(1988) 08 KL CK 0029

High Court Of Kerala

Case No: S.A. No. 580 of 1983

VELAYUDHAN RAMAKRISHNAN AND OTHERS		APPELLANT
	Vs	
RAJEEV AND OTHERS.		RESPONDENT

Date of Decision: Aug. 1, 1988

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 66
- Constitution of India, 1950 - Article 19
- Income Tax Act, 1961 - Section 100, 281A
- Transfer of Property Act, 1882 - Section 41, 53
- Trusts Act, 1882 - Section 82

Citation: (1988) 73 CTR 1 : (1988) 174 ITR 482

Hon'ble Judges: K. Sukumaran, J

Bench: Division Bench

Judgement

K. SUKUMARAN J. -

Benami Ordinance :

The interpretation of the Benami Transactions (Prohibition of the Right to Recover Property) Ordinance, 1988 (hereinafter referred to as "the Ordinance"), arises for consideration in the second appeal. As to how the Ordinance is attracted to the case will be revealed from the facts to follow.

Facts of the case :

The facts of the case are short and simple.

The suit was filed for partition and the invalidation of exhibit A-3 document dated August 11, 1965, executed by the plaintiffs mother, the 3rd defendant. He claimed one-fifth share in the property and contended that the alienation effected by his

mother at a time when he was a minor was invalid as regards his share. One Padmanabhan was the original owner of the property. Through his first wife, he had two sons, Bhaskaran and Madhusoodanan, defendants Nos. 4 and 5. On the death of his first wife, Padmanabhan married Meenakshi, the 3rd defendant. Plaintiff, Rajeev, and the 6th defendant, Sarala, are the son and daughter born in that marriage connection.

Padmanabhan had acquired the property under exhibit A-1 sale deed dated February 9, 1961, executed by one Velayudhan. Padmanabhan died on July 4, 1965. It was soon therefter that the 3rd defendant executed exhibit A-3 (the original is exhibit B-3) purporting to be a release deed in favour of the 1st defendant, on her own behalf and on behalf of the plaintiff and defendants Nos. 4 to 6. Later, the 4th defendant affirmed that action by executing exhibit B-5 document on March 29, 1976.

The plaintiff contended that his mother had no authority to alienate the property in which, he, as a legal heir of Padmanabhan, had a one-fifth share.

The first defendant contended that he was the real owner and that Padmanabhan was only a benamidar. The second defendant is an assignee of a portion of the property.

Decisions of the courts below :

The trial court dismissed the suit. It held that Padmanabhan was only a benamidar. The appellate court differed from the trial court. It assessed the evidence independently and exhaustively. The fact that the consideration recited in the release deed is a paltry sum of Rs. 25 was noted by that court. This circumstance by itself will be sufficient to demonstrate that that transaction was positively prejudicial to the interests of the minor children, if they are the real owners of the property. The situation can be salvaged only if it is established that the 1st defendant was the real owner. The defendant, in his examination, displayed a total lack of familiarity with the crucial matters connected with the transaction. His impression about the consideration for the document came from the information conveyed to him by Padmanabhan. Evidence was lacking as to the availability of the financial resources for the acquisition of the property or about the actual payment of the recited consideration. The motive put forward as a justification for the benami transaction was also found to be unacceptable by the appellate court. On the above finding, the suit was decreed by the court below. The plaintiff s entitlement to one-fifth share was-declared. The 2nd defendant, purchaser of a portion of the property, was afforded some equitable adjustment.

The second appeal and its scope :

The appellate court decree has been challenged in second appeal. The success of the second appeal depends on the fallibility of the appellate finding.

Will the appellant get relief, even if the appellate finding is upset and exhibit A-1 is held to be a benami transaction ? The promulgation of the Presidential Ordinance, has a decisive effect on this aspect of the case.

The facts clearly reveal that the fundamental defence put up by the defendants is a plea of benami. If that plea is not available, the defence edifice will quickly collapse. This called for an interpretation of the scope and amplitude of the Ordinance.

Role of the court :

There and then comes the role of the court : the role as described by Lord Scarman in Furniss v. Dawson [1984] 1 All ER 530 [1984] STC 153 : "whatever a statute may provide, it has to be interpreted and applied by the courts; and ultimately it will prove to be in this area of judge-made law that our elusive journeys end will be found."

