

(1994) 09 AP CK 0004

Andhra Pradesh High Court

Case No: Civil Revision Petition No's. 4217 and 4231 of 1993

Mogali Chantamma and Another

APPELLANT

Vs

Mogali Bhaskara Rao

RESPONDENT

Date of Decision: Sept. 2, 1994

Acts Referred:

- Benami Transactions (Prohibition) Act, 1988 - Section 2
- Civil Procedure Code, 1908 (CPC) - Order 14 Rule 2, 115

Citation: (1994) 3 ALT 588 : (1995) 1 APLJ 215

Hon'ble Judges: Syed Shah Mohd. Quadri, J

Bench: Single Bench

Advocate: K.V. Narasimha Murthy, K.V. Subrahmanyam and K. Kanaka Raju, for the Appellant; M. Krishna Mohan Rao and M.S. Ramachandra Rao, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

Syed Shah Mohd. Quadri, J.

The common question canvassed in these two revision petitions is: Whether an issue relating to maintainability of the suit should be decided as a preliminary issue under Order XIV Rule 2 of the Code of Civil Procedure.

2. The petitioners in these two revision petitions are the defendants in the suits out of which these revisions arise which were filed by the respondent-plaintiff.

3. As the facts in these two revisions are similar and the same question arises for consideration, they are heard together and are being disposed of by a common order.

4. For appreciation of the contentions raised in these revisions, I shall refer to the facts in O.S. No. 90 of 1987 out of which C.R.P. No. 4217 of 1993 arose. The parties

will be referred to as they are arrayed in the suit.

5. The plaintiff filed the said suit for cancellation of the suit document executed in favour of the defendant on 4-6-1984 on the allegations that due to the pressure by the sons of the plaintiff, he had nominally executed one sale deed in favour of the defendant in O.S. No. 90 of 1987 on the file of the District Munsiff, Pithapuram (and another sale deed in favour of the defendant's daughter - defendant in O.S. No. 91 of 1987) and that the said two documents are sham and nominal. The plea of the defendants in both the suits is that the sale deeds are genuine and real and they are not benami transactions. They were executed after consideration was passed.

6. On the above said rival contentions, the trial Court framed necessary issues and also an additional issue on 29-9-1993, which is relevant for our purpose and reads as follows:-

"Whether the plaintiff is debarred from contending that the sale deed dated 4-6-1984 is a benami transaction and whether the suit is not maintainable on that ground?"

7. The defendant filed I.A. No. 541 of 1993 in O.S. No. 90 of 1987 under Order XIV Rule 2 of the Code of Civil Procedure, to try the additional issue as a preliminary issue. This was contested by the plaintiff on the ground that the suit transactions are not benami transactions within the meaning of the Benami Transactions (Prohibition) Act, 1988 (Act 45 of 1988) (for short "the Act"), so the issue cannot be tried as a preliminary issue. The trial Court accepted the plea of the plaintiff and dismissed the application on November 15, 1993. Challenging the correctness of the said order, the civil revision petition is filed.

8. Mr. Narasimha Murthy, the learned Counsel for the petitioner contends that from the very issue itself, it is clear that it is a benami transaction and in view of the provisions of Section 4(1) of the Act, the suit itself is not maintainable, therefore, the trial Court ought to have taken up the issue as a preliminary issue and decided the same. On the other hand, the learned Counsel for the respondent contends that as the transactions in question are not benami transactions, the trial Court is right in not trying the issue as a preliminary issue.

9. The short question that arises for consideration is whether the trial Court committed an error of jurisdiction in not trying the issue as a preliminary issue?

10. It would be useful to read here Rule 2 of Order XIV of the CPC which is in the following terms:-

"2. Court to pronounce judgment on all issues:-

(1) Notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues.

(2) Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to-

(a) the jurisdiction of the Court, or

(b) a bar to the suit created by any law for the time being in force, and

for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue."

