
(1990) 07 MAD CK 0015
In the Madras High Court
Case No : Appeal No. 90 of 1981

K.M.B. Syed Fathima represented by mother and guardian ad-
litem K.M. Junitha Begum

APPELLANT

Vs

K.M. Bathusa Mohideen

RESPONDENT

Date of Decision : 05-07-1990

Acts Referred:

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

Citation : (1990) 07 MAD CK 0015

Hon'ble Judges : Abdul Hadi, J

Bench : Single Bench

Advocate : K. Ramachandra, for the Appellant; G. Subramaniam, for the Respondent

Final Decision : Dismissed

Judgement

Abdul Hadi, J.—The defendant, who is none other than the minor daughter of the plaintiff, is the appellant. The suit is for declaration of

plaintiff's title to the suit property and for injunction. His case is as follows :--
The suit site was purchased under Ex.A1 dated 4-4-1975 out of his

own funds benami in the name of the defendant; on it a building was put up by him with his own funds and he is living there; in view of the recent

suit O.S. No. 128 of 1977 filed by the mother of the defendant (wife of the plaintiff) against him for dissolution of the marriage between the two

and the consequent misunderstanding and apprehension of disturbance of possession, the suit was Sled. (Pending this suit, it is stated that the

abovesaid Suit O.S. No. 128 of 1977 has been decreed granting dissolution of marriage). The defendant, represented by her said mother and

guardian ad litem, resisted the suit alleging that the suit site was purchased and

the superstructure thereon was put up, with a view to benefit the defendant and intended as a gift to her.

2. The trial court has accepted the case of the plaintiff and decreed the suit on 31-1-1979 and hence the defendant has filed this appeal.

3. But, while the appeal was pending Benami Transactions (Prohibition) Act, 1988 (Central Act 45 of 1988) has been passed which came into

force from 19-5-1988. S.3 of the said Act runs as follows:

Prohibition of benami transaction,--

(1) No person shall enter into any benami transaction.

(2) Nothing in sub-S.(1) shall apply to the purchase of property by any person in the name of his wife or unmarried daughter and it shall be

presumed unless the contrary is proved, that the said property had been purchased for the benefit of the wife or the unmarried daughter.

(3) Whoever enters into any benami transaction shall be punishable with imprisonment for a term which may extend to three years or with fine or

with both.

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, an offence under this section shall be non-cognizable and

bailable.

S.4 of the Act runs 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 is 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.

The Supreme Court has also held in *Mithilesh Kumari v. Prem Behari Khare* 1989-I-L.W. 430, that though the said Act prohibits future benami

transactions (transactions after 19-5-1988) and treats them as offence under S.3, S.4 would relate also to benami transactions which took place

prior to the above said date. So, according to the Supreme Court, once the property is found to be benami, the real owner is bereft of any defence

against the benamidar.

4. Hence, the learned counsel for the defendant-appellant contends that at any rate, in view of the above said S.4(1) of the above said Act, the

judgment and decree of the trial court has to be set aside and the appeal has to be allowed. But, the contention of the learned counsel for the

respondent is two fold, viz., (1) the said Act does not apply to the present case, (2) Even if it applies, it would apply only to the suit site and not to

the superstructure thereon and the respondent must be at least declared owner of the superstructure and consequential injunction should be

granted.

5. According to the learned counsel, the said Act will not apply to a purchase of a property in the name of one's unmarried daughter as in the

present case, in view of S 3(2) of the said Act. According to him, the above said S. 4(1) of the Act has to be read in the light of S 3(2), the object

of the Act being only to prohibit the benami transfers in favour of persons other than one's wife or unmarried daughter and treat it as an offence.

6. But, the latter part of this contention, viz., regarding the object of the Act is not correct. It is clear that the object of the Act is not simply to

prohibit future benami transfers, but also to affect past benami transactions since no suit would lie to enforce any right in respect of any property

held benami, in view of S.4(1) of the Act. That is why the Supreme Court also says in the above decision as follows :

... In its sweep S.4 envisages past benami transactions also within its retroactivity. In this sense the Act is both a penal and a disqualifying statute.

