

Moumita Mitra and ors. Vs. Rabindra Nath Basu and ors.

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Court : Kolkata

Decided On : Apr-10-1992

Reported in : (1992)2CALLT434(HC),96CWN941

Judge : Bhagabati Prasad Banerjee and ;Amal Kanti Bhattacharji, JJ.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Section 11; ;Benami Transactions (Prohibitions) Act, 1988 - Sections 2, 2(2), 3, 4, 4(3) and 6; ;Hindu Law; ;Hindu Womens' Right to Property Act, 1937 - Sections 3 and 4; ;[Specific Relief Act, 1963](#) - Section 31(1); ;[Transfer of Property Act, 1882](#) - Section 53

Appeal No. : C.O. No. 1438 of 1990

Appellant : Moumita Mitra and ors.

Respondent : Rabindra Nath Basu and ors.

Advocate for Def. : Ashoke Banerjee, Adv.

Advocate for Pet/Ap. : P.K. Dutta, Adv.

Disposition : Application allowed

Judgement :

Amal Kanti Bhattacharji, J.

1. This revisional application is directed against an order of the Assistant District Judge, fifth court, Alipore by which he ordered the striking out of certain properties from the schedule to the plaint of a partition suit. The facts of the case may be succinctly stated as follows.

2. The original plaintiff one Paresh Nath Basu instituted a partition suit against his brother Naresh Chandra Basu, Naresh's son and wife Ramendra Nath Basu and Amala Basu and the plaintiff's mother Sarojini Basu for partition of their undivided properties mentioned in the different schedules to the plaint. The suit was decreed in part by the lower court in the preliminary form. On appeal the first Appellate Court allowed the appeal in part and decreed the suit in a preliminary form. The plaintiff got a decree for partition in respect of 5/12th share-in the 'Ka', and 'Ja' schedule properties and half share in respect of 'Kha', 'Ga', 'Gha', 'Uma' and 'Chha' schedule properties. The plaintiff's claim for partition in respect of 'Cha' schedule properties was disallowed. On a second appeal being preferred before the High Court, the said court dismissed the appeal and endorsed the decree of the first Appellate Court.

3. The main contention in regard to the share in the properties was, however, in respect of 'Kha', 'Ga', and 'Gha' schedule properties. These properties were purchased in the name of Sarojini, the mother of the plaintiff and the defendant No. 1 Naresh. The plaintiff's case is that the parties descended from a common ancestor, namely, late Kshetra Mahon Basu who died leaving two sons, Manmatha and Haren. Manmatha married but became insane and died in 1932 leaving his wife Sarojini and two sons Naresh and Paresh. It is stated that certain properties were purchased in the name of Sarojini out of the nucleus of the joint family fund contributed by Haren and Paresh (Naresh having no income at the relevant time). The said properties were purchased in the name of Sarojini between the period from the 9th April, 1937 and the 12th September, 1946. It is the case of the plaintiff that after the death of Manmatha, Haren became the Karta of the joint family and out of compassion towards Sarojini whose husband died an insane, he purchased the properties in her name out of the joint family funds. It has been further alleged that the defendant No. 1 Naresh with a view to grabbing the properties obtained two deeds-one fictitious sale deed in favour of his wife

Amala and another fictitious deed of gift in favour of his minor son Ramendra, executed by his mother Sarojini. The plaintiff claims that the properties in question were purchased in the benami of Sarojini out of the joint family funds and that the same belong to the joint family in which the plaintiff and his brother had equal shares. The first Appellate Court accepted the plaintiff's case of purchasing the property in the benami of Sarojini and decreed the suit accordingly. As regards the sale deed and the deed of gift executed by Sarojini in favour of defendant, Nos. 2 and 3 the first Appellate Court held that those deeds were sham and colourable ones. The said Court, therefore, decreed the suit in respect of the properties held in the benami of Sarojini taking the same as belonging to the joint family and being inherited by Naresh and Paresh. In the High Court the finding of the lower Appellate Court regarding the benami nature of the properties purchased in the name of Sarojini was confirmed. As regards the subsequent documents created by Sarojini in favour of defendants Nos. 2 and 3, the High Court endorsed the views expressed by the first Appellate Court that they were sham and colourable transactions. The suit was accordingly decreed in the preliminary form in confirmation of the decree of the first Appellate Court.

