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**(2003) 132 TAXMAN 238**

**High Court Of Kerala**

**Case No:** S.A. No. 5 of 2003 (A) 11 July 2003

Eldho

APPELLANT

Vs

Alias

RESPONDENT

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**Date of Decision:** July 11, 2003

**Acts Referred:**

Benami Transactions (Prohibition) Act, 1988 " Section 3, 4

**Citation:** (2003) 132 TAXMAN 238

**Hon'ble Judges:** Pius C. Kuriakose, J; K.S. Radhakrishnan, J

**Bench:** Full Bench

**Advocate:** P.N. Ravindran, M.M. Abdul Aziz and M.A. Abdul Hakhim, for the Appellant;

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### **Judgement**

K.S. Radhakrishnan, J.

This appeal has been placed before us on a reference made R. Bhaskaran, J. since an interesting question of law on the scope and ambit of section

4(2) of the Benami Transactions (Prohibition) Act, 1988 (hereinafter referred as to "the Act") has come up for consideration.

2. The question that is posed for consideration is whether section 4(2) of the Act would debar a defendant in a suit for injunction from disputing the

possession of the plaintiff. learned judge of this court, Manoharan, J., at an interlocutory stage in C.R.P. No. 2179 of 1993 arising out of the

present suit held that as per section 4(2) of the Act first defendant is not entitled to rely on the said section to support his case that he is in

possession of the property.

3. Before we deal with the question raised in this case, we will refer to certain facts. Plaintiff schedule property measuring 1 acre and 46 cents of

land comprised in survey number 614/4A was purchased by the plaintiff as per document No. 1378/85 dated 22-4-1985 and accordingly he is in

possession and enjoyment of the property. Defendants 1 to 3 are the brothers of the plaintiff's father. Fourth defendant is the grandmother of the

plaintiff. There were disputes between the plaintiff and defendants regarding family properties. Defendants caused obstruction in carrying out

agricultural operation in the plaintiff schedule property. Hence suit was instituted for injunction.

4. Suit was resisted by the defendants. According to the first defendant, he is the owner in possession of the schedule property and other

defendants are unnecessary parties to the suit. First defendant was employed in the Kerala State Electricity Board as provisional Meter Reader.

He wanted to start a brick industry but since he was employed in the Electricity Board, it was not possible for him to start the industry. He

negotiated for the purchase of the plaintiff schedule property with its owner and the same was purchased in the name of the plaintiff, but the first

defendant continued to be in possession of the property. The first defendant denied the possession of the plaintiff.

5. Plaintiff in order to establish possession placed reliance on Exts. A I to A4 documents and examined P.Ws 1 to 7. On the side of the defendants

Exts. B1 to B18 documents were produced and D.Ws 1 to 12 were examined. Ext. C1 is the commission report and Ext. C I (a) is rough sketch.

Considering the oral and documentary evidence, the trial court came to the conclusion that the plaintiff was not having possession or enjoyment of

the plaintiff schedule property on the date of the suit. This finding was confirmed by the lower appellate court. Therefore, there is a concurrent finding

that the plaintiff has failed to prove; that he was in possession of the property on the date of the suit. We at the stage of the second appeal do not

find any reason to disturb the said concurrent finding of the courts below that plaintiff was not in possession of the plaint schedule property on the date of the suit.

6. The question that is now posed for consideration is whether even if the plaintiff was not in possession of the plaint schedule property on the date

of the suit, could the defendants raise such a defence in view of the provision contained in section 4(2) of the Act. Counsel appearing on both sides

placed their own interpretation regarding the above-mentioned provision. Before we deal with the rival contentions we may point out that prior to

the commencement of the Benami Transactions (Prohibition) Act, 1988 benami transactions were valid in India and could be enforced through a

court of law. Section 3 of the Act prohibits a person from entering into any benami transaction. A person entering into benami transactions shall be

punishable with imprisonment for a term which may extend to three years or with fine or with both. Section 4(1) of the Act states that 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 the property. Section 4(2) stipulates that 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 subject to certain exceptions. Scope

of the above-mentioned provision came up for consideration before the Apex Court in *Mithilesh Kumar and Another Vs. Prem Behari Khare*, .

The Apex Court in the above case held that section 4(1) of the Act could be pressed into service prior to the coming into operation of the section.

So also u/s 4(2) in whose name the property is held, no defence can be allowed to such persons who have properties held in benami. Overruling

the aforesaid decision in *R. Rajagopal Reddy and Others (deceased by legal representatives) Vs. Padmini Chandrasekharan (deceased by legal*

representatives), held as follows :

So far as section 4(2) is concerned, all that is provided is that if a suit is filed by a plaintiff who claims to be the owner of the property under the

document 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.

7. Counsel appearing for the defendants laid considerable stress on the words ""held benami"" occurring in section 4(1) as well as section 4(2) of the

Act. Counsel submitted that not only plaintiff should have title to the property but also he should be in possession of the property when he files a

suit for injunction. We have already found that plaintiff was not having possession of the property on the date of the suit though the document

stands in his name as benami. In an injunction suit plaintiff has to succeed not on the weakness of the defendants. Plaintiff has necessarily to show

that he was in possession of the property on the date of the suit. Suit is admittedly not for declaration of title but for injunction simpliciter. In a suit

for injunction possession is relevant. To prove possession plaintiff has to show that he was exercising acts of dominion over the property. A Full

Bench of this court in Kesava Bhat v. Subraya Bhat 1979 KLT 766 held that in a suit for injunction, the court is concerned only with the question

of possession - the nature and the character of the possession is immaterial. In the instant case the plaintiff holds property as benami of the first

defendant, but he could not establish possession of the plaint schedule property on the date of the suit. Consequently, in our view, prohibition

contained in section 4(2) of the Act is of no consequence since plaintiff himself has to prove his possession as on the date of the suit. Further the

Act was enacted to prohibit benami and the right to recover property held benami and for matters connected therewith or incidental thereto. In the

instant case sale deed was executed in the year 1985, when benami transactions were not prohibited. Further the first defendant is not trying to

recover the property from the plaintiff. The defendant's case is that plaintiff was never in possession and was never put in possession. In other

words, prohibition u/s 4(2) would not stand in the way of the first defendant contending that plaintiff could not establish his possession as on the

date of the suit. Perhaps such a defence would not be available to the first defendant if the suit was for declaration of title.

8. We therefore hold that in spite of section 4(2) of the Act plaintiff could succeed in a suit for injunction only if he could establish his possession of

the property on the date of the suit. In this case, both the courts have concurrently found that plaintiff could not establish possession on the date of

the suit. We therefore hold that plaintiff is not entitled to get any relief in the suit. Therefore the contention that the defendant could not contend that

the plaintiff was not in possession of the property on the date of the suit in view of the bar contained in section 4(2) of the Act, cannot be sustained.

We are therefore in agreement with the finding of the lower appellate court and dismiss the appeal. No costs.