(As is known to every serious student of law, Furniss case [1984] 1 All ER 530 is a landmark judgment. Much has been already written about it. The assumption of the universality of the knowledge about it is well-reflected in Roger Whites academic article "The New Approach ..." (1986 British Tax Review, page 18) where he imaginatively portrays the picture of the armchair and the little girl with the question :

"Daddy, what did you do before Furniss v. Dawson ?")

Scheme of the Ordinance :

The Ordinance is a short one containing only four sections. It came into effect on May 19, 1988. The long title indicates the object as "to prohibit the right to recover property held benami and for matters connected therewith or incidental thereto". Section 2 is the material section. Sub-section (3) of that section has no application to the case. The remaining portion of section 2 may be conveniently extracted :

"2. 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."

Section 3 culls an exception in relation to a class of cases. The Ordinance is not to affect the provisions of section 53 of the Transfer of Property Act, 1882, or any law relating to transfers for an illegal purpose. u/s 4, repeal of three important statutory

provisions is effected : Section 82 of the Indian Trusts Act, 1882, section 66 of the Code of Civil Procedure, 1908, and section 281A of the Income Tax Act, 1961. Sub-section (2) of section 4 is not very material for the purpose of the present case.

A little bit of history :

Benami literally means "without name". The word "benami" is "a stray visitor to the world of legislation", though it is "a familiar figure in the judicial sphere". The reason for the phenomenon is that the words "benami transactions" do not figure in many statutory provisions. That is not so with judicial decisions. The benami transaction had been noticed as early as the year 1778 (Justice Hides notes vouch for it). Sheikh Bahauder Ali v. Sheikh Dhomun, 1 Beng. Sud. Dew. Rep. 250, would indicate that the principle relating to a purchase in anothers name, called by that law as "furzee" or fictitious name, had been recognised by the Mohamedan Law. The law on this topic was discussed by the Judicial Committee of the Privy Council in 1843. (Dhurm Das Pandey v. Mussumat Shama Soondri Dibiah, [1843] 3 MIA 229. An exhaustive discussion by the Privy Council is available in Gopeekrist Gosain v. Gungapersaud Gosain [1854] 6 MIA 53 (PC). That case where Lord Justice Knight Bruce delivered the opinion of the Privy Council contains an authoritative pronouncement on the theory of advancement as unavailable in the Indian situation. After the general observations about a purchase effected by a person in the name of a stranger, the Privy Council observed (at p. 75) :
"It is clear that in the case of a stranger, the presumption is in favour of its being a benamee transaction, that is a trust; ..."

Perhaps, one other important decision of the Privy Council to be noted in this connection is Bilas Kunwar v. Desraj Ranjit Singh [1915] ILR 37 All 557, equivalent to AIR 1915 PC 96; [1915] 30 IC 299, 302. George Farwell, who spoke for the Board, referred to benami transaction as a "dealing common to Hindus and Muhammadans alike, and much in use in India; ...". Some further ground was covered with the weighty observation :

"... 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 feoffor."

It is doubtful whether the Privy Council did have the benefit of a studied lecture on the topic given by K. K. Bhattacharya in his Tagore Law Lectures (1884-85) on the topic "Joint Hindu Family" (pages 469 and 470 of the Lectures). The report in the ILR does not contain any reference to it, though the arguments and the authorities have been indicated somewhat elaborately. Bhattacharya branded benami as "having its origin in the dishonest motive of defrauding creditors of their just and lawful dues ..."

Three years later, delivering the opinion on behalf of the Board in Gur Narayan v. Sheo Lal Singh [1918] ILR 46 Cal (PC) 566; [1919] 49 IC 1, 5 (PC), Ameer Ali also made some general observations on benami. They read :

"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. There is nothing inherently wrong in it, and it accords, within its legitimate scope, with the ideas and habits of the people."

A desire to avoid certain political and social risks was indicated by Pollock in his work "Law of Fraud, Misrepresentation and Mistake" published in 1894 :

"Practices of this kind (benami practices) naturally grow up in a state of society where there is an appreciable risk, from one generation to another, of hostile conquest or confiscations. And, having regard to the political state of India before and after the shortlived prosperity of the Moghul Empire, I do not see the necessity of explaining the frequency of these transactions by some supposed innate love of secrecy in the minds of oriental owners of property. Neither is there anything surprising in the persistence of the habits of the kind after the reasons for them disappear. Our modern life is full of these survivals in things great and small. Again, it is quite natural for ingenious persons to discover that the means of concealment which formerly were a shelter from the strong hand of princes and adventurers can be turned in peaceful times to the less ambitious but not less lucractive end of baffling creditors."

