

Ouseph Chacko and anr. Vs. Raman Nair Raghavan Nair

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Court : Kerala

Decided On : Apr-07-1989

Reported in : AIR1989Ker317; [1989]180ITR511(Ker)

Judge : V. Bhaskaran Nambiar, J.

Acts : Benami Transactions (Prohibition) Act, 1988 - Sections 3 and 4; [Trusts Act, 1882](#) - Sections 81, 82, 84 and 94; [Evidence Act, 1872](#) - Sections 92

Appeal No. : S.A. No. 506 of 1983

Appellant : Ouseph Chacko and anr.

Respondent : Raman Nair Raghavan Nair

Advocate for Def. : K. Ravindranathan Nair, Adv.

Advocate for Pet/Ap. : Joseph J. Therattil, Adv.

Disposition : Appeal dismissed

Judgement :

V. Bhaskaran Nambiar, J.

1. Is sham transaction 'benami'? Does Section 4 of the Benami Transactions (Prohibition) Act, 1988 apply to sham transactions? These questions arise for determination in this second appeal.

2. The dispute in this case is in respect of a small extent of property measuring 40 cents. The suit was for declaration of title and possession of the plaint property and for consequential reliefs. The suit has been decreed on concurrent findings of fact and defendants 1 and 2, have therefore filed this second appeal under Section 100 of the Code of Civil Procedure. The learned Judge, who admitted the second appeal and issued notice formulated the following question of law 'whether the sale deed by the plaintiff to P. W. 2 and further transactions, Exts. B-1 and B-6 are sham and nominal?'. The brief facts are these.

3. The plaintiff, as owner of the land executed a sale deed in the year, 1963 in favour of one Gopalan Nair, examined in Court as P. W. 2. The original of the sale deed has not been produced and a copy is not available. But, referring to this deed, P.W. 2 Gopalan Nair executed an assignment in favour of the 3rd defendant on 20-6-1968 (Ext. B-1). About six years thereafter, on 29-4-1974, the 3rd defendant purported to assign his rights in favour of defendants 1 and 2 under Ext. B-6. The plaintiff averred that the original assignment in favour of Gopalan Nair was sham and nominal, not acted upon, that no possession was transferred and that he had no intention to transfer the property in favour of P.W. 2 Gopalan Nair or anybody else. He filed the suit, when defendants 1 and 2 attempted to trespass on the property armed with the sale deed in their favour executed in April, 1974. The suit was therefore filed in May, 1974 for declaration of title, injunction and for other reliefs.

4. The defendants contended that the transactions were real and genuine, and that the title actually vested in them. They also contended that just prior to the assignment deed, Ext. B-6 on 29-4-1974, under an agreement executed by the plaintiff, Ext. B-2 dt. 10-4-1973, possession was given to the first defendant and it was thereafter that the sale deed was executed in 1974 in favour of both defendants 1 and 2. The defendants thus claimed title and possession on the basis of the assignment deeds, Exts. B-1 and B-6 and resisted the plaintiffs suit.

5. In the trial Court, Gopalan Nair, the assignee under the 1963 deed was examined as P.W. 2. He admitted that the assignment was sham and nominal, that there was no consideration, that he did not obtain possession and that the

possession continued with the plaintiff. It is thus the accepted case of both the parties to the 1963 document, the plaintiff and P.W. 2, that the plaintiff never intended to transfer any right in favour of P.W. 2. If P.W. 2 did not acquire any rights in 1963, there was nothing he could transfer in 1968 under Ext. B-1. The trial Court, on an elaborate consideration of the evidence found that Ext. B-1 of the year 1968 purporting to assign the rights of P.W. 2 to the third defendant was not a 'genuine transaction', that it was not supported by consideration and that the plaintiff continued to retain possession. Regarding Ext. B-2, the agreement set up by the first defendant, the trial Court held that it was a fabricated document and it did not contain the signature of the plaintiff as alleged. The Court noted that the subsequent assignment deed (Ext. B-6) did not curiously refer to the prior agreement, Ext. B-2 and did not state that the first defendant had obtained possession earlier. Regarding the assignment Ext. B-6, also, the trial Court held that there was no transfer of possession or title under Ext. B-6, and the plaintiff was himself in enjoyment of the property. Finding, therefore, 'when the title and possession of the property did not pass on to the alienees, the plaintiff is entitled to the declaration and injunction as prayed for', the suit was decreed.

