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PROBODH CHANDRA GHOSH

v.

URMILA DASSI AND ANR.

JULY 25, 2000

B

[A.P. MISRA AND MS. RUMA PAL, JJ.]

Code of Civil Procedure, 1908:

C *S.144, Order 21, Rule 35—Application for restitution—Applicability of Benami Transactions/Prohibition Act, 1988—Execution proceeding arising out of proceedings under S.144 initiated by transferee Application u/s. 144 allowed on 4.3.1988—Three month's time granted to respondent to restore possession—Respondent not contesting the same—Meanwhile w.e.f. 19.5.1988 Benami Transactions Prohibition Act came into operation—On 30.7.1988*

D *possession delivered to appellant—Delivery of possession challenged in revision before High Court as violative of s.4 of the Act—Revision allowed—Held, the claim or action, if at all, which could be said to have been made by appellant was when he filed the application u/s. 144 on 17.4.1976 which is prior to the Act coming into force—Even order passed allowing the same on 4.3.1988 was prior to it—merely restoring possession under Order 21,*

E *Rule 35 subsequent to the Act, would have no effect on the bar of s.4 of the Act Passing an order—Order 21, Rule 35 is an act of Court, it is not an act by way of action or claim made by appellant—Benami Transactions Prohibition Act, 1988—S.4.*

F *S. Rajagopal Reddy (dead) by Lrs.* v. *Padmini Chandra Sekharan (dead) by Lrs.* **[1995] 2 SCC 630, referred to.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2351 of 1989.

From the Judgment and Order dated 12.10.88 of the Calcutta High Court

G in C.O. No. 2613 of 1988.

S.K. Bhattacharya for the Appellant.

N.R. Choudhary and J.P. Pendey for the Respondents.

The following Order of the Court was delivered :

H

Heard learned counsel for the parties. A

This appeal is directed against the order of the High Court dated October 12, 1988 allowing the application under Section 115, CPC, through which the order dated 20th July 1988 was challenged, in case No. 13 of 1986, whereby a writ for delivery of possession under Order 21, Rule 35 of the CPC was made. B

The question raised for our consideration is, whether the provisions of Benami Transaction (Prohibition of right to recover property) Ordinance 1988, which has been replaced by Benami Transactions Prohibition Act, 1988 will apply to an execution proceedings arising out of the proceeding under Section 144 CPC, initiated by the transferee from the heiress of the real owner against the benamidar. In other words, submission is, whether the word 'action' and 'claim', appearing in Section 4 of the Act means and includes proceeding under Section 144 CPC. C

The short facts are that the disputed suit property was originally in the name of one Tulsi Bala. A part of this suit property lying in plot No. 615 was purchased in the name of Urmila Dassi who is respondent before us and after the death of Tulsi Bala she became the sole heiress. Some time in 1952 in Revisional Settlement operation the property was recorded in the names of Anil Mani Dassi and Urmila Dassi. Anil Mani Dassi on 10th May, 1967 sold the entire suit property to Probodh Chandra Ghosh, the appellant before us after getting the said suit property in partition. Dasarathi was amongst the other co-sharer and this property of Jadavpur was allotted to Urmila Bala exclusively. Immediately after the aforesaid purchase by the said Probodh Chandra Ghosh, he took possession of the suit property. This led to the filing of the suit by the respondent. She prayed for a declaration of her title and also for declaration that the aforesaid sale deed dated 10th May, 1967 was not binding on her and for the recovery of possession of the same. Her case was that the suit property was purchased by her mother from her stridhan. The suit was decreed. Thereafter, the appellant filed an appeal and during the pendency of the appeal, the respondent Urmila Dassi took possession of the suit property on 21st February, 1976 from the appellant by executing the decree through court. Finally the appeal was disposed of and the decree of the trial court was reversed. Thereafter, the respondent Urmila Dassi preferred a second appeal which was disposed of by confirming the appellate court judgment and decree. Against this judgment, SLP was preferred by the respondent which was also dismissed on 7th August, 1987. D E F G H

A Consequently on the 17th April 1986 the appellant filed an application under Section 144 CPC for restoration of possession. On the 4th March, 1988 the application for restoration was allowed. However, three months time was granted to the respondent to restore back the possession. The case is that in these proceedings the respondent did appear but did not contest the same. At this point of time the cause of action of the present disputes arose as during this inter magnum on the 19th May, 1988, Benami Transaction (Prohibition of right to recover property) Ordinance of 1988 came into force. On the 20th July, 1988 a writ for restoration of possession to the appellant was issued under Order 21 Rule 35. On the 30th July, 1988 possession was delivered to the appellant. This delivery of possession was challenged by the respondent Urmila Dassi before the Calcutta High Court. This revision was allowed and the order for delivery of possession to the appellant was set aside on the ground that the same is violative of the provision of Section 2 of the aforesaid Ordinance which is Section 4 of the Act. It is this order in revision, which is the subject matter of challenge before us. It is interesting that both, the learned counsel for the appellant and learned counsel for the respondent are relying on the same judgment reported in *S. Rajagopal Reddy (dead) by Lrs.* v. *Padmini Chandra Sekharan (dead) by Lrs.*, [1995] 2 SCC 630. Learned counsel for the appellant with reference to Section 4 of the said Act submits that provision of Section 4 of the Act is not retrospective in operation and hence, as this claim if at all was pending when the Act came into force, hence Section 4 would have no application. Thus finding to the contrary recorded by the High Court is liable to be set aside, while counsel for the respondent sumits, this decision holds Section 4 to be retrospective in operation.

