

## Yakub Shareef through GPA Vs Maqdoom Shareef

**Court:** Andhra Pradesh High Court

**Date of Decision:** Dec. 17, 1991

**Acts Referred:** Benami Transactions (Prohibition) Act, 1988 " Section 3, 3(3), 4

**Citation:** (1992) 1 ALT 408 : (1992) 1 APLJ 316

**Hon'ble Judges:** Mohammed Sardar Ali Khan, J; B. Subhashan Reddy, J

**Bench:** Division Bench

**Advocate:** Syed Saadatullah Hussaini, for the Appellant; Shaik Mahmood Ali, for the Respondent

### Judgement

Mohammed Sardar Ali Khan, J.

This LPA is directed against the judgment dated 11-6-84 passed by a learned single judge in CCCA No.

292/82.

2. The plaintiff is the appellant before us. He filed the suit for partition of the plaint schedule property. The plaintiff and the defendant are real

brothers. The suit property which is a house, was purchased jointly in their names under Ex.B.1, registered sale deed. According to the evidence

adduced in the suit, the plaintiff is living in a portion of the house and the defendant is getting the rents for the other portion of the house. The case

of the defendant is that the house was purchased jointly in their names but the entire consideration was paid by the defendant alone and

consequently the plaintiff has no title or right or interest in the suit property. The defendant asserts that no part of the consideration was paid by the

plaintiff and hence he alone is the owner of the entire suit property.

3. The trial court found that the property belongs to the defendant and that the sale deed was taken nominally in the joint names of both the

plaintiff, and the defendant and that the defendant was in exclusive possession and hence perfected his title by adverse possession.

4. The learned Single Judge held that on a consideration of the evidence on record, both oral and documentary, it is clear that consideration for the

sale transaction was paid by the defendant alone. He initially paid a sum of Rs. 350/- and subsequently the balance at the time of registration of the

sale deed. Further more, learned counsel appearing on both sides agreed that the payment was made by the defendant as per the recitals of Ex.B.1

sale deed. Therefore, it was held that the consideration was paid by the defendant alone and consequently the other aspects were wholly irrelevant.

The plea of joint ownership was also rejected as the parties happen to be muslims. In the above view of the matter, the learned single judge held

that the plea of the joint ownership, set up by the plaintiff, is not true and valid. He further held that since the defendant had no children, he had

taken the sale deed in the names of himself and his brother, the plaintiff. On the question of possession, it was held that the defendant is in

possession and paying the kist. The learned Single Judge, therefore, dismissed the appeal and confirmed the judgment and decree passed by the

trial court. Aggrieved by the judgment of the learned single judge, this LPA has been filed by the plaintiff.

5. The judgment of the learned single judge was rendered on 11th day of June, 1984 when the Benami Transactions (Prohibition) Act, 1988 (Act

No. 45 of 1986), hereinafter referred to as "the Act", had not come into force. u/s 3 of the said Act a complete prohibition of benami transaction

has been imposed. Section 3 reads as follows:

3. Prohibition of benami transactions:-

(1) No person shall enter into any benami transaction.

(2) Nothing in Sub-section (1) shall apply to the purchase of property by any person in the name of his wife or unmarried daughter and it shall be

presumed, unless the contrary is proved, that the said property had been purchased for the benefit of the wife or the unmarried daughter.

(3) Whoever enters into any benami transaction shall be punishable with imprisonment for a term which may extend to three years or with fine or

with both.

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1973) the offence under this section shall be non-

cognizable and bailable.

Thus, a reading of the above section makes it clear that it is prospective in operation and a complete ban has been imposed on benami

transactions, with a penal clause under Sub-section (3) of Section 3. u/s 4 of the Act, prohibition of the right to recover property held benami has

been imposed. It would not be out of place to re-produce Section 4 of the Act, which is in the following terms:

4. 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.

