

Mithilesh Kumari and Another

Vs

Prem Behari Khare.

Civil Appeal No. 2311 of 1978

(G. L. Oza, K. N. Saikia JJ)

14.02.1989

JUDGMENT

K. N. SAIKIA J. –

1. This appeal by special leave is from the judgment and order dated March 27, 1978, of the High Court of Judicature at Allahabad (Lucknow Bench) in Second Appeal No. 130 of 1975 dismissing the appeal and upholding the decree of the plaintiff-respondent's suit.

The plaintiff-respondent, Prem Behari Khare, instituted Suit No. 42 of 1971 in the Court of the Civil Judge, Mohanlal Gunj Lucknow, praying for the reliefs, inter alia, that he be declared to be the sole and real owner of the suit house; and that the defendant-appellant be permanently restrained from transferring the suit house. The learned Civil Judge, Lucknow, by his judgment dated March 13, 1974, decreed the suit declaring the plaintiff to be the sole and real owner of the suit house and permanently restraining the defendant from transferring the suit house to any other person. On first appeal by the defendant appellant. The learned Additional District Judge, Lucknow, by his judgment dated December 23, 1974, dismissed the appeal agreeing with the findings of the trial court that it was the plaintiff respondent who paid the consideration and purchased the suit house benami in the name of the defendant appellant who, therefore, had no right to create any equitable mortgage or to transfer the suit house. The defendant appellant's second appeal thereafter was also dismissed by the High Court of Judicature at Allahabad by the impugned judgment dated march 27, 1978. Hence this appeal by special leave.

Mr. A. B. Rohtagi, learned counsel for the appellant, submits, inter alia. That the learned courts below erred in holding that the suit house was not gifted by the plaintiff to the defendant but was held benami in her name; and that even if it was so held benami, in her name; and that even if it was so held benami, the subsequent legislation namely, the Benami Transactions (Prohibition) Act, 1988, has put a complete bar to the plaintiff's against the defendant in respect of the suit house.

Mr. Yogeshwar Prasad, learned counsel for the respondent, refutes, submitting that the issues on gift and benami have been concluded by concurrent findings of fact of the learned courts below and that the plaintiff's right to the benami suit house having already become final, it will not be affected by the subsequent Act.

The first question, therefore, is whether or not to interfere with the concurrent finding of fact of the learned court below. It has been said in a series of decisions that, ordinarily, this court in an appeal will not interfere with a finding of fact which is not shown to be perverse or based on no evidence (Babu v. Deputy Director, AIR 1982 SC 756), but will interfere if material circumstances are

ignored by the High Court (Prasad v. Govindaswami Mudaliar, AIR 1982 SC 84). In Dhanjibhai v. State of Gujarat, AIR 1985 SC 603 it was observed that where a finding of fact has been rendered by a learned single judge of the High Court as a court of first instance and thereafter affirmed in appeal by an Appellate Bench of that High Court, this court should be reluctant to interfere with the finding unless there is very strong reason to do so. There is no reason why this should not apply to cases where the first appellate court was the district court. It was noted in Ganga Bishan v. Jay Narain, AIR 1986 SC 441 that ordinarily this court, under article 136 of the Constitution would be averse to interfering with concurrent findings of fact recorded by the High Court and the trial court, but where there are material irregularities affecting the said findings or where the court feels that justice has failed and that the findings are likely to result in unduly excessive hardship, this court could not decline to interfere merely on the ground that the findings in question are findings of fact. So also in Uday Chand Dutt v. Saibal Sen, AIR 1988 SC 367 it was said that in an appeal by special leave under article 136 of the Constitution of India where there are concurrent findings of the courts below this court is not called upon to reconsider the entire evidence in detail to ascertain whether the findings are justified. In Ram Singh v. Ajay Chawla, AIR 1988 SC 514, where the concurrent finding was that the appellants were in unauthorised occupation of premises of which the respondents were the owners, this court did not interfere with the concurrent findings of fact.