4. The aforesaid decree which was upheld in the second appeal was then required to be made final. But in the meantime the Benami, Transactions (Prohibition) Act, 1988 came into force. Both the plaintiff and defendant No. 1 died in the meantime. Their mother Sarojini also died and all of them were substituted by their legal heirs. Defendants No. 1(e) and 2 filed a petition praying that in view of the provisions of the Benami Transactions (Prohibition) Act, 1988, the plaintiffs can not recover some of the properties which were purchased in the benami of Sarojini. After a contested hearing the Learned Assistant District Judge accepted the contention of the petitioners and accordingly passed an order deleting the 'Kha', 'Ga', 'Gha' and 'Uma' schedule properties from the plaint and the preliminary decree. Against this order of the Assistant District Judge the petitioners have come before this court on revision.

5. The petitioners are the heirs of the original plaintiff Paresh and the Opposite parties are the heirs of defendant No. 1 Naresh and some of them were parties in the original suit. Sarojini also died during the pendency of the suit leaving Naresh

and Paresh as her heirs.

6. On behalf of the petitioners Mr. Pijush Dutta argues in support of the petition on several grounds. He strenuously argues that the properties in dispute purchased in the name of Sarojini were actually purchased out of the joint family funds as found by the two successive Appellate Courts and that as such the same could not be treated as a benami transaction. According to him the property belonged to the joint family and until there was any partition the same could not be said to belong to any particular member of the family. He next argues that the principle of res judicata applied in this case on the principle enunciated in : 1988 CriLJ1661 (A. R. Antulay v. R. S. Nayak & Am.). Thus according to Mr. Dutta the extent of properties to be partitioned having been conclusively determined (the parties having not chosen to challenge the High Court's judgment by an appeal before the Supreme Court) the same can not be reopened at the time of passing the final decree, Mr. Dutta lays stress on the fact that the nucleus of the family funds was created mainly by the contributions of Haren and Paresh and that the properties having been included in a Hindu undivided family the question of purchasing the same in the benami of a member of the family does not arise.

7. The second branch of argument of Shri Dutta is that even assuming that the purchase of the properties in the name of Sarojini is a benami transaction the same is protected by the provisions of sub-section (3) of Section 4 of the Benami Transactions (Prohibition) Act. He argues that Sarojini is a coparcener in a Hindu undivided family and the property in question is held for the benefit of the coparceners in the family. It is also argued that Sarojini is a trustee for the other members of the family or at any rate she stands in a fiduciary capacity in relation to the said members,

8. The last branch of argument of Mr. Dutta is that even if Sarojini is accepted as a benamdar she should be deemed to have acquired the property absolutely and the subsequent transfers made by her in favour of the wife and the minor son of Naresh having been found sham and fictitious the property was inherited by her two sons on her death and they acquired the same in moiety shares. So the order of the Learned Assistant District Judge deleting the properties from the schedule

of partible properties can not stand.

9. The revisional application is contested by Mr. Mukul Prakash Banerjee on behalf of opposite party Nos. 1 and 3 to 6 and he submits that the Benami Transactions (Prohibition) Act was appropriately applicable in this case having regard to the nature of the benami transactions so clearly found by the two Appellate Courts. He further submits that technically there was no jurisdictional error committed by the Assistant District Judge concerned in passing the order in the manner he did and that the said order could not be interfered with in the revisional jurisdiction of the High Court. His other objection is that the plaintiff in this case having failed to make a prayer for cancellation of the two deeds executed by Sarojini in favour of defendants Nos. 2 and 3, the suit is hit by the provisions of Section 31 of the [Specific Relief Act, 1963](#). Thus the two relevant registered deeds having not been cancelled under sub-section (2) of Section 31 of the Specific Relief Act the said transactions can not be avoided. So inspite of the decree approved by the High Court the property can not be held to be partible between the heirs of Sarojini.

