
(1989) 10 BOM CK 0035
In the Bombay High Court
Case No : Writ Petition No. 5108 of 1987

R.B. Rajput

APPELLANT

Vs

Hiralal Bhagwandas Rajput and Another

RESPONDENT

Date of Decision : 13-10-1989

Acts Referred:

Benami Transactions (Prohibition) Act, 1988 — Section 4, 4(1)
Limitation Act, 1963 — Article 58
Maharashtra Co-operative Societies Act, 1960 — Section 2(9), 92(1), 92(2)

Citation : (1990) 1 BomCR 310 : (1989) 91 BOMLR 869

Hon'ble Judges : M.L. Dudhat, J

Bench : Single Bench

Advocate : S.V. Jhangiani, for the Appellant; B.N. Naik and A.A. Bhore, for the Respondent

Final Decision : Allowed

Judgement

M.L. Dudhat, J

1. The petitioner in this Writ Petition has filed this present writ petition against the order dated 14th July, 1987 passed by the Maharashtra State Co-operative Appellate Court at Bombay in Appeal No. 1 of 1987 reversing the judgment and order of the Judge, IV Co-operative Court, Bombay in Case No. CIV/793 of 1985 dated 29-8-1985.

2. The dispute in this writ petition is about Flat No. 2, Kismat Building at Colaba, admeasuring about 1100 Sq. feet. The said flat was tenanted by the original landlord to respondent No. 1 who is the brother of the present petitioner. It appears that the whole family of respondent No. 1 the petitioner and their parents and other relations were in occupation of the said flat since the year 1963. On 7-5-1971 the landlord expressed his desire to dispose of the said flat to the existing tenants and in pursuance of that the disputant contended that he paid an amount of Rs. 17,840/- as the total consideration towards the flat and the share certificates in the society to be formed after the said purchase. On

6-11-1971 the society was formed and the said society is respondent No. 2 in the present petition. In the said society the present respondent No. 1 was enrolled as a member and his share numbers were from 226 to 270. Admittedly, the said share certificate stood in the name of respondents No. 1 alone.

3. Subsequently, it appears that on 10-3-1973 respondent No. 1 alone with the present petitioner made an application to the society respondents No. 2, which application it at Exh. "A" to this petition at page 22. In the said application it was stated that the said application is meant for enrolling the present petitioner along with respondent No. 1 as the joint members of the society, as the said flat was purchased by them jointly and both agreed that the due liabilities towards the society will be borne out and paid by them jointly and severally. The society thereafter considered the said application in their Managing Committee Meeting held on 16-3-1973 and thereafter in the Special General Body Meeting of respondent No. 2 society held on 30-3-1973. The petitioner was enrolled as joint associate member along with respondent No. 1 in respect of share Nos. 266 to 270 and in respect of Flat No. 2 the suit property. It appears that subsequently on 1-11-1974 the society affected the necessary changes in the share certificates.

4. On 14-8-1980 respondent No. 1 filed a dispute being Dispute No. 895/1538 of 1980 in the Co-operative Court. In the said dispute respondent No. 1 sought a declaration from the Co-operative Court u/s 91 that the disputant respondent No. 1 be declared exclusive tenant in respect of the suit premises and further declaration that subsequently in a capacity as a tenant he acquired the suit premises out of his own funds and the petitioner has made no contribution for the same. Respondents No. 1 disputant also sought a declaration that the costs of the shares Nos. 266 to 270 in the society was contributed by respondents No. 1 alone and lastly sought a declaration that the endorsement made in the name of the petitioner a joint associate member is without any proper and valid sanction and the same may be deleted from the record. The petitioner filed his write statement somewhere in the year 1981 wherein the present petitioner denied that the tenancy was in the individual name of respondent No. 1 and that the purchase of the suit premises was made by respondent No. 1 in his individual capacity. According to him in fact much prior to 1963 they were earlier staying in the other tenanted premises as a Joint Hindu Family and for the sake of convenience for and on behalf of the Joint Hindu Family in the year 1963 the suit premises was taken for the use of Rajput Family consisting of both the brothers, other relations including parents and for the sake of convenience the rent receipts stood in the name of respondent No. 1. It was also contended on behalf of the present petitioner that in fact he has made contribution towards the purchase of the flat and the share money. It was also contended on behalf of the present petitioner that the declaration sought about the tenancy and certain events which took place prior to the formation of the society are beyond the scope of section 91 as the same do not come within the management of the society and the Co-operative Court has no jurisdiction to decide these issues. It was also submitted that in fact the whole dispute is beyond limitation and