Mr. Rohtagi lays emphasis on the facts. Namely, that the wife of the plaintiff, Prem Behari Khare, having died in 1955 leaving behind two sons aged about 2 and 3 years respectively, the plaintiff faced great difficulties in managing the household, looking after his sons and carrying on his duties as an employee of the Allahabad Bank; that under these circumstances. he agreed to take in the defendant Mithilesh Kumari whose relation with her husband, Ram Swarup, was then estranged; that the relation between the plaintiff and the defendant came to be such that she bore him two children; that there were efforts to legalise their de facto living as man and wife by obtaining the defendant's divorce from her husband. And in fact there was a decree for judicial separation in 1958; that the plaintiff had full confidence in and affection towards the defendant and that in the court he could give no reason why he purchased the house in the name of the defendant. Under those circumstance, counsel submits, the purchase of the suit house in the name of the defendant was made for Rs. 8,000 out of which Rs. 2,000 was contributed by the defendant, and the learned courts below ought, therefore, to have held the transaction of purchase in the name of defendant to have been a genuine gift out of love and affection and not a benami purchase in her name.

Perusing the judgment of the trial court, we find that whether the transaction was benami or it was a genuine gift by the plaintiff to the defendant were the main issues on which the parties led evidence. The averment that the defendant contributed Rs. 2,000 towards the purchase price was disbelieved by both the courts below. The plaintiff respondent proved from the statement of his savings bank account with the Allahabad Bank, exhibits 6, 7 and 8, that he withdrew Rs. 8,250 on November 8, 1962 and stated in the witness box that he purchased the suit house in the name of the defendant by sale deed executed on November 8, 1962, which was registered on November 9, 1962. The plaintiff-respondent has since been staying in the suit house. As the two were living as man and wife, the custody of the sale deed was not very material. We thus find that the concurrent findings are based on reasonable appreciation of evidence on record and, therefore, can in no way be said to be perverse or unreasonable. Counsel criticises the observation of the High Court that the relation between the two was of a rather objectionable nature. We do not think that this observation was unwarranted or it had in any way prejudiced the defendant's case. The High Court has analysed the facts and correctly applied the tests to determine whether the transaction was benami or not discussing the case law we do not find any justification in the appeal under article 136 of the constitution of India to interfere with the concurrent findings of fact.

The next question is whether, decree in favour of the plaintiff- respondent. His suit or action will be affected by the subsequent legislation, namely, the Benami Transactions (Prohibition) Act, 1988, and its predecessor Ordinance, in other words, whether the effectuation of the decree has been barred. For this, it is relevant to note that the impugned High Court judgment was dated March 27, 1978. The first appellate court's judgment was dated December 23, 1974, the trial court judgment was dated March 13, 1974 and the suit was filed in 1971. Special leave to appeal was granted by this court on November 15, 1978. The Benami Transactions (Prohibition of the Right to Recover Property) Ordinance, 1988, hereinafter referred to as "the Ordinance", was promulgated on May 19, 1988 to come into force at once. The Benami Transactions (Prohibition Act, 1988 (45 of 1988) hereinafter referred to as "the Act", received the assent of the President of India on September 5, 1988. The provisions of sections 3, 5, and 8 of the Act came into force at once into force on May 19, 1988. It is an Act to prohibit benami transactions and the right to recover property held benami and matters connected therewith or incidental thereto.

Mr. Rohtagi submits that the provisions of the Act cover past benami transactions also and that to hold so it would be permissible for this court to refer to the 57th Report of the Law Commission of India transactions but that Parliament did not accept that suggestion. And made the law applicable to past transactions also.

Learned counsel for the respondent submits that the provisions of the Act are prospective and not retrospective, and as such would nor affect the respondent's established right to the benami property. He has not controverted that this court can refer to the Law Commission's Report.

To decide the controversy, the relevant provisions of the Act may be referred to. As defined in section 2(a) of the Act, "benami transaction" means any transaction in which property is transferred to one person for a consideration paid or provided by another person. As defined in section 2(c) of the Act, "property" means property of any kind, whether movable or immovable, tangible or intangible, and includes any right or interest in such property. There can, therefore, be no doubt that the transaction by which the suit house was transferred to the defendant appellant for Rs. 8.000 paid or provided by the plaintiff respondent would be a benami transaction if this law is applicable to it. There is also no doubt that the suit house being a tangible immovable property would be included within this definition of "property".

Section 3 of the Act prohibits transactions by providing:

"(1) No person shall enter into any benami transaction.

(2) 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 the unmarried daughter.

