
(1992) 04 MAD CK 0046
In the Madras High Court

M. Govindarajan and Others		APPELLANT
	Vs	
The Indian Overseas Bank, Pondicherry		RESPONDENT

Date of Decision : 24-04-1992

Acts Referred:

Trusts Act, 1882 — Section 81, 82

Citation : (1993) 1 MLJ 189

Hon'ble Judges : Bellie, J

Bench : Division Bench

Judgement

Bellie, J.—The two defendants against whom the suit has been decreed is the appellants. The plaintiffs-Indian Overseas Bank, Pondicherry,

got a money decree against the second defendant-Ramaswamy Mudaliar on 18.9.1975 by a Judgment of the High Court, for a sum of Rs. 33,893.

In execution of that decree in E.P. No. 45 of 1976 the plaintiff attached the suit property- a house belonging to the second defendant on

24.10.1976. In the meanwhile, after filing of the suit on 19.11.1964, the second defendant on 21.11.1964 executed a sale deed in respect of the

suit property in favour of the first defendant-his brother in law. First defendant filed a claim petition on the basis of the said sale deed, the certified

copy of which is Ex.B-1 and claim petition was allowed on 16.11.1977. The plaintiff filed the present suit for setting aside that claim order,

pleading that the alleged sale deed executed by the second defendant in favour of the first defendant is a benami transaction and only the second

defendant was the owner in spite of the sale deed.

2. The suit was resisted by the defendants contending inter alia that the sale deed is true and genuine one and not a benami transaction as alleged

and the suit is barred by limitation.

3. The learned trial Subordinate Judge who tried the suit accepted the plea of the plaintiff that the sale deed Ex.B-1 is benami and the title vests

with the second defendant in spite of the sale deed. He further held that the suit is not barred by limitation. He answered the other issues raised in

the suit also in favour of the plaintiff. In the result he decreed the suit as prayed for.

4. Mr. K. Yamunan, learned Counsel for the appellant-defendants argued that

(i) the finding of the trial court that Ex.B-1 sale deed is a benami one and no title has passed under it contrary to the evidence and erroneous;

(ii) the sale deed in question comes within the mischief of Benami Transactions (Prohibition) Act, 1988 and therefore, the plaintiff cannot plead that

the sale deed is a benami one; and

(iii) the finding of the trial Court that the suit is not barred by limitation is incorrect.

5. Though the plaintiff has pleaded that Ex.B-1 sale deed is a benami transaction, on a careful reading of the case in the plaint, the real case

appears to be that Ex.B-1 sale deed is a sham and nominal one executed for the purpose of defeating the plaintiff from recovery of the amount due

by the second defendant to them. As stated above, Ex, B-1 sale deed is executed by the second defendant in favour of the first defendant, which

according to the plaintiff is not a valid one but fictitious with an anterior motive. Therefore the transaction according to the plaintiff is sham and

nominal and not a benami transaction since in the case of a benami transaction one person passes consideration for the sale and gets the sale deed

in the name of another person. Be that as it may, the question is, did the second defendant execute the sale deed Ex.B-1 in favour of the first

defendant without any intention of passing title to the first defendant and with ulterior motive of secreting the property from the creditors (plaintiff).

[After discussing the facts His Lordship proceeded:]

6. As regards the plea of limitation, it is contended that in view of Article 2265 of the French Civil Code, the suit is barred by limitation. The said

Article 2265 reads thus:

A person who acquires an immovable in good faith and under an instrument which is on the face of it capable of giving a title, obtains a title by

prescription to the land in ten years and district of the Court of Appeal, in which the owner lives is the same district as that in which the land lies,

and in 20 years if the true owner lives outside such district.

A close reading of the Article shows that the condition prescribed for application of the Limitation in this Article is that the person must acquire the

property in good faith. But as found above, Ex.B-1 sale deed is a sham and nominal, and therefore the transaction is mala fide.... Hence the trial

court has rightly held that the suit is not barred by limitation.