hopelessly time barred. Lastly it was contended that the suit is bad in view of section 4 of the Benami Transaction (Prohibition) Act of 1988, hereinafter referred to as the Benami Act of 1988, for the sake of brevity. The trial Court, after hearing both the sides and after going through the evidence, by its judgment dated 29-8-1986 dismissed the dispute filed by respondents No. 1 virtually all the grounds and upheld the contentions of the present petitioner. Against the said decision dated 29-8-1988 of the trial Court, respondent No. 1 preferred an appeal being Appeal No. 1 of 1987 before the Maharashtra State Co-operative Appellate Court. Bombay, and the Maharashtra State Co-operative Appellate Court by its decision dated 14th July, 1987 allowed the appeal filed by the present respondent No. 1 and reversed the findings of the trial Court. It is against this decision that the present petitioner has preferred this writ petition.

5. Shri Jhangiani, learned Counsel appearing on behalf of the petitioner, submitted that the Maharashtra State Co-operative Appellate Court upheld the decision of the trial Court that the petitioner was properly admitted associate joint member of respondent No. 2 society. But surprisingly the said Appellate Court further held, after going through the facts and circumstances of the case, that respondent No. 1 was in fact a tenant in the individual capacity in respect of the suit flat and in fact purchased the suit flat out of his own funds exclusively wherein the present petitioner has not contributed anything. The Appellate Court further held that the nominal, sympathiser and associate member in the Co-operative society can be removed as per the desire and sweet will of the person who is shown as the first member of the society and this being the position the Appellate Court held that since respondent No. 1 does not want the present petitioner to be the member, his name must be removed as an associate member along with respondent No. 1 by the society. Shri Jhangiani further pointed out that on the limitation also the Co-operative Appellate Court reversed the finding of the trial Court without applying proper provisions of law. Lastly it was also contended by Shri Jhangiani that the argument advanced by the petitioner about the maintainability of the suit in view of the benami nature of the transaction was not at all considered by the Co-operative Appellate Court. In order to point out how the lower Appellate Court wrongly misinterpreted, Shri Jhangiani drew my attention first to Exh "A" which is at page 22 dated 10-3-1973. This is an application made jointly by the present petitioner and respondent No. 1 to respondent No. 2 society. In the first para of that application it is mentioned that the said application was made by them for enrolling the present petitioner as a joint member of the society along with respondent No. 1. It was stated in para 2 of the said application that the suit flat was purchased by them jointly and, therefore, it was requested that the name of both the petitioner and respondent No. 1 should be shown in the certificate as joint holders. At the end of the application it was also stated that all the dues towards the society will be borne out and paid by both the petitioner and respondent No. 1 jointly and severally. The said application came before the Managing Committee on 16-3-1973 and the Managing Committee, after approving the same, placed the same along with

other items before the Special General Body meeting held on 30-3-1973. Though the society was called upon to produce these resolutions, the society failed to do so and, therefore, the xerox copy of the resolution produced by the petitioner was taken on record by the trial Court since there was no objection from respondent No. 1. On the basis of the said resolution on 1st November, 1974 the share certificate was amended and the name of the present petitioner appeared along with respondent No. 1 as Associate member.

6. At this juncture, before going to the averments in the plaint. I will like to refer to the definition of "member" and "associate joint member" as contemplated by the Maharashtra Co-operative Societies Act, 1960. The relevant provision is section 2, sub-section 19(a) and (b), which is as under :---

"2. (19)(a) "member" means a person joining in an application for the registration of a Co-operative society which is subsequently registered or a person duly admitted to membership of a society after registered and include a nominal, associate or sympathiser member;

(b) "associate member" means a member who holds jointly a share of a society with others, but whose name does not stand first in the share certificate."

