
(1992) 08 CAL CK 0010

In the Calcutta High Court

Case No : Appeal from Appellate Decree No. 1209 of 1976

Sm. Basanti Majumdar

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 10-08-1992

Acts Referred:

Benami Transactions (Prohibition) Act, 1988 — Section 3
Civil Procedure Code, 1908 (CPC) — Order 41 Rule 33, 100

Citation : (1992) 2 CALLT 375 : 97 CWN 60

Hon'ble Judges : Jyotirindra Nath Hore, J

Bench : Single Bench

Advocate : Mihir Chakraborty, for the Appellant;None, for the Respondent

Final Decision : Dismissed

Judgement

Jyotirindra Nath Hore, J.—This appeal is directed against the judgment and decree dated 23rd April, 1975 passed by the learned Additional District Judge, 2nd Court, Alipore, in Title Appeal No. 148 of 1973, affirming those of the learned Munsif, 3rd Court, Alipore, in Title Suit No. 326 of 1969.

2. The appellant instituted the said suit for a declaration that the defendant No. 5, her husband, was a benamdar of the plaintiff in respect of the suit property and for permanent injunction restraining the defendant Nos. 1 to 4 from attaching the suit property for recovery of the Income Tax dues from the defendant No. 5. The plaintiff's case was that her father Bhupendra Nath Mitra was a Zaminder and an Advocate at Suri and her maternal grandfather Prafulla Chandra Sinha had vast landed property, Bank deposits etc. and the plaintiff with others succeeded to the estate of Prafulla Chandra Sinha and got a considerable sum of money. The plaintiff also got considerable ornaments and jewellerys and cash money from her father, maternal uncle, grandfather and other relations. The plaintiff was always in affluence and received much money from her relations. Defendant No. 5, husband of the plaintiff, was very lavish in expenditure. He lived beyond his means and despite the plaintiff's insistent

desire to curb his habit of extravagance he could not mend his habit. The plaintiff, apprehending that her future life might not be happy because of the extravagance of her husband, wanted to make some provisions for herself and accordingly purchased the disputed plot of land on 8.9.59. Thereafter she gradually erected constructions on the land and the house was still incomplete. The plaintiff purchased the land with her own money and the entire costs of construction of the house were borne by the plaintiff from her own Stridhan funds. Defendant No. 5 was a mere benamdar having no right, title, interest or possession in the suit property. In June 1969, the plaintiff came to learn that the suit property was being attached for the Income Tax dues of the defendant No. 5. Defendants Nos. 1 to 4 have no right to proceed against or attach the suit property of the plaintiff for recovery of the dues of the defendant No. 5. Hence, the suit after service of notice u/s 80 of the Code of Civil Procedure.

3. Defendants Nos. 1 and 2 contested the suit by filing written statements inter alia, on the ground that the defendant No. 5 was not the benamdar of the plaintiff and that in order to save the property from attachment for the Income Tax dues of her husband, the plaintiff had filed the false suit in collusion with defendant No. 5. It was the specific case of the defendant No. 2 that the defendant No. 5 purchased the suit land with his own money and constructed the house from his own funds. Defendant No. 5 was a respectable Chartered Accountant having practice for the last 30 years and he had considerable earning therefrom as well as from the Articled clerks and other sources. A huge amount of Income Tax dues from defendant No. 5 was lying unpaid and in order to avoid payment and save the property from attachment, defendant No. 5 had really filed the suit in collusion with the plaintiff.

4. Upon a consideration of the entire evidence on record and the facts and circumstances of the case, the learned Munsif did not accept the plaintiff's case that the plaintiff was the real owner and defendant No. 5 was a mere benamdar. The specific finding of the learned Munsif is that the property was not purchased by the plaintiff with her own money. Defendant No. 5 and plaintiff being husband and wife, the question of possession and custody of the document were not much material in this case. The learned Munsif accordingly dismissed the plaintiff's suit. The finding of the learned Munsif that the property was not purchased by the plaintiff with her own money and that the defendant No. 5 was not her benamdar was accepted by the lower Appellate Court upon consideration of the evidence on record. The appeal was accordingly dismissed and the judgment and decree of the trial court were affirmed. Being aggrieved, the plaintiff has filed this second appeal.

5. No question of law, far less substantial question, has been raised in this appeal. The concurrent finding of the two courts below that the plaintiff did not purchase the suit property with her own money, is a finding of fact which is binding on this Court and cannot be challenged in second appeal, unless it suffers from any legal infirmity. No such legal infirmity has been pointed out by

the learned Advocate for the appellant nor do I find any such legal infirmity in the findings which have been arrived at upon consideration of all the relevant evidence and facts and circumstances of the case. On this ground alone, this second appeal is liable to be dismissed.

6. During the pendency of this appeal Benami Transactions (Prohibition) Act (45 of ,1988) came into operation and because of the provisions of the said Act the present suit is not maintainable. In the case of Mithilesh Kumar and Another Vs. Prem Behari Khare, , the Supreme Court has held that the Benami Transactions (Prohibition) Act (45 of 1988) has retrospective operation. It has been observed by the Supreme Court that the Benami Transactions (Prohibition) Act is a piece of prohibitory legislation and it prohibits benami transactions subject to stated exceptions and makes such transactions punishable and also prohibits the right to defences against recovery of benami transactions as defined in Section 2(a) of the Act. The Parliament has jurisdiction to pass a declaratory legislation. As a result of the provisions of the Act all properties held benami at the moment of the Act coming into force may be affected irrespective of their beginning, duration and origin. This will be so even if the legislation is not retrospective but only retroactive. In its sweep Section 4 envisages past benami transactions also in its retroactivity. In this sense the Act is both a penal and disqualifying statute. In case of qualifying and disqualifying statute it may be necessarily retroactive. When an Act is declaratory in nature the presumption against retrospectivity is not applicable. Acts of this kind only declare. A statute in effect declaring benami transactions to be unenforceable belongs to this type. The presumption against taking away vested right will not apply in this case inasmuch as under law it is the benamdar in whose name the property stands, and law only enabled the real owner to recover the property from him which right has now been eliminated by the Act. All the real owners are equally affected by the disability provision irrespective of the time of creation of the right. A right is a legally protected interest. The real owner's right was hitherto protected and the Act has resulted in removal of that protection.

7. In that case the suit was filed by the real owner for declaration that certain property was held by the defendant as a benami and that the plaintiff was the real owner. The suit was decreed by the lower courts but an appeal by special leave against the same was pending before the Supreme Court on the date of commencement of the Act. It has been held that the appellate Court is competent to take into account the legislative changes since the decision under appeal was given and its power are not confined only to see whether the lower court's decision was correct according to the law as it stood at the time when its decision was given. Once the decree of the High Court has been appealed against, the matter became sub-judice again and thereafter the Supreme Court had seisin of the whole case. In view of the provisions of the Act, therefore, the plaintiff's suit or action could not be decreed under the law ; and hence the decree passed by the lower courts was annihilated and the suit dismissed. The facts of the present case are entirely on par with this in the case referred to

above. In this case the appeal was pending before this Court when the Act came into force. In this case also the plaintiff filed the suit for a declaration that her husband, defendant No. 5 was a benemdar and she was the real owner of the disputed property. Therefore, in view of the provisions of the Benami Transactions (Prohibition) Act (1988), the present suit must be held to be untenable.

8. In the result, the appeal is dismissed and the judgment and decree of the lower Appellate Court are affirmed.

There will be no order as to costs.