(3) Nothing in this section shall apply, -

(a) Where the person in whose name the property is held is a coparcener in a Hindu Undivided Family and the property is held for the benefit of

the coparceners in the family; or

(b) Where the person in whose name the property is held is a trustee or other person standing in a fiduciary capacity, and the property is held for

the benefit of another person for whom he is a trustee or towards whom he stands in such capacity.

The opening words of Sub-section (1) of Section 4 of the Act are clear 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 such property. Under Sub-section (2) of Section 4 no defence can be set up in respect of any property held benami against the

person in whose name the property is held or against any other person by or on behalf of the person claiming to be the real owner of such

property. Sub-section (3) of Section 4 exempts, from the operation of Section 4, the property held by a coparcener in a Hindu Undivided Family

or by a trustee or other person standing in a fiduciary capacity to the person who is the Gestue qua trust under the trust deed. The operation of

Section 4, therefore, bars the defendant in this suit in setting up the plea of benami against the plaintiff. Section 4 bars the filing of any suit. Claim or

action to enforce any right in respect of any property held benami and therefore is given a retroactive operation by denying the right to recover the

property held benami by a person who claims to be the real owner. Section 4 of the Act has in fact abolished the plea of benami available to any

person who claims to recover the property as the real owner as against another person who is a benami. In *Mithilesh Kumar and Another Vs.*

*Prem Behari Khare*, Section 4 of the Benami Transactions (Prohibition) Act, 1988 fell for consideration. The Supreme Court held that Section 4

refers to the definition of the "benami transactions" given in Section 2(a) of the Act, which means any transaction in which property is transferred to

one person for a consideration paid or provided by another person. u/s 3 of the Act no person shall enter into any benami transaction. Since

Section 3 of the Act prohibits entering into benami transactions, it cannot have a retrospective operation. However, in so far as Section 4 of the

Act is concerned, it is clear that it provides 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 such

property. This provision of law, therefore, applies to past transactions as well. The Supreme Court interpreted the expression "any property held

benami" as not being limited to any particular time, date or duration. The ratio of the decision of the Supreme Court is that once the property is

found to be held benami, no suit, claim or action to enforce any right in respect of any property held benami shall lie. Therefore, once the property

is found to have been held benami, the real owner is bereft of any defence against the person in whose name the property is held or any other

person. In this view of the matter, the sweep of Section 4 was envisaged to take in its ambit and scope the past benami transactions also. Applying

the principle laid down by the Supreme Court in the above cited decision, it is clear that the plea of benami is no longer available to the defendant

in this matter who is trying to set up his ownership to the plaintiff's schedule property on the ground that he is the real owner of the property and that

the plaintiff is only a benami therefor. It is precisely to weed out such contentions that Section 4 of the Act has been promulgated.

6. The learned counsel for the defendant in this matter has relied on a decision reported in *Joseph Chacko v. Behari Nair*, AIR 1989 Kerala 317 in

which it has been held that a sham transaction is not benami and therefore does not come within the purview of Section 4 of the said Act. The

whole emphasis in this decision is on the distinction which exists between the benami transactions and the sham transactions. It is no one's case

here that the transaction in this case was a sham transaction but the specific plea is that the property has been purchased benami jointly in the

names of the two brothers. The plaintiff is admittedly in possession of a portion of the suit house and the defendant has been appropriating the rents

for the rest of the portion in his own name. The transaction is a benami transaction and it was never intended to be a transaction which can fall

within the catch of a "sham transaction". Therefore, we are of the opinion that the decision relied upon by the learned counsel for the defendant is

not applicable to the facts of this case. Applying the principles laid down by the Supreme Court in *Mithilesh Kumari v. Prem Behari Khare* (1

*supra*), referred to above, we hold that the defendant cannot set up the plea of benami in this matter as he is barred to do so u/s 4 of the Act. The

judgment under appeal is, therefore, set aside and the plaintiff is declared to be the owner to the extent of his half share in the plaintiff's schedule

property and is entitled to a decree for partition and separate possession of his half share accordingly.

7. In the result, the L.P.A. is allowed, but, in the circumstances, there will be no order as to costs.