10. The second group of opposite parties namely, O.Ps. Nos. 2 and 7 also contest the revisional application. Mr. Shakti Nath Mukherjee speaking for them raises a further new point. According to him two types of benami are in vogue in India. One kind is when a property is purchased for valuable consideration by a person in the name of another person [the type of transaction defined as a 'benami transaction' in clause (a) of Section 2 of the Benami Transactions (Prohibition) Act]. The other kind of benami is when a valid owner of property creates a sham and colourable document in favour of another person without any consideration pretending that the property no longer belongs to him. According to Mr. Mukherjee Section 3 of the Act deals with the first kind of benami but Section 4 of the Act covers both the two types of benami. Thus Mr. Mukherjee's contention is that the documents executed by Sarojini in favour of the defendants Nos. 2 and 3 are also benami transactions and that they can not be called in question in view of the bar imposed by Section 4 of the Act.

11. Mr. Dutta relies much on the judgment of the High Court which conclusively finds that the properties purchased in the benami of Sarojini were financed out of the joint family fund. He refers to A.R. Antulay's case : 1988 CriLJ1661 that a judgment of a High Court is binding on subsequent proceedings in the same case. In fact, however, Antulay's case was a criminal case. In this case the legality of an order of the Supreme Court transferring a criminal case triable exclusively by a Special Court to the High Court was questioned before the Supreme Court. The Supreme Court held that the order of transfer given by the said Court was per incuriam as it violated several rights of the accused. In the said case it was argued on behalf of the respondents that the doctrine of res judicata was applicable even to criminal trials and that a judgment of a High Court was binding in all subsequent proceedings in the same case. It was of course a piece of argument advanced before the Supreme Court and the judgment did not proceed on that basis. In any case the point of law urged can not. be assailed so far as the doctrine of res judicata is concerned. But the question is not concluded by the doctrine of res judicata here as we shall presently examine. The findings arrived at by the High Court here, however, are to be accepted and the same is .conclusive so far as the parties are concerned in the subsequent proceedings.

12. Mr. Dutta has referred to several decisions regarding the nature of incidents of a Hindu undivided family. He refers to : [1991]187ITR696(SC) (Income-tax Officer, Calicut v. Smt. N. K. Sharada Thampatty) to argue that until and unless a joint family property was physically divided, there was no severance from the status of Hindu undivided family. The aforesaid case, however, explains the scope of partition under Section 171 of the Income-tax Act, 1961 in the context of a special definition of 'partition' in the Explanation to the aforesaid section. In that context it was held by the court that the partition of the property of a Hindu undivided family is accepted only if there has been an actual physical division of the property. This case, specially applicable to a particular section of the Income-tax Act as stated above, does not actually come to any real aid to decide the matter raised in this revisional application. Accepting the fact that there was a Hindu undivided family the question that has been urged before us is how the purchase of a property in the name of a member of such a family has been affected by the provisions of the Benami Transactions (Prohibition) Act.

13. For a proper appreciation of the relative sequence of purchase of any property out of the joint fund of a Hindu undivided family in the face of the prohibitory provisions of the Benami Transactions (Prohibition) Act it is necessary to examine the scheme of the Act.

14. From the preamble of the said Act, it appears that it is an Act to prohibit benami transactions and the right to recover property held benami and for matters connected therewith or incidental thereto. The expression 'benami transaction' has been defined in clause (a) of Section 2 of the Act as any transaction in which property is transferred to one passing for a consideration paid or provided by another person. Section 3 of the Act prohibits all benami transactions subject to the provisions of sub-section (2). Sub-section (3) of the said section makes a benami transaction punishable. Obviously, Section 3 of the Act deals with a benami transaction as defined in the Act and it makes any such transaction an offence punishable under the Act. In the instant case the benami nature of the transaction as has been dealt with by the two Appellate Courts would be covered by the definition of a benami transaction as given in Section 2(a) of the Act. As the transaction when it was made was not illegal and as the penal provision in this respect is not prospective such a transaction would not attract any penalty. The transaction in question is also not covered by sub-section (2) of the said section as it was not a purchase of any property by a person in the name of his wife or unmarried daughter. Provisions have, however, been made in the Act to protect the transactions which were in vogue as a long time custom to purchase property in the name of a member of the joint family and such protection has been given in sub-section (3) of Section 4 of the Act. Section 4 reads as follows :-

'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.'