7. The next contention of Mr. Yamunan is that in view of the Benami Transactions (Prohibition) Act, 1988, it is not open to the plaintiff to take the

plea that Ex.B-1 is a sham and nominal sale. He submits that as per this Act it is not open to take a plea that a sale deed is sham and nominal, and

no suit can be filed on such a plea. In support of this contention the learned Counsel relies on a decision of a single Judge of this Court in Kathoom

Bivi Ammal v. S. Mohamad alias Sheik Mohamad (1990) 1 L.W. 284 : (1990) 2 M.L.J. 284, wherein it has been held to the effect that a plea

that a transaction is sham and nominal cannot be taken since such a transaction is hit by the Benami Transactions (Prohibition) Act. This view has

been arrived at mainly on the ground that Section 7 of the Act declares that Section 81 and Section 82 of the Indian Trusts Act, 1882 along with

some other provisions have been repealed.

8. Section 81 of the Indian Trusts Act, 1882 is as follows:

Where the owner of property transfers or bequeaths and it cannot be inferred consistently with the attendant circumstances that he intended to

dispose of the beneficial interest therein, the transferee or legatee must hold such property for the benefit of the Owner or his legal representative.

And Section 82 of the Indian Trusts Act reads thus:

Where property is transferred to one person for a consideration paid or provided by another person, and it appears that such other person did not

intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person

paying or providing the consideration.

A reading of Section 82 shows that it relates to benami transaction and therefore we are not concerned with that Section 81 relates to sham and

nominal transactions. A reading of this only conveys the meaning that in a sham and nominal transaction the transferee or legatee must hold such property for the benefit of the owner or his legal representative. In other words this section creates a statutory obligation on the part of the transferee or the legatee towards the transferor or the testator or his legal representative. So such a statutory obligation is removed when this section is repealed. This does not mean that a sham and nominal transaction itself is prohibited or it is not open for anyone to make a transaction that a transaction is sham and nominal.

9. From the title of the Benami Transactions (Prohibition) Act, 1988 itself it could be seen that what is prohibited under the Act is benami transactions and not any other transactions like sham and nominal transactions. The benami transaction has been defined in Section 2(a) of the Act as meaning, any transaction in which property is transferred to one person for a consideration paid or provided by any other person". Certainly a sham and nominal transaction does not come within the meaning of this definition. Therefore with great respect I am unable to agree with the decision of the learned single Judge of this Court in the case referred to above the sham and nominal transactions are also hit by the Benami Transactions (Prohibition) Act.

10. This view of mine is supported by a decision of the Kerala High Court in Ouseph Chacko and Another Vs. Raman Nair Raghavan Nair, wherein it has been held that,

A right under the general law for a declaration from a Court of law that a transaction is fictitious, sham or nominal and that it has not been acted upon and was never intended to be acted, is not taken away by the Benami Transactions (Prohibition) Act. That right survives.

In this view of mine, I think it would be necessary and appropriate to refer the matter to a Division Bench on the point where the Benami Transactions (Prohibition) Act prohibits sham and nominal transactions also and it is not open to contend that a transaction is sham and nominal and no title passed under it.

11. Hence, the office will place the matter before my Lord the Chief Justice for necessary orders for posting the matter before a Division Bench.

After a decision on this point, the matter will be placed before me for final

disposal of the appeal. This appeal having posted for answering a reference, before The Honourable Mr. Justice Ratnam and The Honourable Mr. Justice Somasundaram, on Monday, the 1st day, Tuesday the 2nd day, Monday the 15th day, Tuesday the 16th days of April 1991, upon perusing the grounds of appeal, the judgment and decree of the lower Court and the material papers in the suit and upon hearing the arguments of Mr. K. Yamunan, Advocate for the appellants and of Mr. V. Narayanaswami, Advocate for the respondent and having stood over for consideration till Tuesday the 11th day of June, 1991,

The Order of the Court was made by Ratnam, J.:

1. Whether the Benami Transactions (Prohibition) Act, 1988 (45 of 1988) prohibits sham and nominal transactions also and it is not open to

contend that a transaction is sham and nominal and no title passed under it. Is the question that has been referred to us for decision.

2. Inasmuch as the reference has arisen in the course of the hearing of an appeal, which still awaits consideration and disposal at the hands of the

learned single Judge who made the reference, we have refrained from referring to the factual background giving rise to the pending appeal with a

view to enable the learned Judge to further deal with the matter in the light of the answer to the reference and on the facts as may be found on the

evidence.