(underlining is mine).

7. Anyway I think the submission of the learned counsel for the appellant that S.4(1) of the above said Act has to be read in the light of S.3(2), has

to be accepted for the following reasons. In the case of benami purchase in favour of wife or unmarried daughter, the total effect of S.3 is only that

such a transfer in future, that is, after the commencement of the Act, is not prohibited. But, on the contrary such purchase shall be presumed unless

the contrary is proved, that the said property had been purchased for the benefit of the wife or unmarried daughter as the case may be. In other

words, in such a case, the court is bound to hold as proved that the said property had been purchased for the benefit of the wife or the unmarried

daughter, as the case may be, until evidence is adduced to disprove it by the party interested in disproving it. The party interested in disproving the

same must produce such evidence if he can. (vide: Public Prosecutor v. A. Thomas AIR 1959 Mad 166.).

8. Since the above said prohibition against future benami transactions will not apply to the above referred to purchases in the name of wife or

unmarried daughter pursuant to S 3(2) of the said Act, it has necessarily to be construed that such a purchase will not come under ""benami

transaction"" spoken to in S.3(3) and will not be punishable under S.3(3) Even though a ""benami transaction"" is defined under S.2(a) of the Act as

any transaction, in which property is transferred to one person for a consideration paid or provided by another person, the said definition itself says

that such a meaning has to be given for the said expression of the Act ""unless the context"" otherwise requires."" So, though S.3(3) uses the word

benami transaction"" and says ""any person entering into it shall be punishable"" in the context of S.3(2) the purchase spoken to in S.3(2) would not

come under the term ""benami transaction"" used in S.3(3).

9. Likewise, in the same context, it has also to be construed that the term ""property held benami"" used in S 4(1) of the Act cannot include in it a

property held benami pursuant to any such purchase above mentioned in the name of wife or unmarried daughter. No doubt, in such a suit, the

presumption mentioned in S.3(2) shall arise in the case of future benami transactions (that is, those effected on or after the date of the coming into

force of the said Act). But the suit itself will not be barred. No doubt, in such a suit, in view of the presumption under S.3(2), unless the plaintiff

who claims himself to be the real owner, establishes that the said property had not been purchased for the benefit of the wife or the unmarried

daughter, as the case may be, he shall fail in the suit. But in the case of past transactions (that is, those which were effected before the

commencement of this Act) S.3(2) will not apply and the law that was prevailing earlier will prevail.

10. So, I find that S.4(1) of the above said Act will not be a bar for the maintainability of the present suit.

11. Then, the court below has held that the entire funds for, the purchase of the above said site came from the plaintiff-respondent and the plea of

the defendant that partially funds were provided by the wife of the plaintiff by selling her jewels is not proved and the learned counsel for the

appellant did not advance any argument to disturb this finding of the court below. On the other hand, he pointed out the passage in the judgment of

the court below, ""according to the plaintiff, as his first child died soon after its birth and with a view to avoid similar fate overtaking his second child

also namely minor defendant, he purchased the suit property in her name..." and contended that this fact shows that the suit site was purchased for

the benefit of the minor defendant. But, this contention cannot be accepted because I do not find any plea to this effect in the plaint. In the plaint,

the plaintiff only states that ""without any intention to confer any benefit on the daughter, for the purpose of trying his luck, he purchased the

property benami in the name of the plaintiff's daughter, the defendant." No piece of evidence in this regard given by the plaintiff as P.W.1 has also

been brought to my notice. On the other hand, the trial court itself observes in another place of its judgment that the plaintiff asserted both in the

plaint and in his evidence as P.W.1 that he never intended to benefit the defendant by the purchase, or to confer title on her.

12. The trial court also gives out several circumstances showing that the purchase under Ex. A1 was made by the plaintiff only for his own benefit.

The learned counsel for the appellant did not assail these observations of the trial court. Therefore, I see no reason to interfere with the judgment

and decree of the trial court. In the result, the appeal is dismissed. However, in the circumstances of the case, there will be no order as to costs.