(3) Whoever enters into any benami transaction shall be punishable with imprisonment for a term which may extend to three years or with fine or with both.

(4) Notwithstanding contained in the Code of Criminal Procedure, 1973 (2 of 1974), an offence under this section shall be noncognisable and bailable."

The appellant having not been the wife or unmarried daughter of the respondent, the exception in sub section (2) will not be applicable.

Section 4 prohibits the right to recover property held benami by providing:

"(1) 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.

(2) No defence based on any right in respect of any property held benami, whether against the person in whose name the property is held or against any other person, shall be allowed in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property."

Having upheld the finding that the suit house has been held benami by the respondent in the name of the appellant, the question is whether to this transaction, the Act shall be applicable. The Act has not been made retrospective by any specific provision. Is it permissible to refer to the Law Commission's Report to ascertain the legislative intent behind the provision? We are of the view that where a particular enactment or amendment is the result of a recommendation of the Law Commission of India, it may be permissible to refer to the relevant report as in this case. What importance can be given to it will depend on the facts and circumstances of each case.

In *Santa Singh v. State of Punjab* [1977] 1 SCR 229. Fazal Ali J., in order to answer the question whether the non compliance with the provisions of section 235(2) of the Criminal Procedure Code, 1973, vitiated the sentences passed by the court, considered it necessary to trace the historical background and social setting under which section 235(2) was inserted for the first time in the 1973 Code and referred to the research done by the Law Commission which made several recommendations in its 48th Report for revolutionary changes in the provision, the Statement of Objects and Reasons were also referred to in that context. In the instant case. We find that way back in 1972, the Government of India considered it necessary to request the Law Commission of India to examine the problem of benami held property with a view to determining whether benami transactions should be prohibited. The Law Commission, accordingly, submitted its 57th Report on benami transactions on August 7, 1973, after studying the benami system as operation in India and in England. It also examined implications of the provisions of the Indian Trusts Act, 1882, and other statutory modifications of the benami law as contained in the Code of Civil Procedure, the Transfer of Property Act, the Indian Penal Code and the Income tax Act, it also suggested in its Report, the following draft of proposed legislation:

"6.33 REcommendation: In the light of the above discussion, we recommend the enactment of a separate law containing the following legislative provisions:

(1) No suit 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 be instituted in any court by or on behalf of a person claiming to be the real owner of such property.

(2) In any suit, no defense based on any right in respect of any property held benami, whether against the person in whose name the property is held or against any other person, shall be allowed in any court by or on behalf of a person claiming to be the real owner of such property.

(3) Nothing in this section shall apply:

(a) where the person in whose name the property is held is a manager of, or a coparcener in, a Hindu undivided family, and the property is held for the benefit of the coparcener in the family, or

(b) where the person in whose name the property is held is a trustee or other person standing in a fiduciary capacity and the property is held for the benefit of another person for whom he is a trustee or towards whom he stands in such capacity."

On May 19, 1988, the President of India promulgated the Benami Transactions (Prohibition of the Right to Recover Property) Ordinance, 1988 (2 of 1988), "to prohibit the right to recover property held benami and for matters connected therewith and incidental thereto" based on the suggestion of the Law Commission of India made as far back as in 1973. With this Ordinance, the judicial acceptance of benami transactions was being removed with a view to help people keep property they were holding for others. It remedied the age old doctrine of benami and made a benamidar the real owner in law of course with a few exceptions.

The Ordinance was referred by the Government on July 22, 1988, to the Law Commission of India requesting the latter to take up the question of benami transactions for detailed examination and to give its considered views as early as possible so that a Bill to replace the Ordinance could be drafted on the basis of its recommendations and got passed before the close of the monsoon session of Parliament. The 130th Report of the Law Commission was submitted to the Government on August 14, 1988. The Benami Transactions (Prohibition) Bill, 1988, drafted after getting the report. Was introduced in the Rajya Sabha on August 31, 1988, and the Bill was passed. The Law Commission devoted several pages to justify retrospective legislation and its view was that the legislation replacing the Ordinance should be retroactive in its operation and that no locus penitentiae need be given to the persons who had entered into benami transactions in the past. It reported at para 3.18 as follows:

"3. 18 Therefore, viewed from either angle, the Law Commission is of the firm opinion that the legislation replacing the Ordinance should be retroactive in operation and that no locus penitentiae need be given to the persons who had entered into benami transactions in the past. They had notice of one and a half decade to set their house in order. NO more indulgence is called for."