3. The answer to the question referred would depend upon the types of transactions comprehended within the expression ""benami transactions

and the scope of the impact of the provisions of the Benami Transactions (Prohibition) Act, 1988 (45 of 1988) (hereinafter referred to as "the

Act") and its fore-runner the Benami Transactions (Prohibition of the Right to Recover Property Ordinance, 1988) (Ordinance No. 2 of 1988)

(hereinafter referred to as "the Ordinance"), on such transactions. Whatever views might have been earlier entertained with regard to the types of

transactions, which could be called ""benami transactions"", considerable light had been thrown on the types of transactions, which can be

appropriately comprehended within the expression ""benami"" by two decisions of the Supreme Court in Meenakshi Mills, Madurai Vs. The

Commissioner of Income Tax, Madras, and Thakur Bhim Singh (Dead) by Lrs and Another Vs. Thakur Kan Singh, In the first decision, viz.,

Meenakshi Mills, Madurai Vs. The Commissioner of Income Tax, Madras, though arising under the provisions of the Income Tax Act, 1922, the

Supreme Court had to deal with the question, whether certain intermediaries of the assessee-company, were benamidars for the assessee. In that

connection, Venkatarama Ayyar, J., speaking for the court, clearly set out the types of the transactions comprehended by the word "benami", in

the following terms:

...it is necessary to note that the word "benami" is used to denote two classes of transactions, which differ from each other in their legal character

and incidents. In one sense, it signifies a transaction which is real, as for example, when A sells properties to B, but the sale deed mentions X as the

purchaser. Here the sale itself is genuine, but the real purchaser is B, X being his benamidar. This is the class of transactions which is usually termed

as benami. But the word "benami" is also occasionally used, perhaps not quite accurately, to refer to a sham transaction, as for example, when a

purports to sell his property to B without intending that his title should pass or pass to B. The fundamental difference between these two classes of

transactions is that whereas in the former there is an operative transfer resulting in the vesting of title in the transferee, in the latter, there is none

such, the transferor continuing to retain the title notwithstanding the execution of the transfer deed. It is only in the former class of cases that it

would be necessary, when a dispute arises as to whether the person named in the deed is the real transferee or B, to enquire into the question as to

who paid the consideration for the transfer, X or B. But in the latter class of cases, when the question is whether the transfer is genuine or sham,

the point for decision would be, not who paid the consideration, but whether any consideration was paid....

Again, in Thakur Bhim Singh (Dead) by Lrs and Another Vs. Thakur Kan Singh, the Supreme Court dealt with the kinds of benami transactions

generally recognized in this country. In that context, the Supreme Court observed at page 732 as follows:

...Two kinds of benami transactions are generally recognized in India. Where a person buys a property with his own money, but in the name of

another person, without any intention to benefit such other person, the transaction is called benami. In that case, the transferee, holds the property

for the benefit of the person, who has contributed the purchase money, and he is the real owner. The second case, which is loosely termed as a

benami transaction, is a case, where a person who is the owner of the property, executes a conveyance in favour of another, without the intention

of transferring the title to the property thereunder. In this case, the transferor continues to be the real owner. The difference between the two kinds

of benami transactions referred to above lies in one fact that whereas in the former case there is an operative transfer from the transferor to the

transferee though the transferee holds the property for the benefit of the person who has contributed the purchase money, in the latter case, there is

no operative transfer at all and the title rests with the transferor, notwithstanding the execution of the conveyance. One common feature, however,

in both these cases is that the real title is divorced from the ostensible title and they are vested in different persons. The question whether a

transaction is a benami transaction or not mainly depends upon the intention of the person, who has contributed the purchase money in the former

case and not the intention of the person, who has executed the conveyance in the latter case. The principle underlying the former case is also

statutorily recognized in Section 82 of the Indian Trusts Act, 1882, which provides that where property is transferred to one person, for a

consideration paid or provided by another person and it appears that such other person did not intend to pay or provide such consideration for the

benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration....

From the aforesaid decisions of the Supreme Court it is clear that the two types of transactions, which can be regarded as "benami" are

(i) where a person buys property with his own funds or money, but in the name of another without any intention to benefit such other person; and

(ii) where a person executes a conveyance in favour of another, without any intention to transfer the beneficial interest in the property to that

person.

The first type of transaction, according to the Supreme Court, is, without doubt, a benami transaction. However, the second type of transaction,

which is only a transaction as such in name and not in reality, is also, in a loose and erroneous sense, called a benami.