A perusal of the above extracted provisions makes it clear that after Amendment Act 1976 even if the suit can be disposed of on preliminary issue, the Court is bound to pronounce a judgment on all the issues. But sub-rule (2) provides that where issues both of law and of fact arise in the same suit and the Court is of the opinion that the case or any part thereof may be disposed of on an issue of law only, it has discretion to try that issue first, provided the issue relates to (a) jurisdiction of the Court or (b) a bar to the suit created by law for the time being in force. In such event, the Court, in its discretion, may postpone the settlement of the other issues until after the preliminary issue has been determined and may deal with the suit in accordance with the decision on that issue. It is thus clear that every issue of law should not be tried as a preliminary issue; it is only when the question of law relates to the jurisdiction of the Court or relates to a bar to the suit created under any law for the time being in force, then that issue has to be tried as a preliminary issue. In the instant case, the contest between the parties is that the suit transaction is not a benami transaction. A benami transaction is defined u/s 2(a) of the Act to mean any transaction in which property is transferred to one person for a consideration paid or provided by another person. There is a specific allegation in the plaint that no consideration was passed and that the parties never intended to convey the property but the sale deeds were executed nominally having regard to the peculiar circumstances alleged by the plaintiff.

11. By merely labelling the transaction as a "benami transaction", the provisions of the Act cannot be invoked. Before a transaction can be termed as "benami transaction" and the provisions of the Act can be invoked, it must be shown that the transaction in question falls within the meaning of Section 2(a) of the Act. When the Court is called upon to proceed under the provisions of the Act, it has to record a finding whether based on admission of the parties or on material on record that the transaction is a benami transaction and for that purpose, having regard to the facts and circumstances of the case, it may, if it considers necessary, record evidence. On the facts of the present case, the trial Court came to the conclusion that unless the entire evidence is adduced, it cannot be said that the transaction is a benami transaction and as the suit is of the year, 1987, all the issues can be enquired into and decided at the one and the same trial.

12. There is no doubt that the additional issue is an issue of law and relates to a bar created by the provisions of the Act so the Court has to decide the same as a preliminary" issue. But here, the question is whether the transaction is it benami transaction within the meaning of the Act and having regard to the pleas of the parties, the trial Court felt it necessary to record evidence to determine if the transaction in question falls within the meaning of "benami transaction", so the requirement of Order XIV Rule 2 of the Code of Civil Procedure, is not satisfied.

13. The learned Counsel for the petitioner relied upon a judgment of this Court in *R. Jayaram Naidu v. G. Venkata Subramanyam Naidu*, 1990(1)AW.R.23. In the said case, Justice V. Neeladri Rao (as he then was) held that an issue "whether the suit is laible to be dismissed in limine as hit by the provisions of the Act" should be framed and tried as a preliminary issue. Having regard to the facts of the present case and the question under consideration the said decision does not help the petitioner.

14. The learned Counsel for the petitioner next relied upon a decision of Justice Seetharam Reddy (as he then was) in [Hyderabad Asbestos Cement Products Ltd. Vs. Mohamad Argobasi Enterprises and Another](#), . In the said case, the learned single Judge reiterated the principle embodied in Order XIV Rule 2 of the CPC and laid down that an issue pertaining to jurisdiction of Court or law which bars suit, has to be determined as a preliminary issue. No exception can be taken to the principles stated by the learned judge. The question in this case concerns application of that principle to a case where basic facts are yet to be found by the Court. As the basic fact whether the transaction is a "benami transaction" within the meaning of the Act, is yet to be determined by the Court, so trial of the preliminary issue would amount to putting the cart before the horse. Therefore, the above decision also will not help the petitioner.

15. In [State of Andhra Pradesh and Another Vs. Bandalam Srinivasulu and Others](#), . Rama Rao, J. (as he then was) explained the principle underlying in Rule 2 of Order XIV of the Code and held that notwithstanding the salutary principle of hearing all the issues at the same time contained in the circular issued by the High Court should be adhered to normally, but in a situation where a bar to the suit is contemplated by the Act framing of preliminary issue and initial decision of the same has to be taken up. In that case, the learned Judge held that having regard to the provisions of Section 11 of the Andhra Pradesh Occupants of Homesteads (Conferment of Ownership) Act, 1976, the trial Court committed an error in not framing the issue and trying it as a preliminary issue.

16. For the above reasons, I am of the view that the orders under revision in the above two revision petitions, do not suffer from any error of jurisdiction to warrant interference of this Court. The revision petitions are devoid of merit and accordingly, both the Civil Revision Petitions are dismissed, but in the circumstances, without costs.