However, the court has to interpret the language used in the Act, and when the language is clear and unambiguous, it must be given effect to the Law Commission's Reports may be referred to as an external aid to the construction of the provisions. It may be noted that the 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 rights to defenses against recovery of benami transactions as defined in section 2(a) of the Act. 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.

Learned counsel for the respondent rightly submits that the Act contains no specific provision making its operative retrospective. The Law Commission itself observed that democratic culture abhors ex post facto legislation and that it was necessary to curb unlawful and nefarious uses of

property.

We read in Maxwell that it is a fundamental rule of English law that no statute shall be construed to have retroactive operation unless such a construction appears very clearly at the time of the passing of the Act, or arising by necessary and distinct implication. Retrospective operation is, therefore, not to be given to a statute so as to impair existing right or obligation, otherwise than as regards matter of procedure unless that effect cannot be avoided without doing violence to the language of the enactment. Before applying a statute retrospectively, the court has to be satisfied that the statute is in fact retrospective. The presumption against retroactive operation is strong in cases in which the statute, if operated retrospectively would prejudicially affect vested rights or the illegality of past transactions, or impair contracts, or impose a new duty or attach a new disability in respect of past transactions or consideration already passed. However, a statute is not properly called a retroactive statute because a part of the requisites for its action is drawn from a time antecedent to its passing. We must look at the general scope and purview of the statute and at the remedy sought to be applied, and consider what was the former state of law and what the legislation contemplated. Every law that takes away or impairs rights vested agreeably to existing laws is retrospective, and is generally unjust and may be oppressive. But laws made justly and for the benefit of individuals and the community as a whole, as in this case, may relate to a time antecedent to their commencement. The presumption against retroactivity may in such cases be rebutted by necessary implication from the language employed in the statute. It cannot be said to be an invariable rule that a statute could not be retroactive unless so expressed in the very terms of the section which had to be construed. The question is whether, on a proper construction, the Legislature may be said to have so expressed its intention, *Crabtree v. Statute Law*, 7th Edition, writes that the general rule of law that statutes are not operative retrospectively may be departed from (a) by express enactment and (b) by necessary implication from the language employed, and the author goes on to say (at pp. 392-393).

"If it is a necessary implication from the language employed that the Legislature intended a particular section to have a retrospective operation, the courts will give it such an operation," *Baron Parke*, said Lord Hatherley in *Pardo v. Bingham* [1870] LR 4 Ch.App. 735 did not consider it an invariable rule that a statute could not be retrospective unless so expressed in the very terms of the section which had to be construed, and said that the question in each case was whether the legislature had sufficiently expressed that intention. In fact, we must look to the general scope and purview of the statute, and at the remedy sought to be applied, and consider what was the former state of the law, and what it was that the legislature contemplated. 'But a statute is not to be read retrospectively except of necessity. In *Main v. Stark* [1890] 15 App Cas 384,388, Lord Selborne said: 'Their lordships, of course, do not say that there might not be something in the context of an Act of Parliament, or to be collected from its language which might give to words prima facie prospective a larger operation, but they ought not to receive a larger operation unless you find some reason for giving it ... In all cases it is desirable to ascertain the intention of the legislature.'

He went on: 'Words not requiring a retrospective operation, so as to affect an existing statute prejudicially, ought not to be so construed'; but in *Reynolds v. Atty.-Gen for Nova Scotia* [1896] AC 240, it was held that this rule did not extend to protect from the effect of a repeal a privilege which did not amount to an accrued right."