4. It is in the aforesaid conceptual background relating to benami transactions, the provisions of the Ordinance and the Act, have to be examined

to ascertain whether benami transactions, strictly so called or even otherwise loosely called so, had been dealt with, under its respective provisions.

The provisions of the Ordinance may first be taken up for consideration. The object of the Ordinance was to prohibit the right to recover property

held benami and for matters connected therewith or incidental thereto. Section 2(J.) of the Ordinance prohibited the enforcement of any right in

respect of any property held benami, in a suit, claim or action at the instance of a real owner or on his behalf, against the benamidar or any other

person. u/s 2(2) of the Ordinance, in a suit, claim or action, by or on behalf of a person claiming to be the owner of the property, though held

benami, no defence based on benami, could be raised by the real owner, against the person in whose name the property is held or any other

person. Section 2(3) of the Ordinance provided for exceptions, in relation to the applicability of Section 2(1) and (2) of the Ordinance in the two

specified cases enumerated thereunder. Section 3 of the Ordinance contained a provision to the effect that nothing therein shall affect the provisions

of Section 53 of the Transfer of Property Act, 1882 (4 of 1882) or any law relating to transfers for an illegal purpose. u/s 4(1) of the Ordinance,

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 281-A of the

Income Tax Act, 1961 (43 of 1961) were repealed. Section 4(2) of the Ordinance declared that nothing in Sub-section (1) of Section 4 of the

Ordinance, shall affect the continued operation of Section 281-A of the Income Tax Act, 1961, in so far as the State of Jammu and Kashmir is

concerned. Though the provisions of the Ordinance, u/s 1(3) thereof, came into force on 19.5.1988, the Law Commission was requested to take

up the provisions of the Ordinance for detailed examination and give its considered views so that on the basis of the recommendations of the Law

Commission, the Ordinance could be replaced by an appropriate act. In its One Hundred Thirtieth Report on Benami Transactions, the Law

Commission had made some recommendations and purporting to incorporate those recommendations, as could be seen from the Statement of

Objects and Reasons, the Benami Transactions (Prohibition) Act, 1988 came to be passed repealing the Ordinance. The objects of the Act are

wider than the objects of the Ordinance and are two fold, viz., (i) to prohibit benami transactions; and (ii) to prohibit the right to recover property

held benami. Sections 3, 5 and 8 of the Act came into force on 6.9.1988 and its other provisions were deemed to have come into force on

19.5.1988, when the repealed Ordinance was promulgated. Consistent with one of the objects of the Act, viz., prohibition of benami transactions,

it became necessary in the Act, to define a "benami" transaction. Section 2(a) of the Act define a "benami transaction" as meaning any transaction,

in which property is transferred to one person, for a consideration paid or provided by another person. "Property" has been defined u/s 2(c) of the

Act, as meaning property of any kind, whether movable or immovable, tangible or intangible, and includes any right or interest in such property.

Section 3(j) of the Act prohibited a person from entering into any "benami" transaction. u/s 3(2) of the Act, the purchase of property by a person

in the name of his wife or unmarried daughter was taken outside the operation of Section 3(j) of the Act and a presumption had also been enacted

in that such property so purchased shall be presumed, unless the contrary is proved, to be for the benefit of the wife or the unmarried daughter.

Section 3(3) of the Act makes the entering into benami transaction, a punishable offence with imprisonment for a term, which may extend to three

years or with fine or with both and u/s 3(4) of the Act, such an offence, notwithstanding anything contained in the Code of Criminal Procedure,

1973, is declared to be non-cognizable and bailable. Section 4 of the Act prohibited the right to recover property held benami and this is couched

in language identical to that found in Section 2 of the Ordinance. Section 5 of the Act provides for acquisition of properties held benami by such

authority, and in such manner and after following such procedure, as may be prescribed, and no amount shall be payable for the acquisition of any

property. Section 6 of the Act corresponds to Section 3 of the Ordinance. Section 7(1) of the Act provides for repeal of Sections 81,82 and 94 of

the Indian Trusts Act, 1882, Section 66 of the Code of Civil Procedure, 1908 and Section 281-A of the Income Tax Act, 1961. Section 7(2) of

the Act corresponds to Section 4(2) of the Ordinance. Section 8 of the Act provides for the making of the Rules for carrying out the objects and

purposes of the Act. u/s 9(1) of the Act, the Ordinance has been repealed and Section 9(2) of the Act saves the Acts, done or action taken under

the Ordinance, as having been done or taken under the corresponding provisions of the Act.