6. The matter was taken in appeal before the Subordinate Judge's Court as A. S. No. 157 of 1976, and the learned Subordinate Judge formulated the points for consideration thus: -- 'whether the documents relied on by the plaintiff are sham documents?'. The Sub-Court set aside the decision of the trial Court and dismissed the suit. The plaintiff filed a second appeal before this Court as S.A., No. 858 of 1977. This Court found that the approach of the Court below was vitiated by a total 'misapprehension of the legal principles and interference in second appeal was justified.' This Court said 'obviously the intention behind executing a benami document is lest gatherable from the evidence of the parties directly concerned. An admission by P.W. 2 is an important piece of evidence in the light of the principles relating to gathering an intention of a party. The surrounding circumstances would certainly throw light on the intention of the parties. The inadequacy of the consideration for the document would be one such. The conduct of the parties also, it is settled law, is relevant. That a fabricated document was projected in an attempt to substantiate the defence plea is a conduct which could not be totally ignored by Court of law.' The matter was

remitted to the lower Court. The Court below has agreed with the reasoning and conclusion of the trial Court, held that the assignment Ext. B-1 by P.W. 2 in favour of the third defendant was a 'nominal document', not supported by any consideration and that 'P.W. 2 did not intend to execute a genuine sale deed.' It also held that Ext. B-2, the agreement set up by the first defendant was 'spurious and unbelievable' and that the subsequent sale deed, Ext. B-6 was also not supported by consideration and it was also a 'nominal document' The decree granted to the plaintiff was confirmed.

7. In this second appeal by defendants 1 and 2, it is mainly contended that the Benami Transactions (Prohibition) Act, 1988 (for short, 'the Act') applies to all pending proceedings and the present suit to enforce a right against them in respect of a property held benami did not lie and the suit has to be dismissed on that short ground. This contention was met by the plaintiff stating that the plaintiff's case was that the transactions were only sham and nominal and that the finding of the Courts below also was only that the transactions were nominal and not intended to be acted upon and thus this is not a case in respect of any property held benami and Section 4 of the Act has no application.

8. Recently, the Supreme Court in *Mithilesh Kumari v. Prem Behari Khare*, (1989) 1 Ker LJ 424 : (AIR 1989 SC 1247) has held thus : --

'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 defences 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 defence against the person in whose name the property is held or any other person. In other words 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 case of a qualifying or disqualifying statute it may be necessarily

retroactive.

When the law nullifies the defences 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.'

9. Two decisions of this Court rendered earlier in *Velayudhan v. Rajeev*, (1988) 2 Ker LT 369 : (AIR 1989 Ker 12) and in *Narayanan v. Gangadharan*, (1988) 2 Ker LT 307 : (AIR 1989 Ker 256) have taken the view that the Act applies to pending proceedings.

10. The Supreme Court has also held that the Court is bound to take into account the provisions of this Act in moulding the relief in appeal. The Benami Transactions (Prohibition) Act, 1988 applies to all proceedings pending before the Courts of law on the date of the commencement of the Act, even if they are at the second appellate stage. On the authority of the Supreme Court, it is therefore clear that though the suit was filed on 29-5-1974 and decreed on 23-8-1976 and confirmed on 31-3-1977, the second appeal was pending on 19th May, 1988, when the Act came into force. The Act has to be taken into account and no relief can be granted to the plaintiffs, if Section 4 is attracted.

11. This leads to the question whether on the facts and in the circumstances of this case, Section 4 of the Act is attracted.

12. Benami transactions, a dealing common to all communities and prevalent in this country for a very long time have received judicial recognition from very early times, as would be seen from the classic decisions of the Privy Council in *Gosain v. Gosain*, (1854) 6 MIA 53, in *Bilas Kunwar v. Rajit Singh*, AIR 1915 PC 96, in *Gur Narayan v. Sheolal Singh*, ILR (1919) 46 Cal 566 : (AIR 1918 PC 140).

13. What, then, was benami transaction, as understood prior to the Act. As early as 1908, the Privy Council in *Petherpermal Chetty v. Muniandy Servai*, ILR (1908) 35 Cal 551 approved the statement in *Mayne's Hindu Law* (7th Edition) as correct.

