

## **Facts**

- Appellant/plaintiff claimed that though registered Sale Deed dated 26-11-2001 of suit property was in name of his wife and three sons, (Respondents) but since only appellant/plaintiff had paid entire sale consideration for purchasing suit property, therefore it was appellant/plaintiff who was actual owner of suit property. Hence, he filed plaint seeking reliefs of declaration, possession, use and occupation charges etc.
- Trial Court rejected plaint filed by appellant/plaintiff on ground that suit filed by plaintiff was barred under 'The Benami Transactions (Prohibition) Act, 1988' (unamended Act). The trial court referred to the fact that the unamended Act was amended with effect from 1-11-2016 and the Amended Act containing various amendments is now called as 'The Prohibition of Benami Property Transactions Act, 1988, yet, the Amended Act, however, it has not been held to be applicable by the trial court as the Amended Act has been held to not have retrospective application.
- On appeal to the High Court:

## **Held**

- There did not exist any vested right that a particular transaction was specified as an exempted transaction as not being a barred benami transaction under the expressions 'fiduciary capacity' and 'trustee' under the repealed provision of section 4(3) of the unamended Act, and by Section 2(9) of the Amended Act a 'benami transaction' is defined and the exceptions have been specifically defined which are the exceptions to the prohibited benami transaction. No vested right is thus taken away, and therefore, the trial court has erred in holding that there existed a vested right in favour of the respondents/defendants by the repealed provisions of section 4(3) of the unamended Act when it used the expressions 'fiduciary capacity' and 'trustee'. It is, therefore, held that definitions of the exempted transactions to the prohibited benami property transactions, and now contained in the four exceptions in section 2(9) are always deemed to have been included in the exceptions to the prohibited benami transactions, and in the facts of the instant case, the suit of the appellant/plaintiff would be maintainable by the third exception contained in section 2(9) of the Amended Act.

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**[2019] 101 taxmann.com 319 (Delhi)**

**HIGH COURT OF DELHI**

**Anis Ur Rehman**

**v.**

**Mohd. Tahir**

VALMIKI J. MEHTA, J.

RFA NO. 855 OF 2018

JANUARY 21, 2019

**S.D. Ansari** and **I. Ahmed**, Advs. *for the Appellant.*

## JUDGMENT

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1. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the plaintiff in the suit impugning the Judgment of the trial court dated 08.05.2018 by which the trial court has rejected the plaint filed by the appellant/plaintiff under Order VII Rule 11 CPC on account of the suit filed by the plaintiff being barred under The Benami Transactions (Prohibition) Act, 1988 (*hereinafter* 'unamended Act').
2. At the outset, it may be noted that the trial court has referred to the fact that the unamended Act was amended w.e.f. 01.11.2016 and the Amended Act containing various amendments is now called as The Prohibition of Benami Property Transactions Act, 1988, yet, the Amended Act has not been held to be applicable by the trial court as the Amended Act has been held to not have retrospective application.
3. The limited issue is that whether the suit filed by the appellant/plaintiff, who is the father of the respondents/defendants (respondents/defendants being the sons and daughters of the appellant/plaintiff), claiming rights in the suit property no. G-6, Shop no. 7, Dilshad Colony, Delhi– 110095 by seeking reliefs of declaration, possession, use and occupation charges etc. as barred by the provisions of the unamended Act and as to whether the provisions of the Amended Act apply or the provisions of the unamended act.
4. The present issue arises because the appellant/plaintiff claims that though the registered Sale Deed dated 26.11.2001 of the suit property was in the name of his wife Smt. Khursheed Begum and the three sons, namely Mohd. Tahir (defendant no. 1), Mohd. Zahid (defendant no. 2) and Nadeem Ur Rehman (defendant no. 6), but since only the appellant/plaintiff had paid the entire sale consideration for purchasing the suit property, and therefore it was the appellant/plaintiff who was the actual owner of the suit property.
5. Let us now examine as to whether the trial court has rightly held the suit to be barred by the provisions of Sections 3 and 4 of the unamended Act. These Sections 3 and 4 read as under:-

### "Section 3

3. *Prohibition of benami transactions.*—(1) No person shall enter into any *benami* transaction.

(2) Nothing in sub-section (1) shall apply to-

- (a) 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;
- (b) the securities held by a-
  - (i) depository as registered owner under sub-section(1) of section 10 of the Depositories Act, 1996
  - (ii) participant as an agent of a depository.

*Explanation.*-The expressions "depository" and "Participants shall have the meanings respectively assigned to them in clauses (e) and (g) of sub-section (1) of section 2 of the Depositories Act, 1996.