5. On a close scrutiny and comparison of the provisions of the Ordinance and the Act, it is at once seen that the object of the Act is wider viz., to

prohibit benami transactions and also to interdict the right to recover property held benami. The prohibition of benami transaction was not in

contemplation of the Ordinance at all. The provision for prohibition of benami transaction u/s 3 of the Act necessitated a definition of benami

transaction and Section 2(a) of the Act provided that unless the context otherwise requires, "benami transaction" means a transaction in which property

is transferred to one person for a consideration paid or provided by another person. The definition of benami transaction" u/s 2(a) of the Act, is

nothing but a reproduction of the opening part of Section 82 of the Indian Trusts Act, 1882. There is no indication in the definition u/s 2(a) of the

Act that the other type of benami transaction, loosely so called, according to the Supreme Court, was even contemplated. Besides, in furtherance

of the objects of the Act, Section 3(1) of the Act prohibited the entering into of a benami transaction as defined in the act, subject to the exception

contained in Section 3(2) of the Act and had made it a non-cognizable and bailable offence punishable with imprisonment for three years or with

fine or with both. Likewise, consistent with the other object of the Act to interdict the right to recover properly held benami, the ostensible title has

been declared to be indefeasible either by way of action or even defence. This prohibition u/s 4 of the Act has been made applicable with

reference to property held benami. The expression "held benami" connotes the state of holding property as a result of and referable to a benami

transaction and defined in Section 2(a) of the Act. The repeal of Sections 82 and 94 of the Indian Trusts Act, 1882, would appear to indicate that

such a repeal was called for, in view of the provisions made in the Act, with reference to matters, which fell under those provisions of the Indian

Trusts Act, 1882. The definition of a "benami transaction" based on the opening words of Section 82 of the Indian Trusts Act, 1882, has been

already referred to. Regarding the latter part of Section 82 of the Indian Trusts Act, 1882, in view of the interdict on the right to recover property

provided u/s 4 of the Act and the enactment of a presumption, though rebuttable u/s 3(2) of the Act, the retention of that part of Section 82 of the

Indian Trusts Act, 1882, had become unnecessary. Thus, by the combined operation of Sections 2(a) and 4 of the Act, Section 82 of the Indian Trusts Act, 1882 has been rendered wholly unnecessary and that is the reason why, u/s 7(1) of the Act, Section 82 of the Indian Trusts Act, 1882 has been repealed. Likewise, even as regards Section 94 of the Indian Trusts Act, 1882, in view of Section 4 of the Act, that section has been rendered unnecessary and that accounts for the repeal of Section 94 of the Indian Trusts Act, 1882. In other words, the repeal of Sections 82 and 94 of the Indian Trusts Act, 1882 had been done u/s 7(1) of the Act, as provision has been made already in the Act, to deal with . matters, which had already been dealt with under Sections 82 and 94 of the Indian Trusts Act, 1882. However, with reference to Section 81 occurring in Chapter IX of the Indian Trusts Act, 1882, relating to certain obligations in the nature of trust, it appears to us that a situation contemplated by that provision, is not covered by the definition in Section 2(a) of the Act and it is, therefore, not possible to infer from the repeal of Section 81 of the Indian Trusts Act, 1882, provided u/s 7(1) of the Act, that even transfers not at all intended to dispose of the beneficial interest, were also contemplated, as cases falling under the provisions of the Act. At best, the repeal of Section 81 of the Indian Trusts Act, 1882 by Section 7(1) of the Act, may discharge the transferee or the legatee from the obligation of holding the property for the benefit of the owner, but that cannot be pressed into service to include transactions, only in name and not in reality, also, as falling within the provisions of the Act. Thus, released from an obligation in the nature of a trust u/s 81 of the Indian Trusts Act, 1882, it may be still open to a person to contend that notwithstanding the execution of a document, it is only a transaction in name and not in reality and in fact not acted upon and remained only as a transaction on paper without divesting any right of the transferor and without in any manner being affected by the provisions of the Act.

