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**Court :** Delhi

**Decided On :** Apr-02-1992

**Reported in :** [1992]196ITR786(Delhi); 1992RLR267

**Judge :** Usha Mehra, J.

**Acts :** Benami Transactions (Prohibition of the Right to Recover Property) Act, 1988 - Sections 4

**Appeal No. :** Suit No. 1365 of 1982

**Appellant :** Mahinder Singh

**Respondent :** Pardaman Singh

**Advocate for Def. :** R.L. Kohli, Adv.

**Advocate for Pet/Ap. :** M.L. Lonial, Adv

**Judgement :**

Usha Mehra J.

1. In view of the objections raised, the following preliminary issue was framed on October 4, 1991 :

'Whether the suit is barred under section 4 of the Benami Transaction (Prohibition of the Right to Recover Property) Act, 1988, and as such the suit is liable to be

dismissed ?'

2. In order to decide this objection, the facts of the case are these :

Mahinder Singh filed a suit for partition against Shri Pardaman Singh and others. It is an accepted case of the parties that Sardar Anoop Singh, father of defendant Nos. 1, 2 and 4 and husband of Smt. Sahib Kaur owned about 3,000 bighas of agricultural land in village Luku, Roda, Noorpur Thal, in Tehsil Khushab, District Sargodha, and in village Saiyanwala in Tehsil and district Lyallpur in addition to garden measuring about 30 bighas and a number of houses and shops in Sargodha, Roda and Noorpur. Sardar Anoop Singh died on September 5, 1941.

3. It is the allegation of the plaintiff that disputes arose between the parties after the death of Anoop Singh and an arbitrator was appointed who made and published his award on August 18, 1985. As per the award, the agricultural land and garden remained the joint property of the plaintiff and defendants Nos. 1 and 2. No property was awarded to Smt. Sahib Kaur, widow of Sardar Anoop Singh. She was only entrusted with a sum of Rs. 15,000 for the education and marriage of the two daughters, namely, Kulwant Kaur and Gulshan, defendant No. 4 and the wife of defendant No. 3, respectively. Defendant No. 1 came to Delhi but, on account of communal disturbances and the partition of the country, he did not go back to Sargodha. Sahib Kaur and the plaintiff joined him as a member of the joint Hindu family. Defendant No. 1 joined service in November, 1947. In January, 1948, the plaintiff joined service. The other children were school-going children. Sahib Kaur had no source of income. The family had a common hotchpotch in which the salary of the plaintiff and defendant No. 1 used to be put. The rehabilitation authorities, in 1947, made temporary allotment of 20 acres of land to the plaintiff and defendant No. 2 jointly in village Gola, Tehsil and District Ambala in lieu of the agricultural land left by them in West Pakistan. In 1950, after verification of the claims for agricultural lands from the revenue record received from West Pakistan, the rehabilitation authorities, Government of India, allotted to the plaintiff and defendant No. 2 jointly 361 bighas of agricultural land in village Pheruwala, Tehsil Jagadhari, District Ambala, and 302 bighas of agricultural land in village Niharsi, Tehsil and District Ambala. In 1951, the rehabilitation authorities

made permanent allotment of about 600 bighas of agricultural land jointly in favor of the plaintiff and defendant No. 2 in village Niharsi cancelling the allotment in their favor in village Pheruwala. Similarly, the earlier allotment in favor of defendant No. 1 in village Pheruwala was cancelled and he was permanently allotted three piece of land having a total areas of 36 standard acres in villages Bilaspur, Marwa Kalan and Nainawali in Tehsil Jagadhari, District Ambala. During 1948-49, Smt. Sahib Kaur alone used to receive the agricultural income from the land allotment to the plaintiff and defendant No. 2 in but used the same for common purpose. Till 1953, she had been receiving income from the land allotted to the plaintiff and defendant No. 2 in village Niharsi and used to put it in a common pool. Till the middle of 1956, the plaintiff and defendant No. 2 and was receiving the income. In 1956, the plaintiff and defendant No. 2 divided the agricultural land between themselves and the said Sahib Kaur went on managing the land of defendant No. 2 and had been receiving the income till 1971. In 1949, out of the saving effected from the common hotchpotch, the plaintiff purchased a plot bearing No. 3-A/29, Regar Pura (now know as Sat Nagar), Karol Bagh, New Delhi, for a sum of Rs. 2,000, but, in order to avoid disputes and differences amongst the members of the said joint Hindu family, he got the sale deed of the said plot executed in the name of his mother, Smt. Sahib Kaur. The ground floor of the said house was constructed in 1950 with the joint Hindu family funds and the first floor portion was constructed in 1951 from the same funds. Thus, according to the plaintiff, Sahib Kaur did not have any right, title or interest in the said house. She was merely a name-lender or benamidar. The said house, in fact, is a joint property of the plaintiff, defendants Nos. 1 and 2, or alternatively, it is a joint Hindu family property. The joint Hindu family also owned jewellery which was brought by them while migrating from Pakistan to India. Sahib Kaur had taken a locker in 1948 on rent in Delhi Safe Deposit Company Ltd. and kept and the said jewellery there. The plaintiff had also entrusted to Smt. Sahib Kaur, his wife, gold ornaments weighting about 15 tolas along with one set of silver jug and tumblers and decoration ornamental pieces of silver, all weighing about 200 tolas, for safe custody, Similarly, defendant No. 2 entrusted to his mother four gold rings weighting about 3 tolas wearing which were kept in the locker. Sahib kaur died on August 22, 1981. On her death, defendant No. 4 and her husband tried to take

possession of 3-A/29 wrongfully and illegally. It was in September, 1981, that defendant No. 4 proclaimed that Sahib Kaur had made a will in her favor bequeathing the property bearing No. 3-A/29. Defendant No. 4 tried to take forcible possession of house No. 3-A/29 and has in fact removed gold ornaments and silver from the locker on the basis of a forged will purported to have been executed by late Smt. Sahib Kaur.