15. Mr. Dutta has extensively argued that the purchase of the relevant property out of the funds of a Hindu undivided family ipso facto protects the transaction in this case. But an analysis of the scheme of the Act set out above clearly shows that a benami purchase even in the name of a member of such a family is not protected unless it comes within the exempted provisions set out in Section 4 of the Act. The transaction is protected only if it is held in the benami of a coparcener and the same is held for the benefit of the coparceners in the family.

16. Mr. Dutta emphatically argues that Sarojini was a coparcener in a Hindu undivided family and that the property was held for the benefit of the coparceners in the family. The transaction should, therefore, be covered by the exemption clause (3) (a) of Section 4. His submission is that the Lower Court most erroneously opined that the idea of the coparcener is a concept of Mitakshara School of Hindu Law and the same is not applicable in Bengal. It was further opined by the learned Assistant District Judge that coparcener is a person who is entitled to a share by birth. Needless to say that the opinion expressed by the - Assistant District Judge that coparcener is peculiar to Mitakshara School and that a coparcener is a person who is entitled to a share by birth is quite erroneous. Obviously she has not understood what is meant by the expression 'coparcener'. The conception of coparceners and coparcenary property is common to both the Mitakshara and Dayabhaga Schools of Law. There are, however, certain

distinguishing features of the Dayabhaga joint family from those of a Mitakshara joint family. Mr. Dutta argues that there is no bar to a female being a member of the coparcenary property even in Dayabhaga Law. There is no doubt that he is right on this point. As the law stands even in Dayabhaga School of Law a female can be a coparcener. This is supported by the observations made in Article 227 of Mulla's Hindu Law, page 319, Seventh Edition. The relevant observations are as follows :-

'According to the Mitakshara Law the foundation of coparcenary is first laid on the birth of a son. The son's birth is the starting point of a coparcenary according to that law. Thus if a Hindu governed by a Mitakshara Law has a son born to him, the father and the son at once become coparceners.

According to the Dayabhaga Law, the foundation of a coparcenary is that laid on the death of the father. So long as the father is alive there is no coparcenary in the strict sense of the word between him and his male issue. It is only on his death leaving two or more male issues that the coparcenary is first formed. In the previous editions of this book the author had stated: The formation of a coparcenary does not depend upon any act of the parties. It is a creation of the law. It is formed spontaneously on the death of the ancestor. It may be dissolved immediately afterwards by partition, but until then the heirs hold the property as coparceners. These observations must obviously be read in the context of a father dying leaving two or more male issues who would constitute a coparcenary though of course in their case there would be only unity of possession and not any unity of ownership. Before the Hindu Women's Rights to Property Act, 1937 his male issues inherited his property, separate as well as ancestral, as his heirs, but as between themselves they held it as coparceners, and the property inherited from the deceased was coparcenary property. On the death of anyone of the coparcener his heirs succeeded to his share in the coparcenary property and they became members of the coparcenary. Such heirs, in default of male issue, could be his widow or widows or his daughter or daughters. These two, though females, got into the coparcenary representing the share of their husband or father, as the case might be. A coparcenary under the Dayabhaga Law could thus consist of males as well as females. Under the Mitakshara Law no female can be a

coparcenary with male coparcener. But even under the Dayabhaga Law a coparcenary could not start with females. Thus if a person died leaving two or more widows, or two or more daughters they could not constitute a coparcenary.'

