

(2011) 03 BOM CK 0196

In the Bombay High Court

Case No : Second Appeal No. 263 of 1989

Ramkrishna Mahadeo Wagh since deceased through his legal heirs, namely (Smt. Malati Ramkrishna Wagh and Others) **APPELLANT**

Vs

Ramchandra Keshav Kulkarni, since deceased through L.Rs. (Sushila Ramchandra Kulkarni, Suhas Ramchandra Kulkarni and Shantanu Ramchandra Kulkarni) , Kantilal Surajmal Oswal and Shankar Mahadeo Chavan **RESPONDENT**

Date of Decision : 18-03-2011

Acts Referred:

Benami Transactions (Prohibition) Act, 1988 — Section 3, 4, 4(1), 4(2), 5
Trusts Act, 1882 — Section 7, 82

Citation : (2011) 3 ALLMR 559 : (2011) 3 BC 649 : (2011) 3 BomCR 628 : (2011) 3 MhLj 807

Hon'ble Judges : V.M. Kanade, J

Bench : Single Bench

Advocate : Uday Warunjikar, for the Appellant; G.R. Rege, instructed by Leena Sawant, for the Respondent

Final Decision : Dismissed

Judgement

V.M. Kanade, J.—Heard the learned Counsel appearing on behalf of the Appellant and the learned Counsel appearing on behalf of Respondent No. 1.

2. Appellant is the original Plaintiff and Respondents are original Defendants. For the sake of convenience parties shall be referred to as "Plaintiff" and "Defendants".

3. Plaintiff filed suit for partition and separate actual possession of the Plaintiff's one half share in the suit property and future mesne profit alongwith costs of the suit. Trial Court decreed the suit and held that the Plaintiff was entitled to get separate possession of his one half share in the suit property, subject to payment of additional court fee. Against this order, Defendants filed appeal No. 253 of 1984 in the District Court and the decree of the Trial Court was set aside. Being

aggrieved by the aforesaid judgment and order passed by the lower appellate court, Plaintiff has filed this second appeal.

4. The additional grounds were tendered by the Plaintiff's advocate at the time of admission and the second appeal was admitted on the additional grounds which were tendered by the Plaintiff. The second appeal, therefore, was admitted on the following substantial questions of law:

20A) Whether in view of Section 4 of Benami Transactions (prohibition) Act, 1988, which came into force on 19.5.88, it is now open to take the defence of the suit transaction being Benami?

20B) It should have been seen that the Honourable Supreme Court has held that Section 4 of the said Act will be retrospective in operation and will have the effect of nullifying the defence based on right in respect of property held Benami.

20C) The Appellant submits that the facts and Circumstances of the present dispute needs to be reappreciated especially in view of provisions of Benami Transactions (prohibition) Act being Act No. 45 of 1988.

5. During the course of hearing of this second appeal, the Appellant/original Plaintiff has raised the following additional grounds:

(1) Whether the judgment and order of the lower appellate court is perverse since it has not taken into consideration the following documents viz (i) Exhibit 38 - property card Extract, (ii) Exhibit 39 - Statement of Defendant No. 1 before the City Survey Officer dated 20.9.1975, (iii) Exhibit 40 - Statement recorded before the City Survey Officer of the Defendant No. 1 before the City Survey Officer dated 19.7.1978 (iv) Exhibit 41 - Statement recorded before the City Survey Officer of the Plaintiff dated 23.8.1975, (v) Exhibit 49 - Statement recorded before the City Survey Officer of the Defendant No. 1 dated 20.9.1975, (vi) Exhibit 50 - Statement recorded before the City Survey Officer of Defendant No. 1 dated 20.9.1975, (vii) Exhibit 47 - copy of 7 x 12 extract sanctioned on 21.4.1970, (viii) Exhibit 48 - Property Card Extract dated 23.2.1982, (ix) Exhibit 83 - Statement of the Plaintiff before the City Survey Officer dated 23.8.1975, (x) Exhibit 114 - Joint Building permission dated 19.1.1972, (xi) Exhibit 115 - Notices to both Plaintiff and Defendant No. 1 by Municipal Council dated 12.1.1972, (xii) Exhibit 155 - N.A. Permission Order in the Joint Name dated 11.2.1981.

