pending on the date when the Act came into force, such suit can be continued and Decree passed notwithstanding the repeal of Section 82. Clearly it means that in such suits Decrees can be passed on the basis of benami nature and such Decrees can also be put into execution. There will be no use if such Decree is not put into execution. I am referring to this because learned Counsel for the Petitioners relying on the decision in 1988 (2) KLT 307 very vehemently contended that an execution proceeding is also an action and after the coming into force of the Act, the execution petition cannot be filed in cases where the question of benami arises. But, the above decision is directly contrary to the decision in R. Rajagopal Reddy and Others (deceased by legal representatives) Vs. Padmini Chandrasekharan (deceased by legal representatives), wherein it is observed that any right or privilege acquired u/s 82 or any pending proceedings will have to be continued or enforced as if the repealing Act had not been passed. This means that a Decree obtained before the coming into force of the Act can be enforced even after the coming into force of the Act.

6. The lower Court has discussed as point No. 2 regarding the violation of the Petitioners. I agree with the findings of the Court below and hold that the Petitioners have violated the order of injunction. The Court below has ordered the Petitioners to be detained in civil prison for a period of fifteen days. I modify the above direction to the following extent: The Petitioners are given an opportunity to remove the structures they have constructed in violation of the orders and to pay an amount of Rs. 3,000 (Rupees three thousand only) as cost to the

Respondents within a period of three months from today. If both these conditions are satisfied, the order regarding detention will not be implemented. But, if any of these conditions are not satisfied within the stipulated time, the order regarding detention will be implemented.

The C.R.P. is disposed of as above.