There have been some academics who found the book lacking the vigour and vitality of his earlier and youthful writings. Some subtly referred to it by describing the book as Pollocks Fraud. The discussion on this topic of benami is, however, useful and helpful.

Later decisions, by and large, religiously adopted benami as a well-noted practice and the system as a respectable enough one. One facet of the concept was discussed by Asutosh Mookerjee J. with reference to English and American decisions. (See Raghupati Chatterjee Vs. Nrishingha Hori Das and Others,

The State took a more serious view when benami transactions affected the collection of its own revenue. Enactments to discourage benami purchases at revenue sales were made with much promptitude.

Sections 41 and 53 of the Transfer of Property Act, 1882, and section 66 of the Code of Civil Procedure, 1908, are some of the early statutory provisions where benami transactions were statutorily dealt with.

The passage of time did reveal that the benami transaction was not unobjectionable, even when looked from different angles. Social scientists, parliamentarians and even judges started expressing themselves against the practice in later times. The attack became more aggressive particularly after the

independence of the nation and a self-presentation of the Constitution by the people to the people.

Professor Nicholas Kaldor, the noted economist, looked into some of the challenging problems in the tax area and made a specific and strong condemnation of the system. He did not conceal his strong feelings in the matter. He said :

"My feeling is that the Revenue would gain far more from screening all benami transactions at the outset than it would lose from any added difficulty in breaking the benami in the case of such fraudulent transactions."

A Division Bench of the Bombay High Court consisting of Patel and Wagle JJ., delivering the judgment in Hasman Gani Sahib v. Vidhadhar Krishnarao Mung, Appeal No. 533 of 1968, observed :

"Moreover, the law permitting and recognising benami transactions results in a lot of wasteful litigation and enables all sorts of frauds to be committed ... Similarly, if a transaction is completed and money received, someone raises his head and says he is the owner and often notice of such title is even falsely alleged. Is it now time that this branch of the law was reformed ? This will reduce much wasteful litigation, and the courts will be able to do better and more fruitful work."

An impatient member of the Rajya Sabha participating in the debate on the Taxation Laws (Amendment) Bill, 1971, forcibly asserted : "even now, benami transactions are not debarred by law. A very drastic remedy is needed ... All benami transactions should be debarred under the law. And I want to know why it has not been done. Why do you want to encourage benami transactions indirectly by a supposed penalty or harm or by saying that the party may suffer because he has done that ? why not debar it completely ?"

It may incidentally be noted that section 281A of the Income Tax Act 1961, was introduced by the Taxation Laws (Amendment) Act, 1972.

The Select Committee on the Taxation Laws (Amendment) Bill, 1969 agreed to the suggestion for the examination by the Government on existing law relating to benami transaction with a view to determine whether such transaction should be prohibited. The Law Ministry addressed the Law Commission, accordingly, in its letter dated December 20, 1972. The report was submitted on August 7, 1973.

It will thus be evident that strong public opinion developed against the continuation of a practice which had its origin in historic reasons and with its practice in early days not involving any enduring damage to public interest.

Indian society no longer faced any appreciable risk of hostile conquest or confiscation as noted by Pollock in his book. If at all, benami device had intense abuse, particularly in defeating the Revenue and defrauding creditors. Time was ripe for drastic action.

Even after the submission of the Report of the Law Commission, 1973 follow-up action had only a slow pace. Any critical observation of tax decisions containing indications of the trends and tendencies relating to benami practices, would demonstrate the undesirable proportions to which benami practices had been pressed into service to defeat the Revenue and to promote corrupt practices. It is under these auspices that the Ordinance happened to be promulgated.