The Privy Council observed thus : --

In Mayne's Hindu Law (7th Ed P.595, para 446) the result of the authorities on the subject of benami transactions is correctly stated thus : -- '446..... Where a transaction is once made out to be a mere benami it is evident that the benamidar absolutely disappears from the title. His name is simply an alias for that of the person beneficially interested. The fact that A has assumed the name of B in order to cheat X can be no reason whatever why a Court should assist or permit B to cheat A. But, if A requires the help of the Court to get the estate back into his own possession, or to get the title into his own name, it may be very material to consider whether A has actually cheated X or not. If he has done so by means of his alias, then it has ceased to be a mere mask, and has become a reality. It may be very proper for a Court to say that it will not allow him to resume the individuality, which he has once cast off in order to defraud others. If, however, he has not defrauded any one, there can be no reason why the Court should punish his intention by giving his estate away to B, whose roguery is even more complicated than his own. This appears to be the principle of the English decisions. For instance persons have been allowed to recover property, which they had assigned away.....where they had intended to defraud creditors, who, in fact, were never injured..... But where the fraudulent or illegal purpose has actually been effected by means of the colourable grant, then the maxim applied: *In pari delicto potior est conditio possidentis*. The Court will help neither party. 'Let the estate lie where it falls.'

14. The judicial committee of the Privy Council in *Gurnarayan v. Sheolal Singh*, AIR 1918 PC 140 described the nature of benami thus : --

'The system of acquiring and holding property and even of carrying on business in names other than those of the real owners, usually called the benami system, is and has been a common practice in the country..... The rule applicable to benami transactions was stated with considerable distinctness in a judgment of this Board delivered by Sir George Parwell. Referring to a benami dealing, their Lordships say: 'It is quite unobjectionable and has a curious resemblance to the doctrine of our English law that the trust of the legal estate results to the man who pays the

purchase money, and this again follows the analogy of our common law that where a feoffment is made without consideration the use results to the feoffer.'

'So long, therefore, as a benami transaction does not contravene the provisions of the law, the Courts are bound to give it effect. As already observed, the benamidar has no beneficial interest in the property or business that stands in his name; he represents, in fact, the real owner, and so far as their relative legal position is concerned, he is a mere trustee for him.....'

15. In the 57th report of the Law Commission of India on benami transactions, regarding benami transactions in general, it was stated, with reference to judicial decisions thus : --

'Principle that transaction is presumed to be for benefit of person providing money: --The principle is that where property is acquired in the name of one person but the purchase price is paid by another, a presumption arises that the transaction was one for the benefit of the person providing the money. Such cases are common in India where 'benami' transactions are recognised.

Benamidar representing the true owner: --In general, the benamidar fully represents the owner of the property in dealings with the third persons. In fact, that is the very object of benami transactions. The property stands 'in the name' of the benamidar, and a third party would not be able to challenge his title so long as the real owner does not come in the picture.

Position as between real owner and third parties: -- As to the position between the real owner of the property and third parties, ordinarily the real owner will not have an occasion to make any assertions about title. If, however, such a situation does arise, then law will have regard to the reality, and (disregarding the ostensible title of the benamidar), the law will allow the real owner to assert his ownership, as a general rule.'

Is there any difference between benami and sham transaction? In a very early decision of the Madras High Court in Rangappa v. Rangaswami, AIR 1925 Mad 1005 it was held thus : --

'The essence therefore of a sham transaction is that though a registered deed is brought into existence no title of any kind, either legal or beneficial is intended to be passed thereby to any person whatsoever, that is to say, the deed of transfer is not intended to effect any transfer of property. The difference therefore between sham transactions and benami transactions is one of intention. If the deed of transfer is made with the intention of placing the property in the name of third person, the intention clearly amounts to a transfer of the legal title and such a transaction can scarcely be called a sham transaction, but comes directly within the meaning of benami transactions properly so called.'