6. Learned Counsel for the appellants first contended that the avowed object of the Act is to do away with benami transactions, inclusive of sham and nominal transactions, which have also been understood as belonging to the category of benami transactions, though in a loose sense. On the other hand, learned Counsel for the respondent submitted that the definition of benami transaction" in the Act does not purport to cover sham and

nominal transactions, as ordinarily understood and, therefore, the definition cannot be extended or expanded to include other types of transactions, not at all contemplated by the definition, as transactions dealt with by the Act. The definition of "benami transaction" has already been referred to and it takes in only one kind of transaction, in which the property is transferred to one person, for consideration paid or provided by another person. In other words, the only transaction recognised as a "benami transaction" under the definition in the Act is the first category of transactions referred to by the Supreme Court in the decisions already noticed. The definition contemplates only real transaction when A sells property to B who pays consideration, but the document mentions X as the purchaser, while the real purchaser in this genuine sale is only B, X being the benamidar. There is an operative transfer resulting in the vesting of title in the transferee, though the consideration is provided by another and it is only this kind of transaction, which has been contemplated and also included in the definition of "benami transaction" u/s 2(a) of the Act. Thus, in Sections 2, 3 and 4 of the Act, there is absolutely no indication that sham and nominal transactions also were intended to be included within the definition of "benami transaction" and dealt with under the provisions of the Act. This contention of learned Counsel for the appellants has, therefore, to be rejected.

7. Learned Counsel for the appellants next contended that the words "benami" and "held benami" occurring in Sections 3 and 4 of the Act have to be read differently and that while it may be that the definition of "benami transaction" occurring in Section 2(a) of the Act may apply to Section 3 of the Act, it may not apply to Section 4 of the Act, as the expression "benami transaction" does not occur therein, but only the words "held benami" have been used. It has earlier been noticed that the twin objects of the Act are to prohibit benami transactions and also the establishment of rights over property held benami, either on a cause of action or defence, based on benami. The prohibition of benami transactions is sought to be achieved by preventing persons from entering into such transactions and making it a punishable offence, except in cases provided for u/s 3(2) of the Act. The prohibition contained in Section 4 of the Act is aimed at securing the other object of the Act, viz., to put an end to the right to recover

property held benami and to vest the title to the property in the benamidar or the ostensible owner. In other words, in order to accomplish the twin objects earlier referred, provision has been made in the Act to prohibit the entering into of benami transactions and also to put an end to the right of a person claiming to be the real owner, either on a cause of action or by way of defence, and it is with reference to the latter class of cases, the words used are "held benami". Those words would mean the state of holding property, as a result of entering into a benami transaction or pursuant to such a transaction and necessarily, the definition of a "benami transaction" found in Section 2(a) of the Act, has to be read into and applied in interpreting the words "property held benami" occurring in Section 4 of the Act. In view of that, this argument of learned Counsel for the appellants also cannot be accepted.

8. Learned Counsel for the appellants next contended that there was no reason to confine the operation of the provisions of the Act only to those transactions falling u/s 2 (a) of the Act and further that the repeal of Section 81 of the Indian Trusts Act, 1882, also indicated that sham and nominal transactions, were also intended to be brought under the operation of the provisions of the Act. Reference was also made in this connection to the decision in *Kathoom Bivi Ammal v. S. Mohamad alias Sheik Mohamad* (1990)1 L.W. 284. On the other hand, learned Counsel for the respondent submitted that the provisions of the Act, as they are found, have to be interpreted and given effect to and in view of the definition u/s 2(a) of the Act relating to "benami transaction", its scope cannot be widened to include sham and nominal transactions also and that the repeal of Section 81 of the Indian Trusts Act, 1882 would not in any manner affect the position at all, as the effect of such repeal, would only be to release the sham and nominal transaction from the scope of the obligation arising u/s 81 of the Indian Trusts Act, 1882, but nevertheless leaving it open to the parties to contend that the transaction is a sham and a nominal one and has been entered into only in name and not in reality.

Strong reliance in this connection was also placed by learned Counsel for the respondent upon the decision reported in *Ouseph Chacko and*

Another Vs. Raman Nair Raghavan Nair, . In addition, learned Counsel for the respondent also attempted to characterise certain observations

occurring in *Kathoom Bivi Animal v. S. Mohamad alias Sheik Mohamad* (1990)1 L.W. 284, as obiter.