One striking aspect noticeable on a critical comparison between the recommendation of the Law Commission and the positive provisions in the Ordinance may be dealt with in this context itself, though the question might pointedly be posed at a later place. The Law Commission did recommend an amendment in the law. Various alternatives were posed and their merits discussed in some detail. Paragraphs 6.29 dealt with exception for past transactions. The reasons were :

"We do not consider it desirable that it should apply to past transaction because those transactions would have been entered into after keeping in mind the legal position as understood at present, namely, that the real owner can always enforce his rights against the benamidar. This position is now proposed to be reversed and the reversal should not work in a manner which will defeat the intention of the parties who acted under the old law. Of course, those benami transactions which have been entered into with the object of carrying out fraudulent or illegal motives, and which, therefore, fail within the specific provisions enacted by the Legislature to prevent the abuse of the practice of benami, are governed by those specific provisions, and the bar against retrospective operation of the new provision will not affect the operation of those specific provisions."

Consistent with the above view, the Commission couched section 3 of the Draft Bill suggested by it in the following words :

"Nothing in this Act shall, -

(a) affect the provisions of section 53 of the Transfer of Property Act, 1882, or the law relating to transfers for an illegal purpose, or

(b) apply in relation to any property held benami at the commencement of this Act."

This draft has been departed from, in the Ordinance.

Sections 3 and 4 of the Ordinance read :

"3.Act not to apply in certain cases. - Nothing in this Act shall affect the provisions of section 53 of the Transfer of Property Act, 1882 (4 of 1882), or any law relating to transfers for an illegal purpose.

4. Repeal of provisions of certain Acts. - (1) Section 82 of the Indian Trusts Act, 1882 (2 of 1882), section 66 of the Code of Civil Procedure, 1908 (5 of 1908), and section 281A of the Income Tax Act, 1961 (43 of 1961), are hereby repealed.

(2) For the removal of doubts, it is hereby declared that nothing in sub-section (1) shall affect the continued operation of section 281A of the Income Tax Act, 1961 (43 of 1961), in the State of Jammu and Kashmir.

It will be obvious that section 3 (a) of the Draft Bill assumed the form of section 3 in the Ordinance and section 3 (b) got altogether deleted.

An assessment of the provisions of the Ordinance :

The object of the Ordinance is clear enough. It destroys a right hither to enjoyed by a class of persons who, for diverse reasons, felt It desirable to acquire property in the name of another in the then prevailing situation. In the past, the real owner could acquire property in the name of another, without incurring any pejorative reputation. The motive for putting up such a facade can be many and varied. The man who paid the money, who could, therefore, rightly deal with the property, could pull down the benami facade at any time he pleased. If the trusted person does not oblige by a prompt reconveyance, the real owner could get relief by a suit instituted in that behalf. The court may, on applying the tests evolved and elucidated by judicial decisions, come to the conclusion that the real owner is yet another person, the outward form of the deed notwithstanding. The real owner thus could remove the cobwebs around his title and could parade his proprietorship in full shine and strength.

This right hitherto recognised by law, is unambiguously cut and curtailed by sub-section (1). The real owner is deprived of a right and a remedy in view of the positive provision contained in section 1 of the Ordinance. He cannot bring any suit, claim or action raising the benami plea.

That, of course, deals with a situation of the hereafter. What about pending actions ? If a suit has been already instituted, or other action already commenced for the establishment of the ownership of the property by the real owner, would it also be affected ?

While attempting an answer to the query, attention could be focussed on the words :

"No suit, claim or action ..... shall lie by or on behalf of a person ...

The section mandates that no suit, claim or action, which raises a benami plea shall lie. The section has an extraordinary sweep. It is not a mere declaration that no suit of that nature hereafter could be instituted. The suit would not simply lie; nor would any claim (based on benami) lie. The words are wide enough to take any suit already instituted; they are wide enough to bar any claim that might have been already made, or may hereafter be made. The section is clear enough to ward off future suits. All those who wield the sword for winning back their own property are now doomed to disappointment. He is disarmed and barred entry into the battle field; the disarming exercise is practised on him even if he is already in the field. In either

case, a destined defeat is the ultimate and inevitable fate.

Is there any difference, if the benami plea is wielded as a shield ? It is quite likely that those who had an apparent title, attempt to build up an impenetrable fortification in an otherwise defenceless fort. Here again, the positive, peremptory and wide words cannot be missed. The words "no defence", convey an emphasis of extraordinary rigour; they rope in all that is within the vision and in the horizon. The succeeding words, "shall be allowed in any suit, claim or action" are equally wide and equally sweeping in their effect and operation. The deprivation of a defence is not confined to a suit hereafter to be filed; it extends to the projected areas of a claim, or an already initiated action.