16. It is unnecessary to refer to the other decisions of the High Courts, for, we have the direct authority of the Supreme Court in at least two decisions. In *Meenakshi Mills Ltd, v. I.-T. Commissioner*, AIR 1957 SC 49, Justice Venkatarama Ayyar speaking for the court held thus : --

'In this connection, it is necessary to note that the word 'benami' is used to denote two classes of transactions which differ from each other in their legal character and incidents. In one sense, it signifies a transaction which is real, as for example, when A sells properties to B but the sale deed mentions X as the purchaser. Here the sale itself is genuine, but the real purchaser is B, X being his benamidar. This is the class of transactions which is usually termed as benami. But the word 'benami' is also occasionally used, perhaps not quite accurately, to refer to a sham transaction, as for example, when A purports to sell his property to B without intending that his title should cease or pass to B. The fundamental difference, between these two classes of transactions is that whereas in the former there is an operative transfer resulting in the vesting of title in the transferee, in the latter there is none such, the transferor continuing to retain the title notwithstanding the execution of the transfer deed. It is only in the former class of cases that it would be necessary, when a dispute arises as to whether the person named in the deed is the real transferee or B, to enquire into the question as to who paid the consideration for the transfer, X or B. But in the latter class of cases, when the question is whether the transfer is genuine or sham, the point for decision would be, not who paid the consideration but whether any consideration was paid.'

17. In *Bhim Singh v. Kan Singh*, AIR 1980 SC 727, it was held thus :-

'Two kinds of benami transactions are generally recognised in India. Where a person, buys a property with his own money but in the name of another person without any intention to benefit such other person, the transaction is called benami. In that case, the transferee holds the property for the benefit of the person who has contributed the purchase money, and he is the real owner. The second case which is loosely termed as a benami transaction is a case where a person who is the owner of the property executes a conveyance in favour of another without the intention of transferring the title to the property thereunder. In this case, the transferor continues to be the real owner. The difference between the two kinds of benami transactions referred to above lies in the fact that whereas in the former case there is an operative transfer from the transferor to the transferee though the transferee holds the property for the benefit of the person who has contributed the purchase money, in the latter case, there is no operative transfer at all and the title rests with the transferor notwithstanding the execution of the conveyance. One common feature, however, in both these cases is that the real title is divorced from the ostensible title and they are vested in different persons. The question whether a transaction is a benami transaction or not mainly depends upon the intention of the person who has contributed the purchase money in the former case and upon the intention of the person who has executed the conveyance in the latter case. The principle underlying the former case is also statutorily recognised in S. 82 of the Indian [Trusts Act, 1882](#), which provides that where property is transferred to one person for a consideration paid or provided by another person and it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration.'

18. Prior to the Act, there were several statutory provisions which curtailed or modified the general principles of benami. Thus, under Section 66 of the Civil P. C, no suit could be maintained against any person claiming title under a purchase certificate issued by court on the ground that the purchase was made on behalf of the plaintiff or on behalf of someone through whom the plaintiff claims. Section

281A of the Income tax Act inserted by the Taxation Laws (Amendment) Act, 1972 provided for the effect of failure to furnish information in respect of properties held benami and prohibited institution of suits to enforce any right in respect of any property held benami unless certain specified conditions are fulfilled.

19. The Indian Trusts Act has in Chap. IX made provisions for 'certain obligations in the nature of Trusts'.

20. Section 81 reads thus :--

'81. Where it does not appear that transferor intended to dispose of beneficial interest-- Where the owner of property transfers or bequeaths it; and it cannot be inferred, consistently with the attendant circumstances, that he intended to dispose of the beneficial interest therein, the transferee or legatee must hold such property for the benefit of the owner or his legal representative'.

21. Section 82 provided thus : --

'82. Transfer to one for consideration paid by another.-- Where property is transferred to one person for a consideration paid or provided by any other person, and it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration.

Nothing in this section shall be deemed to affect the Code of Civil Procedure, Section 317, or Act No. XI of 1859 (to improve the law relating to sales of land for arrears of revenue in the Lower Provinces under the Bengal Presidency), Section 36.'

22. Section 84 reads thus : --

'84. Transfer for illegal purpose.-- Where the owner of property transfers it to another for an illegal purpose, and such purpose is not carried into execution, or the transferor is not as guilty as the transferee, or the effect of permitting the transferee to retain the property might be to defeat the provisions of any law, the transferee must hold the property for the benefit of the transferor'.

