

**(2009) 10 BOM CK 0017**  
**In the Bombay High Court**  
**Case No : Second Appeal No. 401 of 1996**

Ms. Milan Madhukar Korgaonkar

APPELLANT

Vs

Shri Shashank Shrikrishna Gandhi

RESPONDENT

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**Date of Decision :** 14-10-2009

**Acts Referred:**

Benami Transactions (Prohibition) Act, 1988 — Section 2, 3, 3(1), 3(2), 3(3)

**Citation :** (2010) 3 BomCR 704

**Hon'ble Judges :** J.H. Bhatia, J

**Bench :** Single Bench

**Final Decision :** Dismissed

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## Judgement

J.H. Bhatia, J.—To state in brief, this Second Appeal is filed by the original defendant. The plaintiff and defendant were married in 1979. The plaintiff claimed that he had purchased the suit land for consideration of Rs. 5,000/- under the sale deed dated 21.1.1981 in the name of the appellant. However, she was only an ostensible owner or benamidar, while the plaintiff himself was the real owner of the property. The dispute arose between husband and wife and she left the house of her husband in the year 1984. Thereafter, the plaintiff moved an application for mutation of the land in his name. Though that application was allowed, in the appeal that order was set aside by the Collector, as the sale deed was in the name of wife. He challenged the order of the Collector before the Commissioner and then in the High Court by filing a Writ Petition. The Writ Petition was dismissed on 9.1.1989 and the High Court observed that the plaintiff could seek declaration of title to the suit property by filing a civil suit. After that the plaintiff filed Regular Civil Suit No. 227 of 1989 seeking declaration of his title and injunction restraining the defendant from causing any interference in her possession. Before that divorce had taken place between the parties.

2. The defendant/appellant contended that she is the real owner of the land and she had purchased the property in her name. It was contended that the suit was barred by the provisions of the Benami Transactions (Prohibition) Act, 1988 and

also by the Limitation Act.

3. several issues were framed by the trial Court and the trial Court dismissed the suit holding that the suit is barred by the provisions of the Benami Transactions (Prohibition) Act, 1988. The trial Court also came to conclusion that the defendant had purchased the property from her own funds through the father of the plaintiff, who was her power of attorney holder. Against dismissal of the suit, the plaintiff preferred Regular Civil Appeal No. 52 of 1993. The Appeal was allowed. The first appellate Court came to conclusion that the plaintiff had purchased the property in the name of his wife only because of love and affection and he had paid consideration for the same. He also held that the purchase of property by the husband in the name of wife is not prohibited under the Benami Transactions Prohibition Act and as the said Act came into force in 1988, while the transaction had taken place in 1981, there is no presumption that the property was purchased for the benefit of the wife. He also held that the suit is within limitation. In the result, the Appeal was allowed and the suit was decreed.

4. This Appeal was admitted on following grounds:

(g) The learned appellant court clearly erred in law in holding that the suit transaction is not barred in view of the provisions of Benami Transaction (Prohibition) Act, 1988.

(h) The learned Judge ought to have considered that under the provisions of Benami Transaction (Prohibition) Act, 1988, any suit by the Respondent is clearly barred as the property stands in the name of the appellant.

(o) The learned judge clearly failed in holding that the suit was filed within the period of limitation though the suit was not filed within 3 years from signing the consent letter on 12.9.1985.

5. Heard the learned Counsel for the defendant/appellant. None for the respondent.

6. At the outset, it may be stated that the provisions of Sections 3, 5 and 8 of the Benami Transactions (Prohibition) Act, 1988 came into force on 5.9.1988, while the remaining provisions were deemed to have come into force on 19.5.1988. u/s 2(a) "Benami transaction" means any transaction in which property is transferred to one person for a consideration paid or provided by another person. Section 3(1) prohibits any benami transaction and it provides that no person shall enter into any benami transaction. u/s 3(3), whoever enters into any benami transaction shall be liable to be sentenced to imprisonment. Section 4 provides 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 claiming to be the real owner of such property. Thus, while this Act prohibits any benami transaction and the person who enters into any benami transaction is liable to be convicted and sentenced to imprisonment, it also provides that a person, who

claims to be real owner, cannot claim any right or title over the property held benami by the ostensible owner. However, Sub-section (2)(a) of Section 3 clearly provides that nothing in Sub-section (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 unmarried daughter. In view of this, it becomes clear that the prohibition against benami transaction is not applicable if the property is purchased in the name of the wife or unmarried daughter. Therefore, claim of such property by the person claiming to be the real owner from the wife or unmarried daughter, who may be ostensible owner, is also not prohibited.

7. Sub-section (2)(a) of Section 3 provides that it shall be presumed, unless the contrary is proved, that the property had been purchased for the benefit of wife or unmarried daughter. Therefore, the Court is bound to raise a presumption in favour of the wife or the unmarried daughter that the property was purchased for her benefit. Of course, the presumption is rebuttable and the burden to rebut that presumption is on the husband or father of the ostensible owner, as the case may be, who claims to be the real owner. Under the Benami Transactions (Prohibition) Act, 1988, any transaction entered into prior to the coming into force of the Act between the ostensible owner and the real owner is not voided by any provision whatsoever as ruled in (1996) 7 SCC 55 *Sankra Hali and Sankara Institute v. Kishori Lal Goenka*. As pointed out earlier, Sections 3, 5 and 8 of the Act came into force immediately i.e. On 5.9.1988 when the Act received the assent of the President of India, while the remaining provisions shall be deemed to have come into force on 19.5.1988. In view of this, even the presumption u/s 3(2)(a) that the property was purchased for the benefit of the wife and unmarried daughter will be applicable only if the said transaction had taken place after Section 3 came into force. That presumption will not be available to any transaction which has taken place prior to the said Act coming into force, to the present case, as the suit property was purchased in 1981, the presumption u/s 3(2)(a) of the Act would not be applicable in favour of the defendant-wife if it is proved that the husband had purchased the property in her name.