After going through the aforesaid provision, it is clear that as per section 2, sub-section 19(b) "associate member" means a member who holds jointly a share of a society with others, but whose name does not stand first in the share certificate. That means there is no distinction as per the Maharashtra Co-operative Societies Act, 1960 between associate member and the joint member. Further it is also pertinent to note that in Exh. "A" which I have already referred to i.e. the joint application made by respondent No. 1 and the present petitioners, they have made a clear cut statement that the said suit flat was purchased by them jointly and therefore, the petitioner's name should be added jointly along with respondent No. 1. Against this document I will have to consider the plaint in the dispute filed by respondent No. 1 and the evidence led by him. In the plaint respondent No. 1 stated as to how he was the exclusive tenant of the suit premises prior to the formation of the society-respondent No. 2. He has also specifically stated as to how he has paid all the dues towards the flat and the share certificates and specifically stated that the petitioner has not contributed anything. As regards the joint application at Exh. "A" to the petition, a detailed reference is made by respondent No. 1 in para 6 of his plaint. He averred in the said para that somewhere in March 1973 his father prevailed upon to him to allow the present petitioner to be a joint member in respect of five share Nos. 266 to 270 issued by respondent No. 2 society. He further contended that since the relations were good between the petitioner and respondent No. 1 respondent No. 1 agreed and made the application at Exh. "A" to the petition. The said application was made by him jointly on 10th March, 1973 requesting the society to admit opponent No. 2 the present petitioner as joint member. I have already referred to the said agreement in detail. At this stage I may mention that it is not the case of respondent No. 1 that this agreement at Exh. "A" dated 10th

March, 1973 was not to be acted upon for some reasons. On the contrary it is his specific plea that the agreement was to be acted upon. The only explanation he has given is that he did the same at the behest of his father. It is true that he has stated in the plaint that the monies were paid by respondent No. 1 only and the petitioner has not contributed anything to that effect, but surprisingly respondent No. 1 in the plaint has not given any reasoning or explanation why in the letter dated 10th March, 1973 which is Exh. "A" to the petition he has referred to that both the petitioner and respondent No. 1 have paid the shares and the flat ownership charges jointly and both of them are responsible for the society's dues jointly and severally. The whole plaint is conspicuously lacking in referring to this aspect of Exh. "A". Further as to why respondent No. 1 has filed the dispute for deletion of the name the present petitioner, the reason given is two-fold and that is because of the subsequent events respondent No. 1 found that the acceptance of the petitioner to be a joint member of the aforesaid five shares is not in the interest of either respondent No. 1 or his parents and secondly that respondent No. 2 society has not passed proper resolution and, therefore, the addition of the name of the present petitioner to the society is without adopting due procedure of law and therefore, the said addition should be deleted. As regards the last reason, i.e. the society has not passed proper resolution, both the trial Court as well as the Appellate Court held that the petitioner was properly added as an associate member of the society and that being the position, I need not consider this aspect any further. I may further mention that respondent No. 1 has not filed any writ petition challenging this finding. As regards the reason for deletion of the name of the petitioner as associate member along with respondent No. 1 "because of the subsequent events, the Disputant now finds that the acceptance of the Opponent No. 2 to be a joint member of the aforesaid 5 shares is not in the interest of the either Disputant or his parents." I am surprised as to how this can be a reasoning which gives a cause of action to file such a dispute. Once a joint application is made by respondent No. 1 along with the present petitioner to respondent No. 2 society for adding the name of the present petitioner as a joint member, as he has paid the money towards the shares and purchase of the flat jointly and he has made himself responsible jointly and severally along with the present petitioner to pay the dues of the society, how can the respondent No. 1 unilaterally withdraw himself from the said tripartite agreement entered into between him and the petitioner and the society respondent No. 2. Merely because respondent No. 1 feels that the continuance of the name of the present petitioner as a joint member of society is not in the interest of respondent No. 1 and his parents cannot be a ground for asking the deletion of the name of the petitioner from the society because under no Act respondent No. 1 has got a right to claim such a relief unilaterally. In view of this, in my opinion really speaking there was no cause of action for respondent No. 1 disputant to file the dispute at all.

