



\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **RFA No. 35/2002 and**  
**RFA No. 197/2002**

% **3<sup>rd</sup> January, 2012**

+ **RFA 35/2002**  
**P.E. LYALL** ..... Appellant  
Through : Ms. Richa Kapoor, Advocate.

versus

**BALWANT SINGH** ..... Respondent  
Through : Mr. R.M. Sinha, Advocate.

**AND**

+ **RFA 197/2002**  
**P.E. LYALL** ..... Appellant  
Through : Ms. Richa Kapoor, Advocate.

versus

**BALWANT SINGH** ..... Respondent  
Through : Mr. R.M. Sinha, Advocate.

**CORAM:**  
**HON'BLE MR. JUSTICE VALMIKI J.MEHTA**

To be referred to the Reporter or not? **Yes**

**VALMIKI J. MEHTA, J. (ORAL)**

1. The challenge by means of these two Regular First Appeals (RFAs) filed under Section 96 of Code of Civil Procedure, 1908 (CPC) is to the



impugned judgment and decree dated 15.12.2001.

2. The impugned judgment and decree disposed of two suits, suit Nos. 451/1995 and 34/2001. Suit No. 451/1995 was a suit filed by the respondent/plaintiff for possession of portion of ground floor of the property No. D-1043, ward No. 8, opposite Babar Kothi, Mehrauli, New Delhi (hereinafter, referred to as the suit/subject property). Suit No. 34/2001 was a suit filed for injunction to restrain the defendants in the suit from carrying out any construction on the suit property. Plaintiff in the suit, and the respondent herein, Sh. Balwant Singh claimed the reliefs of possession and injunction on the ground that he was the owner of the suit property. There were four defendants in the suit. Defendant No. 1 Mrs. P.E. Lyall, the appellant herein, is the sister of the plaintiff/Sh. Balwant Singh. The other defendants being defendant Nos. 2 to 4 were the legal heirs of the late brother of the respondent/plaintiff namely, late Sh. George J. Singh. Defendant No. 2 was the widow of late Sh. George J. Singh and defendant Nos. 3 and 4 were the children of late Sh. George J. Singh. Defendant Nos. 2 to 4, after passing of the impugned judgment, had vacated the portion in their possession i.e. a portion in the ground floor of the property.

3. The dispute is now confined only to original defendant No.1-Smt. P.E. Lyall, who is the appellant in this Court, and between the original plaintiff-Sh.



Balwant Singh, who is the respondent herein.

4. I may state that for the sake of convenience I am referring to respondent as the original plaintiff-Sh. Balwant Singh, inasmuch as, Sh.Balwant Singh, original respondent in the appeals expired during the pendency of the appeals and is now represented by his legal heirs. Reference in this judgment will be made to original appellant and the original respondent when the appeals were filed i.e. to plaintiff/respondent-Sh. Balwant Singh and defendant No. 1/appellant-Smt. P.E. Lyall.

5. Suit No. 451/1995 was a suit for possession which was filed on 18.4.1988. The suit for injunction being suit No. 34/2001 was filed on 21.11.1987. I am giving dates with respect to the filing of the suits inasmuch as the only issue which has been argued before this Court was the claim with respect to the respondent/plaintiff not being actual owner of the property, but only being the benamidar, and that it was the father/late Sh Jiwan Singh who was stated to be a real owner of the property. The dates of filing of the suits are important inasmuch as the Benami Transactions (Prohibition) Act, 1988 came in to force on 19.5.1988. After coming into force of the Benami Transactions (Prohibition) Act, 1988 (hereinafter, referred to as 'the Act'), no suit can be filed to claim rights in a property on the ground that the property was held benami. Similarly, a defence which alleges that a property was



benami and the actual owner was someone else, was also prohibited. This was a mandate of Section 4 of the Act. Though the Supreme Court initially in the case titled as *Mithilesh Kumari & Anr. v. Prem Behari Khare, AIR 1989 SC 1247* had held that the Act was retrospective in operation and would even apply to pending proceedings, subsequently however, a Division Bench of three Judges in the case of *R.Rajagopal Reddy v. P.Chandrasekharan, AIR 1996 SC 238* held that the passing of the Act will not affect pending proceedings i.e. the Act will not apply where/when a suit has already been filed before passing of the Act taking up the plea that the property was held as benami or when the defences of the property being benami were already taken up before passing of the Act.

The suits which were filed by the respondent/plaintiff were for possession and injunction on the basis of title in his favour and therefore, the issue will be whether defences can be permitted in these suits setting up a case that the respondent/plaintiff is only a benamidar whereas the real owner was the father-late Sh. Jivan Singh.