6. Brief facts are as under:

7. Plaintiff was a Doctor by profession and Defendant No. 1 was working under him as his compounder for couple of years. He, however, obtained license for medical practice. A plot was purchased by the Plaintiff and Defendant No. 1 in their joint name on 8th August, 1968 for consideration of Rs 5000/-from one Roshanbi and a bungalow was constructed on the said plot some time in the year 1972. The contention of the Plaintiff in the suit was that he was the joint owner of the said plot and bungalow which was constructed thereon and he, therefore,

was claiming partition of the common property and for possession of the structure in respect of his one half share.

8. Defendant No. 1 filed his Written Statement and denied the joint ownership of the Plaintiff. It was contended that he was the exclusive owner of the said property and that he had constructed bungalow out of his own funds. It was contended that the Plaintiff was a Benamidar in respect of one half share in the suit plot. It was contended that in order to show respect to the Plaintiff, he had purchased the plot in the joint name.

9. The issues were framed by the Trial Court and the Plaintiff examined himself. Defendant No. 1 also examined himself and also the vendor Roshanbi Raheman Shaikh, one Shankar Krishna Patil and the architect Narayan Tukaram Jadhav as witnesses. Apart from oral evidence of witnesses, both, Plaintiff and Defendant No. 1 also produced number of documents in support of their claim. Trial Court decreed the suit. Appellate Court, however, has set aside the judgment and decree of the Trial Court and dismissed the suit.

10. The questions which fall for consideration before this Court are (i) Whether in view of the provisions of Section 4 of the Benami Transactions (Prohibition) Act, 1988 [For short "the Act"] which came into force on 19.5.1988, it was open for Defendants to take defence that the suit transaction was a Benami transaction? (ii) Whether the said provision of Section 4 of the Act will have retrospective operation? (iii) In view of the provisions of the Act coming into force, whether facts and circumstances of the case are required to be re-appreciated and (iv) Whether the findings recorded by the lower appellate court can be said to be perverse since it has not taken into consideration the various documents on which reliance is placed by the Plaintiff?

11. So far as the first three questions of law which fall for consideration before this Court are concerned, the said questions are no longer res integra in view of the judgment of the Apex Court in Rebti Devi (Smt) Vs. Ram Dutt and Another, . In the present case, the suit was filed in 1981. The Written Statement was filed immediately thereafter on 23.9.1982. The suit was decided on 13.3.1984. Appeal against that order was filed in 1984 and the appeal was decided on 28.4.1988. The Act came into force with effect from 19.5.1988 i.e. after the judgment and order was passed by the lower appellate court. The Apex Court in Rebti Devi's case (supra) cited, with approval, the judgment in R. Rajagopal Reddy and Others (deceased by legal representatives) Vs. Padmini Chandrasekharan (deceased by legal representatives), which overruled its earlier decision in Mithilesh Kumar and Another Vs. Prem Behari Khare, . The Apex Court in para 7 of its judgment in Rebti Devi (supra) has observed as under:

7. In order to appreciate the second submission, we have to start here with R. Rajagopal Reddy and Others (deceased by legal representatives) Vs. Padmini Chandrasekharan (deceased by legal representatives), and find out what it actually decided in regard to the Benami Transactions (prohibition) Act, 1988

(hereinafter called the "Act"). Sections 3, 5 and 8 of the Act came into force at once i.e. w.e.f. 5.9.1988 while the remaining provisions were deemed to have come into force from 19.5.1988. The principles decided in that case, while overruling *Mithilesh Kumar and Another Vs. Prem Behari Khare*, , can be summarised as follows:

(1) Firstly while Section 4(1) prohibited a plea of benami to be raised in a suit, claim or action and again Section 4(2) precluded a defence of benami in suits, claims or actions, -these two provisions did not come in the way of a decision on such pleas in matters pending as on 19.5.1988 if such pleas were already raised before 19.5.1988 by one party or other. This was because such pleas which were already raised before 19.5.1988 were not intended to be affected by the Act, if they were raised in suits, claims or actions pending as on 19.5.1988. The repeal provision in Section 7 repealed S. 82 of the Trust Act only in that manner and to that extent.