And Section 94 reads thus : --

'94. Constructive- trust in cases not expressly provided for.-- In any case not coming within the scope of any of the preceding sections, where there is no trust, but the person having possession of property has not the whole beneficial interest therein, he must hold the property for the benefit of the persons having such interest, or the residue thereof (as the case may be), to the extent necessary to satisfy their just demands'.

23. With reference to the accepted principles regarding the benami system of conveyance, the statutory provisions and judicial decisions, the Law Commission made its 57th report on Benami Transactions in Aug., 1973. On 19th May, 1988, Ordinance No. 2 of 1988 was promulgated and the Government, thereafter took up the matter for detailed examination with the Law Commission of India which submitted its 130th report on Aug. 14, 1988 and thereafter the present Act was passed.

24. In the Act, 'Benami Transaction' was defined in Section 2(a) thus : --

'Benami transaction' means any transaction in which property is transferred to one person for a consideration paid or provided by another person.'

24A. Section 3 relevant for us reads thus : --

'3. Prohibition of benami transactions.--(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 anything contained in the Cr. P. C., 1973 (2 of 1974), an offence under this section shall be non-cognizable and bailable'.

25. Section 4, pressed into service reads : --

'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.'

26. It is in this background, and with reference to the provisions in the Act, that the question as to whether sham transactions can be considered as benami transactions under the Act has to be examined. The learned counsel for the appellants contends that the object of the Act is to put an end to the benami system of conveyancing and Section 4 of the Act expressly prohibits suits, claim, or action to enforce any right in respect of any property held benami. It is submitted that when there is an instrument of transfer and the contention is that the person in whose name the transfer is effected is not the real owner and the transferor continues to be the owner, it is still a benami transaction, for the real owner is not the ostensible owner, Sham transactions thus are also benami transactions, according to the counsel. The counsel also submits that even if the sham transaction does not satisfy the definition of benami transaction in Section

2(a), Section 4 of the Act uses only the word 'benami' and not benami transaction.

27. The learned counsel for the respondent submits that the legal character and incidence of sham transaction are different from a benami transaction, that a sham transaction is not comprehended within the definition of benami transaction in Section 2(a), that Sections 3 and 4 have to be read together and that Section 4 cannot apply to sham transactions.

28. In the light of the decisions of the Supreme Court in *Sree Meenakshi Mills Ltd. v. I.T. Commr.*, AIR 1957 SC 49 and *Bhim Singh v. Kan Singh*, AIR 1980 SC 727, it is clear that there are two kinds of benami transactions, where, in both, the real title is divorced from the ostensible title, but both differing from each other in their legal character and content. In one case, there is a genuine real transaction, an operative transfer where the transferor divests himself of his title, but does not intend to vest his title in favour of the transferee named in the document, but in favour of a third person who furnishes the consideration and takes possession. No title vests in the transferee mentioned in the document and he is a mere name lender for the beneficiary to whom the property was intended to be transferred. In the second class of cases, there is no effective transfer, the transferor does not lose his title, the transferor does not part with his possession and there is no payment of consideration. The transferor never intends to transfer his title or possession. The transferor continues to be the real owner. These transactions are not really benami in character, but are loosely described as benami. The question for consideration is whether the Act applies to both these cases, or whether it is limited only to the benami transaction falling in the first category and not extending to those falling in the second category.

29. The Act has provided a definition for benami transaction. It means 'any transaction in which property is transferred to one person for a consideration paid or provided by another. It contemplates cases where (a) there is a transfer of property, and (b) the consideration is paid or provided not by the transferee, but by another. Where there is no transfer of property as in a sham document, when there is no consideration for the transaction, it is a sham transaction, which does not satisfy the definition of benami transaction under the Act. The definition of

benami transaction in the Act thus excludes from its purview a sham transaction.