4. According to the plaintiff, since Sahib Kaur had no right, title or interest in the said house which is a joint Hindu family property, she could not will it in favor of defendant No. 4 nor could she dispose of the gold ornaments, silver articles and other household goods belonging to and purchased from the joint Hindu family funds. On the basis of the alleged forged and fabricated will, defendant No. 4 has no right in the house and articles.

5. Defendant No. 4 has denied that house No. 3-A/29 was purchased from the joint Hindu family funds. According to her, it was acquired by Sahib Kaur with the own resources and thereafter constructed with the assistance and help of Shri Pardaman Singh. thereforee, it is a self-acquired property of Sahib Kaur. The gold ornaments and silver ornaments also belonged to her, and, thereforee, she was within her right to bequeath it in favor of any person. So far as the plaintiff and defendants Nos. 1 and 2 are concerned, they parted company with Sahib Kaur during her life-time and took away all articles. So far as agricultural land is concerned, it is they who had been managing the same and deprived Sahib Kaur of her share of income and profit from the said properties. She had been owning this house as her own property throughout her life. It was in her physical possession. thereforee, this registered will dated March, 7, 1978, cannot be challenged nor can this property be partitioned. She also executed another will dated September 30, 1978, which is being probated in the court of the District Judge.

6. The Benami Transactions (Prohibition) Act, 1988 (hereinafter called as 'the Act'), came into force on September 5, 1988. Section 3 of the Act creates prohibition of benami transactions. Section 4 stipulates prohibition of the right to recover property held benami. Section 4 reads as follows :

'Section 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 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 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 trustee or towards whom he stand in such capacity.'

7. The burden of showing that a transfer is a benami transaction lies on the person who asserts that it is such a transaction . The governing principle for determining the question whether a transaction is benami or not is to be proved by proving that the purchases money came from a person other than the person in whose favor the property is transferred. In fact, the purchase is prima facie to be inferred. The intention of the person who contributed towards the money has to be inferred from the circumstances and relationship of the parties and the motive governing their action in bringing about the transaction and their subsequent conduct. This is a per *Thakur Bhim Singh v. Thakur Kan Singh and Thakur Kan Singh v. Thakur Bhim Singh* : [1980]2SCR628 . The plaintiff in this case has pleaded that the house in question was purchased by the plaintiff out of Hindu undivided family funds. It was out of love and affection and respect for his mother that he got the sales deed effected in her name. Sahib Kaur had in fact no independent source of income. She was managing the agricultural land and administering the

property which was a joint property of the plaintiff and defendant Nos. 1 and 2. therefore, she had no right to bequeath this property which was purchased from the Hindu undivided funds. Mr. Lonial learned counsel, therefore, contended that the suit as such will not be prohibited nor hit under sub-section (1) of section 4 of the said Act. Sahib Kaur was holding the property as trustee for the sons. This can be proved from the fact that the purchased money was given by the plaintiff. The intention of the parties can be inferred when the plaintiff out of love for his mother even though contributed the purchases money still got the plot registered in the name of his mother. This proves the relationship of the plaintiff and Sahib Kaur. By the surrounding circumstances, he will prove that this case falls under the exception clause of section 4 of the Act. The assertion of the defendant that the property was purchased by Sahib Kaur cannot be accepted because Sahib Kaur had no independent source of income. Mr. Lonial, therefore, contended that the mere fact that he has used the word 'benami' would not throw his case out of court nor his it under section 4 of the Act because he can prima facie establish that the plaintiff lent the purchases money for the benefit of himself and defendants Nos. 1 and 2 and it was because of the relationship between him and Sahib Kaur that he recorded her name in the sale deed.

8. Mr. Lonial, in order to strengthen his argument, has placed reliance on the decision of the Supreme Court in the case of Mithilesh Kumari v. Prem Behari Khare : [1989]177ITR97(SC) . In that case, the court was dealing with the applicability of the Act retrospectively. The decree passed by the trial court as well as affirmed by the appellate court was set aside because there was a finding based on the appreciation of the material on record that the transaction was benami. But, in the case in hand, it is yet to be proved by reliable evidence as to whether the property in suit was purchases benami or not and what was the intention of the parties when the same was purchased. For arriving at this conclusion, one has to go through the merits of the cases. Before arriving at any decision, it is necessary that the parties should lead evidence. Merely on the ground of section 4 itself, the suit cannot be thrown out at this preliminary stage. The questions whether a female can be a coparcener or not will also be decided after the full facts are placed on record and after evidence is led. Hence, this issue will be decided along with other issue on merits.

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