17. Thus it will be seen that after the enforcement of the Hindu Women's Right to Property Act, 1937 there is no bar to a Hindu female's being a coparcener in the property left by her ancestor. The position of a Hindu coparcenary vis-a-vis a Hindu joint family in relation to the Hindus governed by Mitakshara School and the Dayabhaga School has been explained by the Supreme Court in : [1987]163ITR31(SC) (State of Maharashtra v. Narayan Rao, Shyam Rao Deshmukh and Ors.) Para 7 of the judgment in the said case throws illuminating light on the subject.

'A Hindu coparcenary is, however, a narrower body than the joint family. Only males who acquire by birth an interest in the joint or coparcenary property can be members of the coparcenary or coparceners. A male member of a joint family and his sons, grandsons and great grandsons constitute a co-parcenary. A coparcener acquires right in the coparcenary property by birth, but his right can be definitely ascertained only when a partition takes place. When the family is joint the extent of the share of a coparcener cannot be definitely predicted since it is always capable of fluctuating. It increases by the death of a coparcener and decreases on the birth of a coparcener. A joint family may, however, consist of female members. It may consist of a male member, his wife, his mother and his unmarried daughters. The property of a joint family does not cease to belong to the family merely because there is only a single male member in the family See Gowli Buddanna v. Commnr. of Income Tax, Mysore, : [1966]60ITR293(SC) and Sitabai v. Ram Chandra : [1970]2SCR1 . A joint family may consist of a single male member and his wife and daughters. It is not necessary that there should be two male members to constitute a joint family See N.V. Narendranath v. Commnr. of Wealth Tax, Andhra Pradesh : [1969]74ITR190(SC) . While under the Mitakshara Hindu law there is community of ownership and unity of possession of joint family property with all the members of the coparcenary, in a coparcenary governed by the Dayabhaga law there is no unity of ownership of coparcenary property with the members thereof. Every coparcener takes a defined share in the property and he is the owner of that

share. But there is, however, unity of possession. The share does not fluctuate by births and deaths. Thus it is seen that the recognition of the right to a definite share does not militate against the owners of the property being treated as belonging to a family in the Dayabhaga Law'.'

18. From the facts of this case it is apparent that Sarojini is a member of a Hindu undivided family. The question is, did she become a member of the coparcenar also so as to attract the exemption under sub-section (3) (a) of Section 4 of the Benami Transactions (Prohibition) Act? As has been discussed by the Supreme Court in the case reported in : [1987]163ITR31(SC) , a Hindu coparcenary is a narrower body than the joint family. It goes without saying that a member of a Hindu joint family does not ipso facto become a coparcenar in such a family. Under Section 3 of the Hindu Women's Right to Property Act, 1937 when a Hindu governed by the Dayabhaga Hindu School of Law dies intestate leaving any property, his widow or if there is more than one widow all his widows together shall be entitled to a limited widow's estate in respect of any property of which he dies intestate to the same share as a son. Thus when a person dies after the enforcement of the Hindu Women's Right to Property Act his widow gets a share to the property, although a limited one, and becomes a coparcener to the said property. Section 4 of the Act, however, provides that nothing in the Act shall apply to the property of any Hindu dying intestate before the commencement of the Act. It is found that Manmatha, the husband of Sarojini, died in 1932. So at the time of his death Sarojini did not acquire any widow's estate under the aforesaid Act. Obviously, therefore, she was not a member of coparcenary at that time. Although the properties were purchased after the enforcement of the aforesaid Act, Sarojini at the time of such purchase was not a coparcener, although she was a member of the family. It is difficult, therefore, to hold that her benami purchase was protected under Section 4(3)(a) of the Act.

19. Similarly, it is difficult to hold that Sarojini held the property as a trustee or in a fiduciary capacity to the other persons for whose benefit the properties stood.