This section spells out "No suit, claim or action to enforce any right in respect of any property held by benamidar shall lie by or on behalf of a person claiming to be real owner of this property." Based on this for the respondent it is submitted that it is not in dispute that the respondent is holding the property as benamidar, and the appellant is claiming as the real owner of the property hence the present application under Section 144, CPC would be barred. Learned counsel for the appellant relying on the aforesaid decision submits that Section 4 (1) is not retrospective hence it would not apply to the pending proceedings, viz., suits, claims and actions which is already filed prior to the coming into force of Section 4. In other words, what is barred is the filing of the suit claims or actions by the real owner enforcing his right in respect of any property held by a benamidar. The aforesaid decision further records that the operation of sub-section (1) of Section 4 also

includes past transactions where any right acquired by any one as a real owner, in respect of the property held by a benamidar. This is highlighted with the illustration, namely if a benami transaction has taken place in 1980 and suit is filed in June 1988 by the plaintiff claiming that he is real owner of the property and defendant is merely a benamidar then such a suit would not lie in view of Section 4 (1), this Court in the said decision held:

> "With respect, the view taken that Section 4 (1) would apply even to such pending suits which were already filed and entertained prior to the date when the section came into force and which has the effect of destroying the then existing right of plaintiff in connection with the suit property cannot be sustained in the face of the clear language of Section 4(1). It has to be visualised that the legislature in its wisdom has not expressly made Section retrospective."

However, learned counsel for the respondent relies on another portion of the same decision, which is quoted hereunder.

> "It is, however, true as held by the Division Bench that on the express language of Section 4 (1) any right inhearing in the real owner in respect of any property held benami would get effaced once Section 4(1) operated, even if such transaction had been entered into prior to the coming into operation of Section 4 (1) and hence after Section 4 (1) applied no suit can lie in respect to such a past benami transaction. To that extent the section may be retroactive."

The submission for the respondent relying on this quoted portion is misconceived. This Court in earlier part held, this section to be not retrospective but what this last quoted portion refers is, it would cover past transactions between real owner and benamidar. The transactions in other words may be of the past but the suit claim or action would not lie subsequent to the coming into force of the Act.

He further submits, in the earlier proceedings, as we have referred above, the matter became final between the parties, where it is recorded that the respondents are benamidars. If that be so, the present action by the appellant would not lie. We do not find any merit in this submission. What is to be seen in terms of Section 4 is, whether the appellant has filed any suit claim or action subsequent to the coming into operation of the present Act or not? If suit, claim or action was pending on the date this Act came into force, then it would continue to be adjudicated in accordance with law and

A bar of Section 4 would not be applicable. This leads us to find, what are the facts in the present case, whether the suit, claim or action has been filed subsequent to the coming into operation of the said Act or what was pending then. If it was pending, then bar of Section 4 would not apply. The facts as recorded above is, after passing of the decree in favour of the respondent by the trial court, during the pendency of the appeal the decree was executed B and respondent got the possession of the suit property. Subsequent after reversal of the Trial Court order, the claim of the appellant became final when respondent's special leave petition was dismissed by this Court. Then the appellant made an application under Section 144 CPC on the 17th April, 1986. On the 4th March, 1988, the said application was allowed. Though the C respondent appeared in the proceedings but did not contest the same. It is only thereafter on the 19th May, 1988, the aforesaid Ordinance came into force. On the 20th July, 1988 a writ of restoration of possession was given under Order 21, Rule 35 and the possession was actually delivered on 30th July, 1988.

D Learned counsel for the respondent submits the claim or action under Section 4 includes the execution proceedings which culminates only when the possession is delivered under the decree and as that was done through an order under Order 21 Rule 35 CPC which was subsequent to the aforesaid Ordinance hence the claim of the appellant was barred by Section 4 and the same is unsustainable in law. This submission is based on the misconstruction E of Section 4. In the present case it is not necessary for us nor we are adjudicating the periphery of the word "claim" or "action" under section 4 as to whether it would include execution proceedings or not. Here we are merely deciding, whether on the admitted facts, any claim, action or suit was pending or not or whether the appellant has filed any suit, claim or action after the F Act came into force? As we have recorded above the claim or action, if at all, which could be said to have been made by the appellant was when he filed an application under section 144 CPC on the 17th April, 1976 which is prior to the Act coming into force. Even an order was passed allowing the same on 4th March, 1988 which was prior to the said Ordinance coming into force. Merely restoring possession, subsequent to the said Act under Order G 21 Rule 35 would have no effect on the bar of Section 4. Once it is undisputed that an application under Section 144 CPC was made prior to the Act then the claim would be pending on the date when the Act came into force. Once it could be said the claim was pending then in terms of the said Section 4, such a claim would not be barred.

H Accordingly, we find High Court fell into error in interpreting, Section

4 to be retrospective in operation. In fact word 'claim' means something on which right is sought to be enforced for which there is a denial. In the present case, we find, when possession was ordered, allowing application under Section 144 CPC was passed on the 4th March, 1988, there was no contest by the respondent. Thus when order is passed under Order 21, Rule 35 formally restoring the possession was not only consequential order to the order without contest, so any claim if at all stood satisfied prior to the Act coming into force. In any case it cannot be construed to be a claim or action taken after Act came into force. Passing an order under Order 21, Rule 35 is an act of the court, it is not an act by way of action or claim made by the appellant. What is barred in making claim or action by the original owner. The appellant is the owner and he has not made any such claim. The claim if at all was making application under Section 144 which was prior to the Act, which would be deemed to be pending when Act came into force. Hence all these reasons the submissions on behalf of the respondents, have no force. No bar to these proceedings would be said by virtue of Section 4 of the Act.

A B C

Accordingly, we allow this appeal and set aside the impugned revisional order dated 12th October, 1988 of the High Court. Costs on the parties.

D

R.P. Appeal allowed.