(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 anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), an offence under this section shall be non-cognizable and bailable.

## Section 4.

4. *Prohibition of the right to recover property held benami*—(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.

(3) Nothing in this section shall apply,-

- (a) where the person in whose name the property is held is a coparcener in a Hindu undivided family and the property is held for the benefit of the coparceners 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."

(Underlining Added)

6(i). The trial court has alongwith by referring to the provisions of Sections 3 and 4 of the unamended Act has referred to the judgments passed by this Court in the cases of ***Sh. Amar N. Gugnani v. Naresh Kumar Gugnani (Through Legal Heirs) in CS No. 478/2004*** decided on 30.07.2015 and ***JM Kohli v. Madan Mohan Sahni & Anr in RFA No. 207/2012*** decided on 07.05.2012 and these judgments held that what was prohibited by the unamended Act and was the subject matter of the repealed Sections 81, 82 and 94 of the Indian Trusts Act, 1882, such prohibitions cannot be brought in as exceptions to prohibited *benami* transactions by getting them included in the expressions 'fiduciary capacity' or 'trustee' found in the repealed provision of Section 4(3) of the unamended Act. Alongwith this reasoning, the trial court, and as stated above, held that the provisions of the Amended Act are only prospective in nature and not retrospective, and therefore the Amended Act, would not assist the appellant/plaintiff and no benefit of the new Act can be taken by the appellant/plaintiff.

6(ii). The provisions of the Amended Act are not referred to in the impugned judgment and the provision(s) of the Amended Act would be the definition of '*benami* transaction' and various exceptions to *benami* transaction which are not prohibited *benami* transaction and as provided in Section 2(9) of the Amended Act. This Section 2(9) reads as under:-

'2. (9) "*benami* transaction" means—

(A) a transaction or an arrangement—

- (a) where a property is transferred to, or is held by, a person, and the consideration for such property has been provided, or paid by, another person; and
- (b) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration,

except when the property is held by—

- (i) a *Karta*, or a member of a Hindu undivided family, as the case may be, and

the property is held for his benefit or benefit of other members in the family and the consideration for such property has been provided or paid out of the known sources of the Hindu undivided family;

- (ii) a person standing in a fiduciary capacity for the benefit of another person towards whom he stands in such capacity and includes a trustee, executor, partner, director of a company, a depository or a participant as an agent of a depository under the Depositories Act, 1996(22 of 1996) and any other person as may be notified by the Central Government for this purpose;
- (iii) any person being an individual in the name of his spouse or in the name of any child of such individual and the consideration for such property has been provided or paid out of the known sources of the individual;
- (iv) any person in the name of his brother or sister or lineal ascendant or descendant, where the names of brother or sister or lineal ascendant or descendant and the individual appear as joint-owners in any document, and the consideration for such property has been provided or paid out of the known sources of the individual; or

(B) a transaction or an arrangement in respect of a property carried out or made in a fictitious name; or

(C) a transaction or an arrangement in respect of a property where the owner of the property is not aware of, or, denies knowledge of, such ownership;

(D) a transaction or an arrangement in respect of a property where the person providing the consideration is not traceable or is fictitious;

*Explanation.*—For the removal of doubts, it is hereby declared that *benami* transaction shall not include any transaction involving the allowing of possession of any property to be taken or retained in part performance of a contract referred to in section 53A of the Transfer of Property Act, 1882, if, under any law for the time being in force,—

- (i) consideration for such property has been provided by the person to whom possession of property has been allowed but the person who has granted possession thereof continues to hold ownership of such property;
- (ii) stamp duty on such transaction or arrangement has been paid; and
- (iii) the contract has been registered."

7(i). In my opinion, the trial court has clearly erred in holding that the provisions of the Amended Act will not apply because the issue of prospective operation would only arise if some vested right created by the unamended Act is sought to be taken away by the Amended Act. There has to be a specific vested right and such vested right would not be taken away by a repeal of the earlier provision, and this is so because of Section 6 of the General Clauses Act, 1897.

7(ii). The issue is as to whether the exceptions stated in the unamended provision of Section 4(3) of the unamended Act created a vested right in favour of the respondents/defendants.