7. At this Juncture it is necessary to see the defence of the petitioner in his written statement. In the written statement the petitioner has specifically stated

that from the inception there is a joint family consisting of himself, respondent No. 1, their parents and other relations, which according to me is not even disputed by respondent No. 1. The petitioner further took the stand in para 5 read with para 8 of his written statement that the petitioner made payments towards the price of the flat and out going along with respondent No. 1 and that in the year 1973 at the behest of the elders it was decided to introduce the name of the petitioner as a joint member along with respondents No. 1 to protect the right of the present petitioner. The petitioner has further stated that it is because of this suggestion both respondents No. 1 and the petitioner made the application dated 10th March, 1973 which is at Exh. "A". The petitioner had also led the evidence by referring to the retirement deed produced by respondent No. 1 in respect of family firm Ramji Jeevan and Company. The petitioner had stated that in the year 1973 he and some other parents retired from the said family concern which was running a laundry in the Fort area. The petitioner had also stated that if one goes through the said deed of retirement, it is clear that the petitioner had retired from the said firm without getting anything from the said firm and according to the petitioner he had not taken anything at the time of the retirement as the same was adjusted towards the part of the price of the flat and the share amount. The trial Court accepted this story of the petitioner but surprisingly the Appellate Court disbelieved it on the ground that this story about the retirement was not mentioned in the written statement and therefore, this cannot go in the evidence. Further the application made before the lower Appellate Court for the amendment of the plaint to add this circumstance was rejected by the lower Appellate Court. According to me with respect to the lower Appellate Court, I do not know as to why the petitioner was not allowed to rely upon this evidence. What has to be stated in the pleading is the factual aspect. How the payment is made is a matter of evidence which a party can give within the circumscribed limit of the pleadings. As I have already pointed out that since the petitioner has already taken a stand there he has made payments towards the price of the flat and the share amount, it was not necessary for him to describe as to how the said payment was made as the same is a matter of evidence. Therefore, the lower Appellate Court was wrong in drawing the adverse inference from this fact that the retirement of the petitioner from the said firm Ramji Jeevan and Company is an after thought. In fact according to me in view of Exh. "A" dated 10th March, 1973 and in view of no explanation in the plaint as to why the statement was made in Exh. "A" to the effect that both the petitioner and respondent No. 1 paid the price of the flat and the share certificates jointly and both the jointly and severally responsible for the payment towards the outgoings of the society, there was no need for the present to prove as to how he had paid the amount but since respondent No. 1 himself has produced the retirement deed, the petitioner wanted to show as to how he had abandoned his right without consideration in the family adjustment at the relevant time when Exh. "A" dated 10 March, 1973 was written. In view of this position, it is clear that by volition respondent No. 1 wrote the joint application to the society which is at Exh. "A" dated 10th March, 1973, it was acted upon by the society by

passing various resolutions as pointed out above and such tripartite agreement cannot be revoked by only one party, namely, respondent No. 1 on the ground that after seven years of effecting the change respondent No. 1 has come to the conclusion that the said change is neither in the interest of respondent No. 1 nor his parents. On this ground itself the dispute should be dismissed. Surprisingly this aspect is completely lost sight of by the lower Appellate Court. The lower Appellate Court, after coming to the conclusion that the petitioner was properly added as a joint associate member along with respondent No. 1 with the proper approval of the society, further equated nominal members sympathiser member and associate member and came to the conclusion that they have no rights whatsoever and their names can be deleted at the sweet will of the member who is first in the society's record. According to the lower Appellate Court section 35 of the Maharashtra Co-operative Societies Act has no application to the associate members. The Maharashtra State Co-operative Appellate Court has completely lost sight of the fact that section 2(19)(b) of the Maharashtra Co-operative Societies Act defines that "associate member" means joint member. Further the Maharashtra State Co-operative Appellate Court lost sight of the fact that in the joint letter Exh. "A" dated 10th March, 1973 respondent No. 1 himself has stated that the monies towards the flat and shares are paid jointly by both respondents No. 1 and the petitioner and both the present petitioner and respondents No. 1 are jointly and severally liable for the payment towards the outgoings of the society. This being so, the present petitioner-associate member is not merely a sympathiser member or a nominal member but has a right which arises out of the joint ownership of the shares. If the petitioner has got a right of membership, I do not understand as to how respondents No. 1 the other joint member can delete the name of the petitioner from the memberships unilaterally without getting consent from the present petitioner. The finding of the lower Appellate Court is, therefore, patently illegal and deserves to be set aside. If this finding is put into practice, then in spite of the joint purchase of the flats, shares, only because of the fact that one of the joint members is first in _ember out of the society and this will virtually create chaotic situation in the co-operative set up.