20. In : AIR1990 Mad353 , (R. Raja Gopal Reddy and Ors. v. Padmini Chandrasekharan and Ors.) the applicability of the provisions of Benami

Transactions (Prohibition) Act was discussed in respect of a property which was hire purchased in another person's name. It was held that a coparcenary is purely a creature of law and it can not be created by the act of parties. In contrast a composite family was the result of an agreement express or implied. So, although a composite family was in vogue in some part of the country, yet there could not be any benami purchase on behalf of such a composite family. Accordingly, Section 4(2) of the Benami Transactions (Prohibition) Act, was made applicable there.

21. It is thus found that although Sarojini was a member of the joint family and although the property in dispute was purchased out of the joint family funds, she could not get the benefit of Section 4(3) of the Act unless she could be held to be a coparcener in relation to the property.

22. As regards the applicability of Section 4 of the Benami Transactions (Prohibition) Act, in a case where a preliminary decree has been upheld by the High Court and a final decree is to be passed, the matter seems to have been set at rest by two judgments namely (: [1990]184ITR604(Cal) , Urmila Bala Dasi v. Probodh Chandra Ghosh and Anr. and : [1989]177ITR97(SC) (Mithilesh Kumari and Anr. v. Prem Behari Khare). It has been held in Mithilesh Kumari's case that the Act is retroactive and that it can be applied to a pending proceeding. In the instant case a preliminary decree has been passed but the same has not ripened into a final decree. So the provisions of the Benami Transactions (Prohibition) Act, may certainly be applicable to such a case if the said provisions are attracted. In this connection Mr. Dutta cites a decision reported in : AIR 1991 SC1731 (Babusaheb Singh and Ors.) v. Parsid Narain Singh and Ors.) in which certain properties were deleted from the schedule of the partible properties in a preliminary decree in a partition suit. On appeal before the High Court an argument was made that the decree was not drawn up according to the preliminary decree. The High Court observed that the counsel for the appellants gave up this point. During the proceeding for final decree a petition was filed urging that the advocate commissioner be directed to exclude the lands which were ordered to be deleted in the preliminary decree and the court allowed this prayer. On a revision petition being filed before the High Court the said court held that the matter relating to the inconsistency in the preliminary decree was already

final and the same could not be reagitated. On a special leave petition the Supreme Court revised the High Court's decision. The facts of this case are quite different and it does not help any of the parties here.

23. Next come to the third branch of the argument of Mr. Dutta that even if it was accepted that Sarojini was a benamidar in respect of the properties purchased in her name, the said properties were inherited by her sons who are litigating here. Mr. Mukul Prakash Banerjee appearing for a group of opposite parties raises an objection that without a prayer for cancellation of the documents executed by Sarojini in favour of some of the defendant their right by such purchases can not be deemed to have been affected. He accordingly, submits that the property in question would not be inherited by the sons of Sarojini due to the intervention of the intermediate transfers as above. He refers to Section 31 of the [Specific Relief Act, 1963](#) which according to him is a bar to the grant of any relief to the plaintiffs. Section 31 of the Specific Relief Act is as follows :-

'Section 31(1). Any person against whom a written instrument is void or voidable and who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it adjudged void or voidable, and the court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.

(2) If the instrument has been registered under the Indian Registration Act, 1908 the court shall also send a copy of its decree to the officer in whose office the instrument has been so registered, and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation'.

24. A plain reading of the section makes it clear that it is a voluntary act on the part of a person to ask for a cancellation of a deed which is void ab initio. There is no doubt that a registered deed adjudged to be void should better be cancelled by an endorsement of a registering officer in the relevant register so that the others dealing with the same may get a timely caution about the void nature of the deed. But making such a prayer is never mandatory. The person affected by the deed can pray for its cancellation under Section 31 if he has reasonable apprehension that such instrument if left outstanding may cause him injury. If no such prayer is