8. The first appellate Court, after analyzing the evidence led by the parties, came to conclusion that the plaintiff/husband had purchased the suit property in the name of wife and as he had paid the consideration amount, he is the real owner and wife was only benamidar. In fact, that is a question of fact. In spite of that the learned Counsel for the appellant took me through the evidence led by the parties. The learned Counsel pointed out that in her evidence, the defendant had deposed that her father is a born rich person and she used to get scholarship for pursuing her education and out of that money, she had paid consideration. According to her, she had handed over money to her father-in-law to purchase the land as her power of attorney holder and he had purchased it in her name. The plaintiff admitted that his father was power of attorney holder for the defendant. According to the learned Counsel, in view of this, it must be held that

the father-in-law had purchased the property with the money provided by her. However, it is to be noted that according to the plaintiff, he was already in service and was getting salary of Rs. 350/- per month. Besides that, he had obtained loan of Rs. 1500/- from a Co-operative Society a few days before the sale transaction and thus he was in a position to procure funds for purchase of the property and he had paid the consideration. It is contended that according to his own admission, the family properties were mortgaged and were in dispute and therefore he would not have purchased the property. While the plaintiff has proved that he had obtained loan of Rs. 1500/- from a Co-op. Society a few days before this transaction, the vendor P.W.2 Laxmibai deposed that the consideration amount was paid to her about 10 days before the execution of the sale deed by father of the plaintiff. It appears that father of the plaintiff was also acting as power of attorney holder for vendor Laxmibai and he executed the sale deed on her behalf in favour of the defendant. Coming to the evidence led by the defendant about payment of consideration amount, it needs to be noted that as per the evidence, she was born on 15.3.1963 and she was married in 1979 who was just 16 years old. By that time, she had completed SSC and she completed her 12th Standard in the year 1980. Thereafter she had taken admission for Graduation in Bio-Chemistry. She was still a student when the sale deed was executed in her name. From this, it is clear that she could not have any source of income when the sale deed was executed. She tried to depose that her father was rich and she was getting some scholarship. In the examination-in-chief, she deposed that she used to get Rs. 900/- per month as scholarship. However, in the cross-examination, she deposed that she had not filed any certificate to show that she was getting Rs. 200/- per month as scholarship. Therefore, it is not clear whether she was getting scholarship of Rs. 900/- or Rs. 200/-. Besides this, she did not produce any document to show that she was getting scholarship at all. It is material to note that she examined her father D.W.2 Madhukar Korgaonkar, who was one of the trustees of "Govindrao Korgaonkar Charitable Institute". According to him, the Trust used to provide financial assistance to the plaintiff's father and he produced receipts, Exhibits 68 to 79 to prove this fact. The receipts are dated 5.5.1969 to 12.8.1971. These documents only prove that father of the plaintiff was getting financial assistance from the trust during the years 1969 to 1971. The marriage of the plaintiff and the defendant had taken place in 1979. Therefore, on the basis of this document, it could not be inferred that the said Trust had provided funds to father of the plaintiff to purchase the property for and on behalf of the defendant nor it could be held that amount was given to him as scholarship for the defendant. During the relevant period, she was a child aged about 6 to 8 years and was naturally living with her own parents. It is material to note that her father nowhere deposed that he had provided any funds to his daughter to purchase the property nor he deposed that she was getting any scholarship for her education after her marriage. In view of this, there is no material to show that the defendant had received any funds either from her father or any scholarship and out of the same she could purchase the suit property. In absence of any such evidence on her behalf, the first

Appellate court came to conclusion that the plaintiff, who was already in service and who had taken loan from the society, had actually purchased the suit property in the name of his wife. It is difficult to hold that this finding of fact by the first appellate Court is either perverse or against the record.

9. In view of the facts, it is proved that the plaintiff had purchased the suit property in the name of his wife/defendant from his own money and therefore she was only benamidar or the ostensible owner while the plaintiff is the real owner. Such transaction was not barred under the Benami Transactions (Prohibition) Act when the transaction took place in 1981. Therefore, u/s 4 of the said Act, he cannot be prohibited from claiming that property.

10. The next question is about limitation. Even though the sale deed was executed in 1981 and at that time, relations between the husband and wife were cordial and his evidence shows that because of love and affection for the wife, he had purchased the land in the name of wife. This appears to be quite reasonable and logical. In 1984, she left the house and since then they were living separately. In 1984 or so, he filed an application for mutation and that application was allowed. An appeal was preferred by the wife in 1985. That proceeding concluded in 1989. The suit was based on title and he filed suit for declaration that he continued to be in possession of the property. No action was taken by the wife to take back possession from him. In 1989, the High Court, while dismissing the Writ Petition against the order of the Revenue Authorities, observed that he should get his title proved by filing a civil suit. Within a very short period thereafter, he filed suit for declaration of his title and injunction. Both the Courts below held that suit is not barred by limitation. It is material to note that even in the written statement, it was contended that suit is barred by limitation, no reasons or grounds were given on the basis of which it could be held that the suit was barred by limitation. In view of these circumstances, the finding of the Courts below that the suit is within limitation appears to be correct.

11. For the aforesaid reasons, the Appeal stands dismissed.