8. With this now I turn to the next argument made by Shri Jhangiani, learned Counsel for the petitioner, that the dispute is beyond time. According to Shri Jhangiani admittedly the joint application at Exh. "A" signed by respondent No. 1 and the petitioner was made to respondent No. 2 society on 10th March, 1973. The same came before the Managing Committee of the society on 16-3-1973 and after giving approval to the said application, the said application was further placed before the Special General Body Meeting on 30-3-1973 wherein the same was approved. After the said approval on 1-11-1973 the necessary changes were effected in the share certificates. According to Shri Jhangiani section 92(2) is applicable to find out the period of limitation in the present case. According to him admittedly the change was effected at the behest of respondent No. 1 and it was not an act of the society independently by which respondent No. 1 is

aggrieved. That being So, the present dispute cannot come within the ambit of section 92(1) of the Maharashtra Co-operative Societies Act, 1960. Therefore, it will come within the ambit of section 92(2) of the said Act. According to the said provision the period of limitation in respect of cases which do not come within the ambit of section 92(1) shall be as prescribed by the Limitation Act of 1963. The relevant provision for the declaration sought by the present respondent No. 1 in the dispute is item 58 in the schedule of the Limitation Act, 1963. Under the said item 58 to obtain any declaration other than referred to under items 56 and 57, which are not applicable in the present case, the period of limitation is three years from the time when the right to sue first accrued. As I have already stated earlier, in fact according to me there is no cause of action at all accrued to the present respondent No. 1. Presuming, but without admitting, that the said cause of action accrued to the present respondent No. 1, the same would be in any case on 1-11-1974 when the changes were affected in the record of the society respondent No. 2. The dispute in this case was filed by respondent No. 1 on 14-8-1980 while the limitation period under item 58 expired on 1-11-1977. So, taking any view of the matter, this dispute is also hopelessly time barred and therefore, I set aside the finding on the limitation given by the lower. Appellate Court and confirm that of the trial Court.

9. Lastly it was also argued on behalf of the petitioner that the dispute is not maintainable in view of the Benami Transaction Act of 1988. Shri Jhangiani cited the decision of the Supreme Court in Mithilesh Kumari and another v. Prem Behari Khara, 1989 Mh.L.J. 210. In the aforesaid decision when the Act came into force i.e. on 19-5-1988 the matter was pending before the Supreme Court as an appeal by special leave challenging the judgment of the High Court. The question was whether in such a circumstance section 4 of the Benami Transactions Act, 1988 can be made applicable to the transaction mentioned in the said litigation pending before the Supreme Court. The Supreme Court held as under :---

"Held, that on 19-5-1988 when section 4, of the Benami Transactions (Prohibition) Act, 1988 came into force, the appeal by Special Leave challenging the judgment of the High Court was pending. The hearing of appeal under the procedural law of India is in the nature of rehearing and therefore, in moulding the relief to be granted in a case on appeal, the Appellate Court is entitled to take into account even facts and events which have come into existence after the decree appealed against. The Appellate Court is competent to take into account legislative changes since the decision under appeal was given and its powers are not confined only to see whether the Lower Court's decision was correct according to the law as it stood when the decision was given. Once a decree of the High Court had been appealed against, the matter became sub judice again and thereafter the Supreme Court had right of the whole case though for certain purpose, eg. execution, of the decree was regarded as final and the courts below retained the jurisdiction in that regard. The word "suit" includes an appeal from the judgment in the suit. The only difference between a suit and appeal is that