30. A very old decision rendered in 1913 by Justice Shri Asuthosh Mookerjee on behalf of the Division Bench reported in *Akhil Prodhan v. Manmatha Nath Kar*, (1913) 18 Cal LJ 616 is instructive. In that case, a tenant in 1898 executed a fictitious conveyance of his land in favour of A with a view to protect himself from invasion of his rights by his landlord. To protect himself from A, the tenant induced his landlord to institute a fictitious suit for rent. That suit was decreed and execution was taken. A thereupon filed a claim which was disallowed. In execution of the decree, the property was brought to sale and the landlord purchased the holding and possession was delivered to him. Thereafter A sued the tenant and the landlord for declaration of his title on the basis of his conveyance, the suit was withdrawn. The landlord thereafter obtained possession from the tenant by force. The tenant commenced the present suit for declaration that the entire proceedings in the rent suit were fictitious and that the landlords did not acquire any title on the basis of their purchase at the execution sale and his title to his tenancy was not affected. The court held that as the conveyance in favour of A was a fictitious document, A had no real title to the property and was not defrauded and the plaintiff tenant consequently was not disentitled to protection in court. The landlord relied on Section 317 of the Code of Civil Procedure (now Section 66) to contend that no suit could be maintained against a certified purchaser on the ground that the purchase was made on behalf of any other person or on behalf of a man through whom such other person claims. The High Court held that the suit for declaration by the tenant was not a suit to which Section 317 of the C.P.C. applied for, according to the learned Judge. Section 317 contemplated a real sale in execution of a real decree in a real suit. To a fictitious suit, Section 317 had no application. Thus where there is no semblance of any transfer of title or possession, where there is a mere paper transaction, Section 4 can have no application because it can affect only real transactions, where the transferee is only an 'alias' for the actual beneficiary. There are also other reasons for reaching the same conclusion.

31. It has to be noted that the Trusts Act, in Chap. IX, declared certain obligations to be in the nature of a trust. Section 81 applied to those cases where it did not

appear that the transferor intended to dispose of the beneficial interest. The illustration (a) to that Section reads thus : --

'A conveys land to B without consideration and declares no trust of any part. It cannot, consistently with circumstances under which the transfer is made, be inferred that A intended to transfer the beneficial interest in the land. B holds the land for the benefit of A',

Section 81 therefore applies to a transaction under which no transfer was intended and no consideration passed, i.e. to sham transaction. But Section 82 of the Trusts Act provides for another class of transactions which are also statutorily treated as obligations in the nature of trust and they relate to 'transfer to one for consideration paid by another'. It is significant that Section 82 of the Trusts Act has practically been bodily lifted and incorporated in the definition of benami transaction in the present Act. This definition has nothing to do with the concept contained in Section 81 of the Trusts Act. If the Act intended to embrace transactions covered by Section 81 of the Trusts Act also, there was no reason for restricting the definition of benami transaction to the phraseology employed in Section 82 of the Trusts Act. This also gives an indication that sham transactions, loosely called as benami transactions, which are in fact no benami transactions in the real sense of the term, are not subject to the rigour of the Act.

32. When the definition of 'benamii transaction' is practically in pari materia with Section 82 of the Indian Trusts Act, Section 82 became unnecessary and was therefore repealed.) Section 81 of the Indian Trusts Act, on the other hand, relates to transaction 'where it does not appear that transferor intended to dispose of beneficial interest'. This Section also has been repealed, even though no part of the said provision is incorporated in any of the provisions in the present Act. The effect of repealing of Section 81 of the Trusts Act is that it is no longer open to any party to claim that an obligation in the nature of a trust exists. In other words, unless a transaction satisfies the definition of a trust, the Trusts Act does not apply. There is no longer a deemed trust or an obligation in the nature of trust when transferor does not intended to dispose of any beneficial interest and continues to be in possession of the property, notwithstanding the execution of a

document which has not been acted upon. The sham document, of no legal effect, cannot claim any statutory protection or recognition either under the Trusts Act or under the Benami Transactions (Prohibition) Act. The repeal of Section 81 of the Trusts Act only extinguishes the rights conferred under the Trusts Act and does not create any new rights. A sham transaction, merely on paper and never acted upon or operated, immune from challenge under Section 4 cannot be treated as a new class of benami having any statutory protection under the Act.