6. So far as the suit for possession is concerned, the same was filed in 18.4.1988 wherein the written statement taking up the plea of benami was filed by the appellant on 28.7.1988. In the suit for injunction which was filed on 21.11.1987, written statement was filed on 18.7.1988. Thus, in both the



suits the written statements were filed by appellant/defendant No.1 after promulgation of the Act. The written statement, therefore, taking up a defence of benami was clearly prohibited inasmuch as the written statement taking up the defence of benami is specifically barred as per Section 4(2) of the Act. This aspect has been clarified by the Supreme Court in the judgment of *R.Rajagopal Reddy* (Supra) case which has held as under:-

13. So far as Section 4(2) is concerned, all that is provided is that if a suit is filed by a plaintiff who claims in his favour and holds the property in his name, once Section 4(2) applies, no defence will be permitted or allowed in any such suit, claim or action by or on behalf of a person claiming to be the real owner of such property held benami. The disallowing of such a defence which earlier was available, itself, suggests that a new liability or restriction is imposed by Section 4(2) on a pre- existing right of the defendant. Such a provision also cannot be said to be retrospective or retroactive by necessary implication. It is also pertinent to note that Section 4(2) does not expressly seek to apply retrospectively. So far as such a suit which is covered by the sweep of Section 4(2) is concerned, the prohibition of Section 4(1) cannot apply to it as it is not a claim or action filed by the plaintiff to enforce right in respect of any property held benami. On the contrary, it is a suit, claim or action flowing from the sale deed or title deed in the name of the plaintiff. *Even though such a suit have been filed prior to 19.5.1988, if before the stage of filing of defence by the real owner is reached, Section 4(2) becomes operative from 19th May, 1988, then such a defence, as laid down by Section 4(2) will not be allowed to such a defendant.* However, that would not mean that Section 4(1) and 4(2) only on that score can be treated to be impliedly retrospective so as to cover all the pending litigations in connection with enforcement of such rights of



real owners who are parties to benami transactions entered into prior to the coming into operation of the Act and specially Section 4 thereof. It is also pertinent to note that Section 4(2) enjoins that no such defence 'shall be allowed' in any claim, suit or action by or on behalf of a person claiming to be the real owner of such property. That is to say no such defence shall be allowed for the first time after coming into operation of Section 4(2). If such a defence is already allowed in a pending suit prior to the coming into operation of Section 4(2), enabling an issue to be raised on such a defence, then the Court is bound to decide the issue arising from such an already allowed defence as at the relevant time when such defence was allowed Section 4(2) was out of picture. Section 4(2) nowhere uses the words "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 to be raised or continued to be raised in any suit." With respect, it was wrongly assumed by the Division Bench that such an already allowed defence in a pending suit would also get destroyed after coming into operation of Section 4(2). We may at this stage refer to one difficulty projected by learned advocate for the respondents in his written submissions, on the applicability of Section 4(2). These submissions read as under :-

Section 4(1) places a bar on a plaintiff pleading 'benami', while Section 4(2) places a bar on a defendant pleading 'benami', after the coming into force of the Act. In this context, it would be anomalous if the bar in Section 4 is not applicable if a suit pleading 'benami' is already filed prior to the prescribed date, and it is treated as applicable only to suit which he filed thereafter. It would have the effect of classifying the so-called 'real' owners into two classes - those who stand in the position of plaintiffs and those who stand in the position of defendants. This may be clarified by means of an illustration. A and B are 'real' owners who have both purchased properties in say 1970, in the names of C and D respectively who are ostensible owners viz.



benamidars. A files a suit in February 1988 i.e. before the coming into force of the Act against C, for a declaration of his title saying that C is actually holding it as his benamidar. According to the petitioner's argument, such a plea would be open to A even after coming into force of the Act, since the suit has already been laid. On the other hand, if D files a suit against B at the same for declaration and injunction, claiming himself to be the owner but B's opportunity to file a written statement comes in say November 1988 when the Act has already come into force, he in his written statement cannot plead that D is a benamidar and that he, B is the real owner. Thus A and B, both 'real' owners, would stand on a different footing, depending upon whether they would stand in the position of plaintiff or defendant. It is respectfully submitted that such a differential treatment would not be rational or logical.