The words "no defence shall be allowed" necessarily mean that no such defence shall be allowed by the court. The court is, therefore, bound to consider at every stage, to find out whether there is a defence of benami put forward before it. The court has necessarily to say to the person who projects such a plea that it will not be allowed. The court is duty bound to be on the alert in the discharge of this statutory duty, viz., to find out whether any benami defence has been put forward. If it notices one, it has firmly to disallow it. There is no option left to the court. Plainly, that duty is cast on the court to be discharged in suits hereafter to be instituted, when such a defence is raised. It is equally there when such a defence is noticed in suits already pending.

What about benami pleas raised as defence, when the suit stage is over ? In cases where what is pending is only an appeal or second appeal linked with such plea ?

There can be more than one answer to that query.

It is well-settled that the term "suit" would take in its connotation a continuation in appeal or in second appeal. Vide Quilter v. Mapleson [1882] 9 QBD 672 (CA), AIR 1936 49 (Privy Council) , Smt. Dayawati and Another Vs. Inderjit and Others, If a defence is to be disallowed in a suit, it would then follow that it has to be disallowed in the continued projection of the same litigation, in the appellate stage or the still higher second appeal stage.

The disallowance of a benami plea under the statutory provision is equally applicable with as much rigour in a claim or in an action. What in substance is the legal exercise of the appellants in the second appeal ? It is nothing else other than a defence of the benami character of the acquisition of the property. Such a defence is now put forward in proceedings under consideration by the High Court, namely, the second appeal. Could the second appeal pending before this court u/s 100, CPC, answer the description of the term "action" as visualised in section 2 (2) of the Ordinance ?

A search for and settling of the true meaning of the word "action" has then to be attempted. The term has been construed as one of wide import, to take in the legal

proceedings pending before a court of law or other administrative authorities.

It is unnecessary to load this judgment with all the decisions dealing with that concept.

Buckley L. J. said in Roberts v. Metropolitan Borough of Battersea [1914] 110 L.T. 566 :

"Proceeding would be a word with a larger meaning than action. Every action is proceeding, but it is not possible "to say that every proceeding is an action."

In a recent decision of the House of Lords in Herbert Berry Associates Ltd. v. IRC [1977] 1 WLR 1437,1446 Lord Simon of Glaisdale stated :

"The primary sense of action as a term of legal art is the invocation of the jurisdiction of a court by writ ..."

Street J. neatly summarised the thoughts on the concept in these words :

"Whatever the popular signification of the word action may be, it is clear, as was pointed out by Bramwell and Lush, L. JJ., in Clarke v. Bradlaugh [1881] 7 QBD 38 (CA) at (pp. 50, 57) and by the Earl of Selborne, I.C. and Lord Blackburn in the same case on appeal to the House of Lords [1883] 8 AC 354 at (pp. 361, 374) that in its proper legal sense it is a generic term or nomen generale, and includes every sort of legal proceedings. When used by the Legislature it must.. be construed according to its true legal meaning unless it is apparent upon the face of the Act in which it is used that it is intended to bear a more restricted meaning. "Re Carter Smith, Ex. P. Taxation Commrs. [1908] 8 S.R.N.S.W. per Street J. at p. 248 ".

Normally, therefore, a wide and liberal meaning can be assigned to the term. Sometimes, a definition will be applied by the very enactment. Sometimes accumulated judicial wisdom dealing with the term, would be the sole helpful guide.

The statutory background and the context in which the word occurs would aid the construction. In the present case, the term "action" has not been defined.

When there is a judicial proceeding, where matters have to be proved and issues raised, it could be said that there is an action. That is the trend of discussion in China v. Harrow Urban District Council [1954] 1 QB 178 The observation of Havers J. at page 190 of the report sums up the idea :

"Action means a civil proceeding commenced by writ or in such other manner as may be prescribed by rules of court, but does not include a criminal proceeding ..."

In the light of the above discussion, I hold that the term "action" is Wide enough to take in an appeal or a second appeal.

It was urged that the courts should be slow to give an interpretation Which would have retrospective operation upsetting settled rights of the citizens The decisions on

the interpretational techniques to be adopted by the courts were relied on to buttress that contention.