(2) Secondly on the express language of Section 4(1), any right inhering in the real owner in respect of any property held benami would be not enforceable once Section 4(1) operated, even if such transaction had been entered into prior to 19.5.1988 and no suit could be filed on the basis of such a plea after 19.5.1988. The same prohibition applied in case of Section 4(2) to a defence taken after 19.5.1988 pleading benami in respect of a transaction prior to 19.5.1988. The Act could be said to be retrospective only to that extent. But from this it did not follow that where such a plea was already taken before 19.5.1988 to the effect that the property was held benami, such a plea got shut out merely because the proceeding in which such plea was raised before 19.5.1988 was pending on 19.5.1988.

(3) Thirdly, where a suit had been filed before 19.5.1988, and in any written statement filed on or after 19.5.1988, a plea of benami was raised, then such a plea of benami could not also be gone into. If however such a plea in defence had been raised before 19.5.1988, the Act did not preclude that question from being decided in proceedings which were pending on 19.5.1988. *Mithilesh Kumari*'s case was wrong in holding that such a defence could not be decided after 19.5.1988 even though the plea was raised before 19.5.1988.

(4) Fourthly, if such an interpretation as stated in (1) to (3) was given, it could not be validly contended that a question of invalid discrimination arose between cases where suits were filed on or before 19.5.1988 and those filed after 19.5.1988.

(5) Fifthly, even though the word "suit" might include appeal or further appeals, Section 4(1) and 4(2) could not be made applicable to these subsequent stages.

(6) Sixthly, pleas by Plaintiffs or applicants and defences after 19.5.1988 of real owners against benamidars were barred u/s 4(1) and Section 4(2), only to the extent indicated above."

This in substance is what was decided in R. Rajagopal Reddy and Others (deceased by legal representatives) Vs. Padmini Chandrasekharan (deceased by legal representatives),

13. The ratio of the judgment of the Apex Court in R. Rajagopal Reddy and Others (deceased by legal representatives) Vs. Padmini Chandrasekharan (deceased by legal representatives), would squarely apply to the facts of the present case since it has been observed by the Apex Court that provisions of Section 4(1) and Section 4(2) of the Act would not come in the way of a decision on such pleas in matters pending as on 19.5.1988 if such pleas were already raised before 19.5.1988 and they were not affected by the Act.

14. In the present case also, the plea was raised in 1982. Trial Court decided the suit in 1984. The first appeal was filed in 1984 and it was decided on 28.4.1988 even prior to the Act coming into force. In R. Rajagopal Reddy and Others (deceased by legal representatives) Vs. Padmini Chandrasekharan (deceased by legal representatives), the Apex Court has observed that only in those cases where transaction had taken place before 19.5.1988 but the plea is raised after the Act coming into force then such pleas cannot be taken in view of the bar u/s 4(1) and 4(2) of the Act. Similarly, in para 12 of its judgment in Rebti Devi (Smt) Vs. Ram Dutt and Another, , the Apex Court has observed as under:

12. In order to complete discussion, we shall also refer to two subsequent cases. The case in Heirs of Vrajlal J. Ganatra Vs. Heirs of Parshottam S. Shah, was one where the suit was filed in 1981 claiming that the Defendant in whose name the deed dated 16.12.1963 stood was benami. The Plaintiff's heirs filed appeal in Gujarat High Court in 1990 against the judgment of the trial Court. No contention based on the Act of 1988 was raised in the High Court. For the first time it was argued in this Court that the plea was prohibited by the Act. This Court, followed R. Rajagopal Reddy and Others (deceased by legal representatives) Vs. Padmini Chandrasekharan (deceased by legal representatives), and held that the plea was raised in a suit filed before 19.5.1988, and it was not barred under the Act. This Court then proceeded to decide the case on merits, dismissing the Plaintiff's appeal.