9. On a careful consideration of the rival submissions, we find it difficult to accept the contention of learned Counsel for the appellants. When the

expression "benami transaction" has been defined in the Act, the expression "property held benami" has to be interpreted in the light of the

definition occurring in the Act relating to a benami transaction and also as referable to properly held, as a result of or attributable to, such a

transaction. In the absence of a benami transaction preceding, it is difficult to conceive of the holding of any property benami. Necessarily,

therefore, the definition of benami transactions" in Section 2(a) has to be read into Section 4 of the Act also, which interpreting the words

"property held benami" and so read, only transactions answering the definition of a "benami transaction" u/s 2(a) of the Act, pursuant to which

property is held benami, would be affected by Section 4 of the Act. Section 4 of the act cannot be so interpreted as to include sham and nominal

transactions, which are outside the scope of "benami transaction" as defined by Section 2(a) of the Act. Similarly, the repeal of Section 81 of the

Indian Trusts Act, 1882, does not in any manner assist the appellants, as pointed out earlier. A situation contemplated u/s 81 of the Indian Trusts

Act, 1882, in so far as we have been able to ascertain from the provisions of the Act, has not been provided for, while provision has been made,

as pointed out earlier, with reference to matters falling under Sections 82 and 94 of the Indian Trusts Act, 1882. In other words, it looks as though

Section 81 of the Indian Trusts Act, 1882 has been repealed, but that would have only the effect of releasing the property from the obligation of

being held in accordance with Section 81 of the Indian Trusts Act, 1882. The decision in *Kathoom Bivi Ammal Vs. S. Mohamad alias Sheik*

Mohamad and Others, proceeded to hold that the repeal of Section 81 of the Indian Trusts Act, 1882. by Section 7(1) of the Act, would suffice

to include sham and nominal transactions also within the scope of the provisions of the Act. It is difficult to persuade ourselves to the line of

reasoning adopted in that decision. Further, it is seen that apart from the repeal of Sections 81 and 82 of the Indian Trusts Act, 1882, no other has

aspect has been adverted to and examined and on a careful consideration of the scope and ambit of the provisions of the Ordinance and the Act,

we have earlier pointed out that the repeal of Section 81 of the Indian Trusts Act, 1882 by itself, would be of no avail to bring within the provisions

of the Act, sham and nominal transactions. We, therefore, hold that the decision in *Kathoom Bivi Animal v. S. Mohamad alias Sheik Mohamad*

(1990) 1 L.W. 284, in so far as it held that sham and nominal transactions are also covered by the provisions of the Act, is not correct. It is seen

that in *Ouseph Chacko and Another Vs. Raman Nair Raghavan Nair*, the view has been expressed that a sham and nominal transaction is not a

benami transaction and Section 4 of the Act would not apply. We find on a careful consideration of the reasoning in that decision that it accords

generally with the view we have earlier expressed on all the aspects relating to the exclusion of sham and nominal transactions from the scope of

the provisions of the Act and we hold that decision has laid down the law correctly. Though learned Counsel for the respondent submitted that the

provisions of the Act would be inapplicable to the decree-holder/respondent, who had attached the property in execution of the decree, adverse to

the interest of the judgment-debtor, we do not express any opinion thereon, as that aspect of the matter would be totally outside the scope of the

reference. We, therefore, hold that sham and nominal transactions would not be covered by the provisions of the Act and that it is open to the

parties to contend that a transaction is sham and nominal and no title passed under it. We answer the reference made to us accordingly.

This appeal coming on for hearing on this day after the reference being answered by the Honourable Mr. Justice Ratnam and The Honourable Mr.

Justice Somasundaram, upon perusing the grounds of appeal, the judgment papers in the suit, and upon hearing the arguments of Mr. K. Yamunan,

Advocate for the appellants and of Mr. V. Narayanaswami, Advocate for the Respondent.

In answer to the reference made to the Division Bench on the point whether sham and nominal documents are also covered by the Benami

Transactions (Prohibition) Act, the Division Bench which heard the reference answered it in the negative. All other points in the appeal have

already been decided. The final judgment that would follow is dismissal of the appeal. Accordingly the appeal is dismissed. There will be no order

as to costs.