As defined in section (2a) of the Act, "benami transaction" means "any transaction in which

property is transferred to one person for consideration paid or provided by any other person." A transaction must, therefore, be benami irrespective of its date or duration. Section 3, subject to the exceptions states that no person shall enter into any benami transaction. This section obviously cannot have retrospective operation. However, section 4 clearly 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 real owner of such property. This naturally relates to past transactions as well. The expression "any property held benami" is not limited to any particular time. Date or duration, once the property is found to have been held benami, no suit claim or action to enforce any right in respect thereof shall lie. Similarly, sub section (2) of section 4 nullifies the defenses based on any right in respect of any property held benami whether against the person in whose name the property is held or against any other person in any suit claim or action by or on behalf of a person claiming to be the real owner of such property. It means that once a property is found to have been held benami, the real owner is bereft of any defense against the person in whose the property is held or any other person. In its sweep section 4 envisages past benami transactions also within its retroactivity. In this sense, the Act is both a penal and a disqualifying statute. In the case of a qualifying or disqualifying statute, it may be necessarily retroactive. For example, when a law of representation declares that all who have attained 18 years shall be eligible to vote, those who attained 18 years in the past would be as much eligible as those who attained that age at the moment of the law coming into force. When an Act is declaratory in nature, the presumption against its retrospectivity is not applicable. Acts of this kind only declare. A statute in effect declaring the benami transaction to be unenforceable belongs to this type. The presumption against taking away a vested right will not apply in this case inasmuch as under law it is the benamidar in whose name the property stands, and law only enabled the real owner to recover the property from him which right has now been ceased by the Act. In one sense, there was a right to recover or resist in the real owner against the benamidar. Ubi jus ibi remedium. Where there is a right, there is a remedy. Where the remedy is barred, the right is rendered unenforceable. In this sense, it is a disabling statute. 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.

When the law nullifies the defenses available to the real owner in recovering the benami property from the benamidar, the law must apply irrespective of the time of the benami transactions. The expression "shall lie" in section 4(1) and "shall be allowed" in section 4(2) are prospective and shall apply to present (further stages) and future suits, claims or actions only. This leads us to the question whether there was a present suit between the plaintiff respondent and the defendant appellant on the date of the law coming into force. We have noted the dates of filing of suit and judgments of the courts below. ON the date of the coming into force of section 4 of the Act that is, May 19, 1988, this appeal was pending and, of course, is still pending. Can the suit itself be said to be pending ?

Lachmeshwar v. Keshwar Lal, AIR 1941 FC 5 is an authority for holding that the hearing of appeal under the procedural law of India is in the nature of re hearing 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 passing of the decree appealed against. Consequently, 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 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 this court had seisin of the whole case, though for certain purposes, e.g.,

execution, the decree was regarded as final and the courts below retained jurisdiction in that regard. This was followed in *Shyabuddinsab v. Gadagbetgeri Municipal Borough* [1955] 1 SCR 1268 where, after the judgment of the High Court and after grant of special leave by this court the legislation was passed, and it was applied by this court. Their Lordships, referring to *King v. General Commissioner of Income-tax* [1916] 2 KB 249 and *Mukerjee, Official Receiver v. Ramratan Kuer* [1935] LR 63 IA 47, rejected the contention that unless there are express words in the amending statutes to the effect that the amendment shall apply to pending proceedings, it cannot affect the proceedings. In *Dayawati v. Inderjit* [1966] 3 SCR 275, it has been held that the word "suit" includes an appeal from the judgment in the suit. The only difference between a suit and an appeal is that an appeal only reviews and corrects the proceedings in a cause already constituted but does not create the cause. In *Mohanlal Jain v. H. H. Maharaja Shri Man Singhji* [1962] 1 SCR 702, it was observed that "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 proceedings in an action." In *Amarjit Kaur v. Pritam Singh* [1975] 1 SCR 605, it has been held that an appeal is a rehearing and in moulding 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 passing of the decree appealed against.

For the respondent, it is submitted that the right of the parties to a suit would be determined on the basis of rights available to them on the date of filing of the suit. Reliance is placed on *Nand Kishore Marwah v. Samundri Devi* [1987] 4 SCC 382. That, however, was a case of eviction where the rights of the parties on the date of suit were material unlike in this case where subsequent legislation has nullified the defenses against benami holders. That case is, therefore, distinguishable.

Counsel, for the respondent lastly submits that nobody should be allowed to suffer for fault of the court. As the maxim goes, *Actus curiae neminem gravabit*. Nobody should suffer for an act of the court. However, the delay in disposal of an appeal cannot be termed an act of the court. The consequence is that the plaintiff respondent's suit or action cannot be decreed under the law; and hence the decree passed by the lower courts is annihilated and the suit dismissed.

In the result, his appeal is allowed in the manner indicated above. Under the peculiar facts and circumstances of the case, we make no order as to costs.

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