Certain propositions are no longer in doubt. Within their own sphere, the powers of the Legislature are large and ample. They are competent to resort to retrospective legislation. If the law-making authority is entrusted with power or armed with the authority, the only further question is whether such power and authority have in fact been exercised. Retrospectivity can be inferred from the wording of the statute (Rafiquennessa Vs. Lal Bahadur Chetri (Dead) through his Representatives and Others, The question would be whether the new law speaks in a language clear enough to manifest a retrospective operation. Statutes should ordinarily be interpreted as not to affect vested rights adversely. Retrospective character could be explicitly expressed or clearly implied. The statutory scheme would give the useful clue in the resolution of that controversy. The background of the enactment and the object underlying it could also be of aid.

With the above principles in mind, a detailed examination of the Ordinance may now be attempted.

The object of the Ordinance was to do away with what was felt to be an obnoxious system which had deleterious consequences on larger public interest. The provisions of the Ordinance do not even remotely suggest a preservation of the earlier rights or a protection of past transactions.

Materials furnishing the background in which the ordinance has originated have been already referred to, although briefly. The pernicious effects of the system, as a matter of private morality and as a practice prejudicial to the public interest, had been pointedly noted and carefully examined by the Law Commission. Reference has been made to other studies such as the Taxation Enquiry Committee Report, where, in the context of effective revenue mobilisation, the prevalence of benami practice has been adversely commented upon. The firm view of the Law Commission was to withdraw the legal insulation to a practice which had acquired a dominant prevalence of poisonous perniciousness. A model of legislation too was indicated in the report of the Law Commission. No doubt, for about a decade and half, there was no follow up action. Whether any action should be taken at all on a report is a matter for the Government of the day to decide. It can wait till such time as it finds to be opportune and ripe. The State has the onerous responsibility of weighing the various considerations and playing where, and only when, the ground is set. Even when a political decision is for immediate implementation of a decision. the slow pace of the bureaucratic mechanism has also to be reckoned. A pressing need of the entire State mechanism (taking in. the Governments at the Centre and in the States) appears to have hastened the pace for prompt and peremptory action prohibiting benami transactions.

The courts should lean more in favour of an interpretational process which would promote laudable objects; and eschew those which would sap its efficacy and leave it as deadwood, as it were.

There is yet another clinching clue supporting retrospectivity to the Ordinance The difference between the provisions in the model Bill and those of the Ordinance - whereby the clause reading : "Nothing in this section shall .... (b) apply in relation to any property held benami at the commencement of this Act has been deleted - is proof positive of a deliberate decision to deny protection to past transactions. The added experience of the Government during the intervening fifteen years after the submission of the Law Commission Report, apparently persuaded the Government to withdraw the protective umbrella from transactions of the past. Viewed that way too, it has to be held that the provisions act against and affect past transactions as well Retrospectivity is readily inferable from these circumstances as well.

In the light of the above discussion, I have no hesitation to hold that the ordinance takes in transactions entered into long ago and litigations instituted and already pending whatever be the age and stage of the legal

A constitutional objection based on art. 19(1)(f) :

Though not at the instance of the 1st defendant, a contention was urged about the Ordinance violating the fundamental rights and consequently being invalid. In particular, counsel Shri M. I. Joseph, (who appeared in response to an intimation by the court to the President of the Advocates Association) submitted that there is a clear infraction of article 19(1)(f) inasmuch as an unreasonable restriction on the right is introduced by the Ordinance. Benami transactions recognised as lawful, found prevalent among the inhabitants of India for a very long time, and recognised as an honest business activity, could not be subjected to a total prohibition and with retrospective effect, he contended.

There is no doubt that there is a total prohibition in relation to the plea of benami transaction. It might rope in even persons who did not have any foul intention or fraudulent purpose. But then, the constitutionality of statutory provisions has to be considered not by stray possibilities. In the context of a total prohibition, the court would anxiously scan the statute to see whether excessive and impermissible abridgment of the exercise of guaranteed rights has taken place. Here again, the object with which the statutory provision has been introduced, the background materials available and the antecedents of the action itself, will all have to be analysed and assessed with as much care and caution as is possible in relation to every detail and every facet. Viewed that way too, the statutory provision cannot be said to be objectionably offensive as against the guaranteed fundamental right.