14. According to us this difficulty is inbuilt in Section 4(2) and does not provide the rationale to hold that this Section applies retrospectively. The legislature itself thought it fit to do so and there is no challenge to the vires on the ground of violation of Article 14 of the Constitution. It is not open to us to re-write the section also. Even otherwise, in the operation of Section 4(1) and (2), no discrimination can be said to have been made amongst different real owners of property, as tried to be pointed out in the written objections. In fact, those cases in which suits are filed by real owners or defences are allowed prior to coming into operation of Section 4(2), would form a separate class as compared to those cases where a stage for filing such suits or defences has still not reached by the time Section 4(1) and (2) starts operating. Consequently, latter type of cases would form a distinct category of cases. There is no question of discrimination being meted out while dealing with these two classes of cases differently. A real owner who has already been allowed defence on that ground prior to coming into operation of Section 4(2) cannot be said to have been given a better treatment as compared to the real owner who



has still to take up such a defence and in the meantime he is hit by the prohibition of Section 4(2). Equally there cannot be any comparison between a real owner who has filed such suit earlier and one who does not file such suit till Section 4(1) comes into operation. All real owners who stake their claims regarding benami transactions after Section 4(1) and (2) came into operation are given uniform treatment by these provisions, whether they come as plaintiffs or as defendants. Consequently, the grievances raised in this connection cannot be sustained.”

*(Emphasis added)*

7. A reference to the aforesaid paras shows that it is clearly mentioned in the highlighted portion of para 13 above, that a defence of benami taken after passing of the Act will not be allowed by virtue of Section 4(2) of the Act. A further reference to the highlighted portion of para 14 shows that the Supreme Court specifically held that though there was discrimination with respect to defences which were already taken up prior to coming into force of the Act and those defences were pleaded after coming into force of the Act, however, the Supreme Court observed that such discrimination is inbuilt in the provision and a grievance raised that discrimination is caused cannot be sustained.

8. Though, the impugned judgment of the trial Court is a detailed judgment running into 26 pages and deciding all the issues in the two suits, I need not go into the details on any of these aspects inasmuch as the only issue which is required to be determined in this appeal, and as argued before me,



was with respect to the plea of benami i.e the appellant claimed that respondent/plaintiff was not a real owner of the property because the funds for the purchase of property were infact given by the father of the parties late Sh. Jivan Singh.

Since I am not required to go into the merits of the matter, I am not going into the issue on merits as to whether really the respondent is the actual owner as contended by him or he was only a benamidar, as argued by the appellant. The appellant before the trial Court had tried to show that the respondent had no earnings and was of a very young age having just taken employment, though, on this very basis it cannot be said that automatically the property will become benami inasmuch as it is possible that the father can be said to have gifted the moneys to the respondent/plaintiff and therefore the property was purchased in the name of respondent/plaintiff. A leading judgment laying down the indicias for deciding whether property held benami or not is the judgment of the Supreme Court in the case of *Jaydayal Poddar v. Smt. Bibi Hazara and Ors. AIR 1974 SC 171* and which provided for five indicias to decide the benami ownership of the property. As to who provided the funds/source of money is only one (and not the sole) indicia, another indicia being the motive for giving the transaction a benami colour, and which if does not exist the property will not be benami even if funds are provided by



a person other than the benami owner. Therefore, on merits there could have been something to be said in favour of either the appellant or the respondent qua the issue of benami nature of property. Of course I must hasten to add that the trial Court has held that no document has been proved by the appellant/defendant No.1 showing giving of the funds from the retirement benefits of the father for purchase of the property in question.

9. Though, the respondent/plaintiff had raised the plea of bar of the Act before the trial Court, the trial Court has very surprisingly chosen to give findings on merits that the property is not benami, although, once the plea of bar of the defence of benami was raised by the respondent/plaintiff, the trial Court in fact ought to have instead of deciding the issue on merits, disposed of the suit on account of bar to the taking of defence in the written statement of the property benami in view of Section 4(2) of the Act.

10. In view of the above, I hold that the defences which were taken by the appellant/defendant No.1 in the two suits of the plaintiff/respondent being only a benamidar and not the real owner and that the father-late Sh. Jiven Singh was the owner of the property are hit by provision of Section 4(2) of the Act. Since the defence itself is barred, nothing else is required to be looked into.

11. No other issue was urged or pressed before me.



12. I, therefore, sustain the judgments and decrees for possession and injunction passed in favour of the respondent/plaintiff and against the appellant/defendant No.1.

13. In view of the above, both the appeals are dismissed leaving the parties to bear their own costs. Trial Court record be sent back.

**VALMIKI J. MEHTA, J.**

**JANUARY 03, 2012**

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