made that does not affect the position in regard to the nature of the deed. Both the first Appellate Court and the High Court have held that the documents executed by Sarojini in favour of defendant Nos. 2 and 3 were sham and colourable documents. So far as this finding is concerned, it is final. Mr. Saktinath Mukherjee speaking for the other group of opposite parties has also raised certain objections as regards the effect of the High Court's finding in relation to the provisions of the Benami Transactions (Prohibition) Act, but the nature of those objections is a different one. We are going to examine Mr Mukherjee's arguments in this regard separately. But as regards Mr, Banerjee's argument that in the absence of an order for cancellation of those documents, they shall continue to be valid, it must be said that the same is not acceptable. As we have already seen the prayer for adjudication of a document as void or voidable and the consequential cancellation of the same is purely a voluntary act depending on the degree of apprehension in the mind of a plaintiff regarding the possible injury that might result if the documents is left without cancellation. There is, however, a distinction between a void and a voidable document. In this respect a case reported in : AIR1974 Cal309 (Jabalpur Electric Supply Co. Ltd. v. Madhya Pradesh Electricity Board and Ors.) may be referred to. In the said case a question; arose whether an act which is void requires an order from the court declaring that it is void. The following observations of S.P. Mitra CJ. in paragraph 11 of the judgment may be usefully read :-

'Secondly, the order of the 18th March, 1959 has been challenged as-a nullity and not a mere irregularity. In other words the order according to the appellant is void and not merely voidable. The distinction between the two has been repeatedly drawn. If an Act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. But if an Ac,t is only voidable, then it is not automatically void. It is only an irregularity which may be waived. It is not to be avoided unless something is done to avoid it. There must be an order of the court setting it aside and the court has a discretion whether to set it aside or not. It will do so if justice demands it but not otherwise. Meanwhile, it remains good and a support for all that

has been done under it, vide observations of Lord Denning in *Macfoy v. United Africa Company Ltd.*, (1961) 3 All ER 1169 at pages 1172 to 1173.'

Reference may also be made to another case reported in (*Inder Singh v. Nihal Kaur and Anr.*). It was held in this case that a prayer for cancellation of a deed consequent on the declaration of a document as representing a sham transaction is purely a surplusage and that if it is found as a fact that what was represented to be done by the document did not in fact exist nothing remained to be cancelled. So in our opinion in the absence of a prayer for cancellation of a document which is a sham and colourable one the suit can not fail. The effect of declaration is that the document is a sham and colourable one and the parties are bound by the declaration. The party executing the document and the party in whose favour the document is executed are both present before the Court, and the finding as regards the nature of the documents is *res judicata* as between them and is binding on them. It is an idle proposition to suggest that they can ignore the finding of the High Court and deal with a third party representing that the document is a genuine one. Any party who proposes to do it, does it at his peril. We, therefore, overrule the objection of Mr. Banerjee that Section 31 of the Specific Relief Act is a bar to the petitioner's getting any relief on this revisional application.

25. We now come to the last phase of the argument regarding the maintainability of the petition on the basis of the point raised by Mr. Saktinath Mukherjee. As already stated Mr. Mukherjee has raised a new point regarding the petitioner's claim over the disputed properties which have been transferred by Sarojini on the basis of two deeds in favour of defendants Nos. 2 and 3. We have already found that these two documents have been found to be sham and colourable documents by the two appellate courts and that the said finding is binding on both the parties. Mr. Mukherjee's contention is that the transactions made by these two deeds are also benami ones. According to him two kinds of benami are in existence in this country. One is a transaction by which a person actually purchases a property for good consideration in the name of another person. The other kind of benami is when the owner of a property ostensibly transfers a property in favour of another person by creating a sham document without any consideration. Mr. Mukherjee's argument is that the Benami Transactions (Prohibition) Act covers both these

types of benami transactions. When there is a real transaction, but in the name of another person, it is covered by Section 3 of the Act. On the other hand when there is a sham transaction it comes under Section 4 of the Act. Thus according to Mr. Mukherjee any claim or right arising out of a sham or fraudulent transaction held benami in the name of any person cannot be enforced against him by the real owner. Neither any defence in respect of such property is available against the person in whose name the property is held benami. Following these legal propositions properties transferred by Sarojini on the basis of the two sham documents cannot be claimed in this case. It is necessary to see how far such an argument is tenable.