15. The ratio of the judgment in Rebti Devi (Smt) Vs. Ram Dutt and Another, would squarely apply to the facts of the present and, therefore, the first question viz. "Whether in view of the provisions of Section 4 of the Benami Transactions (Prohibition) Act, 1988 which came into force on 19.5.1988, it was open for Defendants to take defence that the suit transaction was a Benami transaction?" is answered in the affirmative since the plea was taken in 1982 prior to the Act coming into force.

The second question viz. "Whether the said provision of Section 4 of the Act will have retrospective operation?" is answered in the negative since it is specifically held that if the plea is raised prior to 19.5.1988, the Act would not have retrospective effect.

So far as the third question viz. "In view of the provisions of the Act coming into force, whether facts and circumstances of this case are required to be re-appreciated?" is concerned, in view of the answers to the above two questions, this question does not survive and there is no question of re-appreciating the evidence on record.

So far as the last question viz. "Whether the findings recorded by the lower appellate court can be said to be perverse since it has not taken into consideration the various documents on which reliance is placed by the Plaintiff?" is concerned, in my view, the submission of the Counsel for the Appellant/Plaintiff cannot be accepted. Perusal of the judgment and order of the lower appellate court discloses that the lower appellate court has re-appreciated the evidence on record and after taking into consideration the circumstantial evidence and the admission given by the Plaintiff in his cross-examination, it has observed that the name of the Plaintiff was shown only out of respect and that he had neither paid the sale consideration of the plot nor had spent any amount for construction of the bungalow. The statements made before the Non-agricultural Assessment Officer were made by Defendant No. 1 only for the purpose of obtaining N.A. Permission. The lower appellate court further observed that the penalty imposed for not obtaining N.A. Permission was paid only by Defendant No. 1. So far as the city survey record is concerned, though statement was made before the City Survey Officer that the property was in joint name, the said statement does not bind the Defendant No. 1 since he has come out with a specific case that the Plaintiff was a Benamidar and, therefore, did not have any right in the property. This version of the Defendant No. 1 is supported by the vendor Roshanbi Raheman Shaikh and also by the other witness. The submission of the learned Counsel for the Appellant/original Plaintiff that the Trial Court has not taken into consideration these documents is also incorrect. In the detailed judgment and order passed by the lower appellate court, it has taken into consideration all the documentary and oral evidence on record. Reference is made by the lower appellate court to the statements which were recorded before the City Survey Officer in para 23 of its judgment and it has observed that the Plaintiff gave statement before the City Survey Officer that he was not ready to pay penalty. The lower appellate court, therefore, came to the conclusion that though Defendant No. 1 made statement that the plot was in joint name, the claim of the Plaintiff that he had equally spent the amount for construction of the bungalow was falsified. Then in para 30 of its judgment, the lower appellate court, again, has taken into consideration the statement made by Defendant No. 1 while obtaining N.A. Permission that the plot was standing in the joint name and, after taking into consideration the said statement, the Court has observed that the surrounding circumstances and other facts which are required to be taken into account in the matter of Benami transaction would clearly go to show that the Plaintiff was the Benamidar so far as the suit plot is concerned and that the Defendant No. 1 had discharged his burden with cogent and satisfactory evidence and, therefore, the admission that the plot was in the joint name could

not be considered as conclusive proof that the Plaintiff was owner of the one half share. The lower appellate court has also taken into consideration the fact that the Defendant No. 1 was in exclusive possession and enjoyment of the suit property. The submission made by the learned Counsel appearing on behalf of the original Plaintiff, the Appellant herein that the documents were not considered is, therefore, without any substance. Though specific exhibit numbers are not mentioned which are mentioned in the said grounds which have been now taken at the time of final arguments of this second appeal, the lower appellate court has considered these documents and recorded its findings on these documents and the submissions made by the Plaintiff. Therefore the aforesaid last question is also answered in the negative.

16. Thus there is no substance in the submissions made by the learned Counsel appearing on behalf of the Plaintiff/Appellant. No case is made out for interfering with the judgment and order passed by the lower appellate court. The second appeal is, therefore, dismissed.