7(iii). In my opinion, there does not arise any issue as regards the retrospective application of the provisions of Section 2(9) of the Amended Act inasmuch as the unamended Act, by virtue of Section 4(3) created three exceptions to *benami* transactions, firstly, when there existed an HUF, secondly, when there is a fiduciary relationship and thirdly, when there is a relationship of a trustee. By the provisions of Section 2(9) of the Amended Act, what has happened is that the expressions 'HUF', 'fiduciary capacity'

and 'trustee' have been defined, giving them the meaning which the law required, and this was done to remove any doubt or confusion with respect to the meaning of the expressions 'fiduciary capacity' and 'trustee' as found in the repealed provisions of Section 4(3). Therefore, by defining the expressions 'fiduciary capacity' and 'trustee', it is not as if any vested right existing under the earlier provisions of Section 4(3) is taken away. What was the subject matter of Section 4(3) of the unamended Act being the transactions which were exempted from being classified as *benami* transactions, the said aspects are now brought in the subject matter of Section 2(9) of the Amended Act. The relevant four exceptions [fifth being the Explanation to Section 2(9)] to the definition of '*benami* transaction' contained in Section 2(9) of the Amended Act have simply expounded and elaborated and made more exhaustive the meaning of the expressions 'HUF' or 'fiduciary capacity' or 'trustee', thereby only those specific transactions as specified in the four exceptions contained in Section 2(9) of the Amended Act are taken out of the purview of the prohibited *benami* transactions. There is no vested right in the sense known to law that 'fiduciary capacity' or 'trustee' only mean a particular set of facts and only certain transactions under the repealed provisions of Section 4(3). This argument of the existence of a vested right under the repealed provision of Section 4(3) would have been available, if the expressions 'fiduciary capacity' or 'trustee' were specifically defined under the repealed provision of Section 4(3) as including certain transactions in these expressions and specifically otherwise barring certain transactions as *benami* (as not being exempted from being *benami*), and that now by the altered definition of the *benami* transaction in the Amended Act defining and specifically specifying what is included (and thus also excluded) in the expressions 'fiduciary capacity' and 'trustee', such alleged existing earlier exclusions in the expressions 'fiduciary capacity' and 'trustee' became in the Amended Act allowed as non-prohibited transactions. But, that is not so, inasmuch as, there were no definitions/meaning given to the expressions 'fiduciary capacity' and 'trustee' in the repealed provisions of Section 4(3) prescribing the exclusions to these expressions which will thus not be exempted as not being *benami*, being fiduciary/trustee transactions. Once that is so, therefore, in my opinion, there did not exist any vested right, and hence, there does not arise any issue of taking away of any vested right on account of the Amended Act giving definitions and meaning to the expressions 'fiduciary capacity' and 'trustee' by the four exceptions (and one Explanation) to prohibited *benami* transactions as prescribed in Section 2(9) of the Amended Act.

**8.** In view of the aforesaid discussion, I cannot agree with the ratio of the judgment of the Bombay High Court in the case of *Shri Joseph Isharat v. Mrs. Rozy Nishikant Gaikwad* in *Second Appeal No. 749/2015* decided on 01.03.2017, which was cited on behalf of respondents/defendants that the provisions of the Amended Act are prospective.

**9.** Accordingly, it is held that there did not exist any vested right that a particular transaction was specified as an exempted transaction as not being a barred *benami* transaction under the expressions 'fiduciary capacity' and 'trustee' under the repealed provision of Section 4(3) of the unamended Act, and by Section 2(9) of the Amended Act a '*benami* transaction' is defined and the exceptions have been specifically defined which are the exceptions to the prohibited *benami* transaction. No vested right is thus taken away, and therefore, the trial court has erred in holding that there existed a vested right in favour of the respondents/defendants by the repealed provisions of Section 4(3) of the unamended Act when it used the expressions 'fiduciary capacity' and 'trustee'. It is, therefore, held that definitions of the exempted transactions to the prohibited *benami* property transactions, and now contained in the four exceptions in Section 2(9) of the Act are always deemed to have been included in the exceptions to the prohibited *benami* transactions, and in the facts of the present case, the suit of the appellant/plaintiff would be maintainable by the third exception contained in Section 2(9) of the Amended Act, and that whether or not on facts, the appellant/plaintiff is able to make out a case under the third exception, the same is a disputed question of fact requiring trial, and can only be decided after evidence is led by the parties, and the suit plaint thus could not have been rejected under Order VII Rule 11 CPC without trial.

**10.** In view of the aforesaid discussion, this appeal is therefore allowed. The impugned Judgment of the trial court dated 08.05.2018 is set aside. Suit is remanded back to the trial court for decision in accordance with law.

**11.** Parties to appear before the District & Sessions Judge, Shahdara District, Karkardooma Courts, Delhi on 20th February, 2019 and the District & Sessions Judge will now mark the suit for disposal to a competent court in accordance with law and the observations made in the present judgment. Pending applications are hereby disposed of.

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