26. We have already briefly referred to the scheme of the Act. The Act purports to prohibit benami transactions and the right to recover property held benami. 'Benami transaction' has been defined as a transaction in which property is transferred to one person for a consideration paid or provided by another. So for a benami transaction there must be a transfer of a property for consideration. Evidently, therefore, a sham transfer without any consideration is not a 'transfer' within the meaning of a benami transaction. Section 3 of the Act refers plainly to a benami transaction. The marginal Note of the section is 'Prohibition of benami transactions'. The marginal Note of the Section 4 on the other hand is 'Prohibition of the right to recover property held benami'. The expression 'held benami' has not been defined. So its meaning should be ascertained in the context of the entire Act.

27. In Mulla's Hindu Law benami transactions have been explained as follows :-

'Where a person buys property with his own money, but in the name of another person or buys property in his own name but subsequently transfers it into the name of another person without any intention in either case to benefit such other person, the transaction is called 'benami' and the person in whose name the transaction is effected is called 'benamidar'.'-Article 604, page 589, 16th Edition.

28. In the definition of a benami transaction in the Benami Transactions (Prohibition) Act, 1988 the intention of the transfer is immaterial and subject to the provisions of Sections 3 and 4 a benami transaction is prohibited and

unenforceable either by way of claim or defence. A voidable transfer made with intent to defraud a creditor coming under Section 53 of the [Transfer of Property Act, 1882](#) is also a benami transaction in the popular sense of the term, but the legal position in respect of such transfers has been kept unaffected by the operations of the Benami Transactions (Prohibition) Act (vide Section 6 of the Act). It may be seen that transfers referred to in Section 6 of the Act are benami transactions as well and that the laws mentioned in the said section are enforceable for avoiding such transactions in addition to the provisions of the Benami Transactions (Prohibition) Act. But void transactions on the basis of sham and colourable documents are distinctly separate from the voidable transactions mentioned above. A void transaction is void ab initio and need not be set aside. We have hereinbefore referred to the distinction between void and voidable transactions as recognised in law. There is evidently no question of enforcing or defending a void transaction with the help of Section 4 of the Benami Transactions (Prohibition) Act. Examples of void transfers may be seen in clause (h) of Section 6 of the Transfer of Property Act. This, therefore, answers the question raised by Shri Mukherjee. A transaction which is void ab initio is not contemplated in the scheme of the Benami Transactions (Prohibition) Act.

29. Reverting now to the facts of the present case we find that the transaction effected by Sarojini in favour of defendant Nos. 2 and 3 being void ab initio need not be specifically cancelled. We also find that Section 4 of the Benami Transactions (Prohibition) Act is no bar to the parties' getting any relief in the partition suit. So far as the purchase by Sarojini is concerned, Section 4 of the Act applies to this purchase and none of the parties is entitled to claim any right on the relevant properties inconsistent with the title of Sarojini thereto.

30. The learned Assistant District Judge has deleted the properties held in the benami of Sarojini from the schedule of the partible properties. But things have radically changed after the death of Sarojini. The properties held by her as a benamidar devolved on her heirs after her death. All those heirs are parties to the suit. So the relevant properties need not be deleted from the schedule. These will be partitioned among heirs according to the shares to be ascertained by the Trial Court. The plaintiffs are given liberty to amend the plaint in the face of the

subsequent development of facts.

31. This revisional application accordingly succeeds. The order dated 14.3.90 of the Trial Court deleting the 'Kha', 'Ga', 'Gha', and 'Uma' schedule properties from the plaint and the preliminary decree is hereby set aside. The Trial Court will now proceed to effect a final decree after ascertaining the shares of the heirs of Paresh and Naresh who inherited their mother's share of the property. There will be no order for costs in this proceeding. On an oral prayer the operation of the judgment is stayed for four weeks, although the same is vehemently opposed. Xerox copy of the judgment may be made over to the parties on the usual undertaking.

Bhagabati Prasad Banerjee, J.

32. I agree.

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