It may be useful to have a historical perspective of the early decisions dealing with benami transactions and the transmutations they have undergone over the last two centuries.

In Gopeekrist Gosian v. Gungapersaud Gosian [1854] 6 MIA 53 (PC) also, the conveyance was in the name of the only son of the age of two years. The consideration in that case proceeded from the father Viewed from any angle, it could not be treated as an objectionable type of transaction resorted to by a malicious mind to carry out a foul intention It is in the background of that case that Lord Justice Knight Bruce observed (at p. 72) :

"It is very much the habit in India to make purchases in the names of others, and, from whatever cause or causes the practice may have arisen, it has existed for a series of years, and these transactions are known as Benamee transactions."

The courts cannot close their eyes to the current national situation while adjudging the constitutionality of an enactment. Much water has flown through the gargantuan Ganges, after the Privy Council made its inoffensive remarks in Bilas Kunwars case [1915] ILR 37 All 557. That was at a time when the Privy Council did not perceive anything pernicious in the benami practice. A rich taluqdar having two Hindu wives and a Muslim mistress, satisfied all of them with his mighty means. The bungalow on the banks of a holy river where the Hindu wives could perform their religious rites need not be conceived of as an acquisition in which the beneficiary was the Muslim mistress. She could not, for obvious reasons, have utility of the river site for religious purposes. The property did not yield enough income to presume an intention of a financial accretion to an already well provided mistress. That was the background in which the well known passage on benami transactions happened to be made by the Privy Council, in the words already noted and quoted above.

A comparatively recent decision of the Federal Court where some possible objectives of benami have been noticed by the Federal Court is Punjab Province v. Daulat Singh [1942] AIR 1942 FC 38. The objective, it was observed, might be a comparatively harmless one of circumventing the restrictions imposed under the "Government Servants Conduct Rules", or to ward off claims by other members of the joint family. There can also be the more immoral, and for that reason, an obviously objection able objective of defeating the claims of creditors.

It may be useful to consider the current realities about those concepts. The percentage of persons bound by the Government Servants Conduct Rules is obviously not a sizeable one. To many among the Government servants who are honest, saving is a difficult process. Even if there be some saving by fanatically frugal expenditure, those heroes need not necessarily resort to benami arrangements. Instances of Government servants resorting to benami practices would, therefore, be few and far between. The corrupt elements among them, would, even otherwise, be adepts at secreting ill-gotten wealth

The joint family system has been on the wane, having regard to the pact of modern living and modern ideas. The joint family has altogether been done away with in the State of Kerala (vide the Kerala Joint Hindu Family (Abolition) Act, 1976). Even

without formal funeral obsequies, the system appears to be having only a vegetative existence under the impact of the Hindu Succession Act. Resort to benami practice, for escaping the gaze of the coparceners, would also be a rarer zone in modern times.

It may be recalled in this connection, even at the risk of repetition that voices were raised even from early days against the pernicious aspects of benami transactions. Bhattacharyas Tagore Law Lectures of 1884-1885 (supra) pointedly referred to the inveterate practice (of benami transactions) having its origin in the dishonest motive of defrauding creditors. He had referred to the attempts of the British Government in the exercise of its legislative functions, of checking such inveterate practices. (There are very many other examples of checking inveterate practices in the social segments of Indian society. Was it not John Charnocks daring feat and Lord Bentincks legislative flat that suppressed the system of "Sati" ? (see Fort St. George Madras by Mrs. Frank Penny, page 124)). Even if the practice of benami as existing at that time did not have dense deleterious tendencies as to shock judicial conscience, the pernicious content assumed unmanageable proportions in later times, undermining individual morality and wrecking public interest.

There is, indeed, an expanding and extensive area where people are tempted to have reckless sorties in the adventurous heights of business activities. The increasing industrialisation the country has witnessed and the resultant proliferation of commercial operations have offered and opened up greater temptations for even an otherwise adventurous group of entrepreneurs Quick money, and acquisition of it with rocket speed, would appear to be the set target of that group. Concealment of ones assets would serve many purposes for such persons who do not have much difficulty with their conscience. A risky business can be continued while a profitable one put into in benami name. This will serve him well to cheat the Revenue and swamp the creditors. Corrupt practices could be better Operated by money lying with seemingly innocent or insignificant persons. Sweeping social legislation like the land reforms can be easily overcome by benami-based manipulation; and the goal is easily achieved if corrupt officials connive and political masters mind it not. It is this killing trend in current times that has called for drastic action.