33. Released of the protection afforded to 'an obligation in the nature of trust' under Section 81 of the Trusts Act, it is always open to a party to contend that, notwithstanding the execution of a deed of transfer, it was only a fictitious transaction, never intended to be acted upon and in fact not operated and that it remained a mere paper transaction, without divesting any rights of the transferor. A claim for declaration that a transaction is only sham and nominal is permissible in law. Any contention that it is not available in view of Section 92 of the Evidence Act cannot also be accepted. Vivian Bose, J. in *Aasaram v. Ludheshwar*, AIR 1938 Nag 335 (FB) held thus : --

'All that Section 92, Evidence Act excludes is oral evidence to contradict, vary, add to or subtract from the terms of a contract which has been reduced to writing. It does not preclude a party from showing that the writing was not really the contract between the parties but was only a fictitious or colourable device which cloaked something else. Benami transactions which have been upheld by the Judicial Committee on numerous occasions afford a common illustration of this rule.'

I am in respectful agreement with this dictum. A right under the general law for a declaration from a court of law that a transaction is fictitious, sham or nominal and that it has not been acted upon and was never intended to be acted, is not taken away by the Benami Transactions (Prohibition) Act. That right survives.

34. It is true that Section 3 of the Act uses the word 'benami transaction' and Section 44 of the Act uses only the word 'benami'. But that, I think, makes no qualitative difference in the application of the Act.

35. Sections 3 and 4 of the Act have to be read and understood together. They are not disjunctive provisions in a comprehensive legislation intended to prohibit benami transactions. Both Sections 3 and 4 are complementary to each other to achieve the same object. While Section 3 prohibits the creation of any 'benami transaction', Section 4 prevents any suit, claim or action to enforce any right in respect of any property 'held benami'. It is only when any right in respect of a property 'held benami' is sought to be enforced, in any suit or claim that Section 4 is attracted. 'Hold', according to Black's Dictionary means 'to possess in virtue of a lawful title as in the expression, common in grants, 'to have and to hold'; to possess; to occupy; to be in possession and administration of. In the context and setting of Section 4, the word 'held' has to be understood as 'possessed or occupied'. If the possession or occupation is not benami, Section 4 can have no application. An intended benami does not confer even pretended rights. A benami transaction where the property is so held as benami is the subject of the statutory prohibition under Sections 3 and 4. The definition of 'benami transaction' is inextricably connected with all the provisions of the Act, as the Act is intended 'to prohibit benami transactions and the right to recover property held benami and for matters connected therewith or incidental thereto'.

36. Counsel for the appellants, however, contends that the courts below have only considered the benami nature of the transaction as reflected in the issues and there is no question, now, in second appeal to consider afresh whether the transaction is sham or nominal. It is stressed that the plaintiff-respondent cannot, at this stage, contend that the transaction is not benami, when two courts have concurrently held that the transaction is benami. When the controversy is regarding the benami nature of the transactions, and that controversy is settled by the findings of fact, it is no longer necessary to reopen those findings. On the findings recorded by the courts below, Section 4 is automatically attracted. So the contention runs.

37. This contention misses the substance of the findings recorded by the courts below. The courts below have found that PW 2 Gopalan Nair did not pay any consideration and did not get possession under the 1963 document. It was sham and nominal. If Gopalan Nair did not get any rights in 1963, there was nothing he

could transfer in 1968 under Ext. B3. He wanted to efface himself even as a name lender and therefore created a fictitious document, Ext. B3. As Ext. B3 was of no avail, the first defendant claimed possession under an agreement, Ext. B2, said to have been executed by the plaintiff himself. The courts below, have found that this agreement is a fabricated document. This court, in the earlier second appeal agreed with those findings that this agreement, Ext, B2, was 'spurious and unbelievable'. The courts below have also found that the subsequent assignment deed, Ext. B6, was only a 'nominal document'. The findings of the courts below, on the question of fact, are that the transactions are sham and nominal and that the plaintiff never intended to transfer his title or possession. The fact that the courts below have loosely used the expression 'benami' cannot affect the substance of the conclusion. Moreover, it has to be noted that when the matter was taken in appeal to the Sub-Court, the point formulated for consideration was 'whether the documents relied on by the plaintiff are sham documents'. In second appeal from that decision, this Court held that that conclusion on the point so formulated was wrong. After remand, the court below addressed itself to all relevant aspects and agreed with the findings of the trial court. These findings have been arrived at on a correct appreciation of all relevant facts. The findings do not call for interference in second appeal. In the circumstances, on the finding that the transactions are only sham and nominal, there is no scope to invoke Section 4 of the Act in aid of the appellants.

38. In the result, the second appeal fails and is dismissed; in the circumstances of the case, no costs.

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