an appeal only reviews and corrects the proceedings in a cause already constituted but does not create the cause. A person is sued" not only when the plaint is filed against him but is "sued" also when the suit remained pending against him. The word sued "covers the entire proceeding in an action. Consequently, the suit filed by the plaintiff could not be decreed under the law in view of the provisions of the Benami Transactions (Prohibition) Act, 1988. The decree passed by the courts below, therefore, were annihilated and the suit accordingly was dismissed."

From the aforesaid ratio decided by the Supreme Court it is clear that the matter is pending in High Court or Supreme Court in continuation of the original dispute or suit when the said Act of 1988 came into force, section 4 of the said Act of 1988 is applicable to the transactions in the pending litigations before the Appellate Court, High Court or Supreme Court. In the present case the Act came into force when the writ petition is pending and, therefore, section 4 will be applicable to the facts and circumstances of the present case. Section 2(a) of the said Act defines "benami transaction". According to the said provision "benami transaction" means any transaction in which property is transferred to one person for a consideration paid or provided by another person. Section 2(c) defines "property". According to the said provision "property" means property of any kind, whether movable or immovable, tangible or intangible, and includes any right or interest in such property. In the present case since in view of the joint application dated 10th March, 1973 both respondent No. 1 and the petitioner requested respondent No. 2 society to add the petitioner as the joint owner of the shares as he had paid money towards the shares and the property along with respondent No. 1, this shall amount, in view of section 2(a) and (c) to a benami transaction if what has been contended on behalf of respondent No. 1 in the plaint is correct. Once the said entry which is made in pursuance of the said application Exh. "A" dated 10th march, 1973 comes within the definition u/s 2(a) as a benami transaction, then section 4(1) will be immediately attracted and since the case of the respondent No. 1 does not come in any of the exceptions more particularly given in section 4 sub-section (3) of the said Act of 1988, the claim in the dispute filed by respondent No. 1 against the petitioner and the society will come within the purview of section 4(1) of the Act of 1988 and, therefore, the said dispute according to me, is also not maintainable in view of section 4(1) of the Benami Transactions (Prohibition) Act of 1988, Shri Naik, learned Counsel appearing on behalf of respondent No. 1 contended that in fact this point was not argued before the lower Appellate Court. I may further point out that in fact this point was not available, as it is available today, at the time when the matter was pending before the Maharashtra State Co-operative Appellate Court because the Act came into force on 19-5-1988 and the decision of the lower Appellate Court is dated 14th July, 1987. According to me since this is a sheer point of law and since even the Supreme Court in the similar circumstances has allowed such argument in the case referred to above Mithilesh Kumari & another v. Prem Behari Khare, 1989 Mh.L.J.210, the said argument can

also be considered in the present writ petition and, therefore, considered. Shri Bhimrao Naik, learned Counsel appearing for respondent No. 1 contended that in fact Respondent No. 1's case comes within the exception mentioned u/s 4(3)(b) of the Benami Transactions (Prohibition) Act of 1988, which carves out exception in favour of a person on whose behalf the property is held in the name of a trustee or a person who is standing in a fiduciary capacity. According to me this argument is not tenable because there is no averment to that effect in the whole plaint filed on behalf of respondent No. 1. When this was pointed out to the learned Counsel on behalf of respondent No. 1 Shri Naik, Shri Naik made oral application for amendment of the plaint to the effect that the case of respondent No. 1 comes within the exception of section 4(3)(b) of the benami Transactions (Prohibition) Act, 1988. The said application is rejected because if this is allowed there will be totally a new case inconsistent and incompatible to the facts disclosed in the plaint and therefore such amendment cannot be allowed.

10. In view of the aforesaid findings of mine, the lower Appellate Court's findings and judgment on the aforesaid points are set aside and that of the trial Court are confirmed. The writ petition is allowed with costs. Rule made absolute