Recognition of benami transactions by the supreme judicial tribunal of the times presumably gave a free licence to immoral traders. It was an advantageous situation for the evader of public revenue. Whether there was justification enough even in that immorality (as is indicated in H. H. Monroes Hamlyn Lectures; the thirty-third stories of the Hamlyn Lectures : Intolerable Inquisition, Reflections on the Law of Tax, particularly, page 69 of Stevans edition), is a different question. Tax collection by as harmless an operation as the collection of honey by the bees without in any way injuring the flowers (as indicated in Mahabharatha) might not fit in with the complicated trade practices and income-earning activities of a modern State. Yet the

welfare State has necessarily to mind a mighty task of transformation of the quality of life of the teeming millions, particularly, the weaker groups in the rural set up. Public revenue, its effective collection and proper utilisation, are indispensable for attempting that challenging task. The vicious elements who seek to obstruct that wholesome work of the State need not be viewed as persons deserving soft and painless treatment. Widespread abuses of benami practices by business empires, as revealed from academic studies and decisions in Income Tax cases, would give an idea of the oppressive proportion in which benami transactions have undermined values and throttled honest dealers. Benami dealings would generate chunks of polluted wealth; that will go to swell the size of an even otherwise fattened corruption corps. Elimination of those dark forces and deleterious tendencies is long overdue. Better late than never. If, in that context, a statutory provision, strong and effective, has been brought in. it could not be condemned as an illegitimate imposition of an unreasonable restriction on the guaranteed freedom of the right to carry on business. I repel the contention that the Ordinance offends article 19(1)(f) of the Constitution.

It is a matter of historical interest that in 1910, Pandit Motilal Nehru raised a plea of benami before the Allahabad High Court. (vide Raghunandan Lal v. Matru Mal [1910] 7 All LJR 623). In the year 1988, the President of India promulgated the Benami Transactions (Prohibition of the Right to Recover Property) Ordinance, the constitutional validity of which this court has now upheld.

It would then follow that the defence of benami - an indispensable one for the appellant-1st defendant to succeed in this litigation - would be unavailable in the second appeal, an action still pending before this court. With the deprivation of such a defence, the appellants have necessarily to reconcile themselves with defeat in this litigation.

Result of the discussion and decision :

The above conclusions would entail a dismissal of the appeal. The second appeal will stand dismissed but without any order as to costs.

Disappointments and acknowledgments :

There were reports in the Press about an apprehension on the part of the State Government whether some of the provisions of the Ordinance would tend to defeat the attempts of the State Government to help innocent victims of unscrupulous monetary manipulators, generally and deservedly referred to as "blade companies". This court ordered notice to the learned Advocate-General also so as to have the views of the State Government, particularly, in the above context. The opportunity so afforded was, however, left unavailed of.

Counsel for the Central Government to whom a notice had been given was unable to assist the court. Unlike the State Government, the Central Government had a duty

to assist the court in the interpretation of the Ordinance. Counsel for the Central Government submitted that he had not received any instructions in the matter. Sufficient excuse for counsel, but not for the client. In these days of advanced technical innovations, it is unimaginable that a mighty institution like the Union of India will fail in the transmission of its information and instructions. Those who hold constitutional responsibilities may do well to enquire into such lapses. Laws delays - proverbial -are bad enough; the Law Departments delays should not worsen the situation, particularly at a time when the nation is poised for daring action when a new century is making its rosy peep in the nearer horizon.

I acknowledge with a deep sense of gratitude the assistance I had in generous profusion from the members of the Bar : Shri Abraham, appearing for the appellant, Smt. Lekha, who made an earnest effort successfully defending the respondents, Shri M. I. Joseph, President of the Advocates Association, Mr. K. P. Parameswara Menon, who readily responded to a request of court to function as amicus curiae; Senior counsel Mr. T. S. Venkateswara Iyer; Shri P. K. Balasubramaniam and Mr. Thankappan learned Government Pleader, who expatiated on areas not covered by others.

A copy of the judgment would be transmitted to the Union of India and the State Government.