

**(2002) 12 DEL CK 0078**

**Delhi High Court**

**Case No:** I.A. No. 8243 of 2001 in Suit No. 1007 of 2000

Anil Bhasin	APPELLANT
Vs	
Vijay Kumar Bhasin and Others	RESPONDENT

**Date of Decision:** Dec. 5, 2002

**Acts Referred:**

- Benami Transactions (Prohibition) Act, 1988 - Section 2, 3(2), 4(3), 7
- Civil Procedure Code, 1908 (CPC) - Order 6 Rule 17
- Trusts Act, 1882 - Section 81, 82

**Citation:** (2003) 2 BC 247 : (2003) 2 RCR(Civil) 839 : (2003) 128 TAXMAN 130

**Hon'ble Judges:** Shamik Mukherjee, J

**Bench:** Single Bench

**Advocate:** N.K. Thanai, for the Appellant; Vijay Kishan and Vikram for Defendant No. 3, N.L. Gupta, for Defendant Nos. 4 and 5 and Bharat Sharma, Proxy Counsel for Defendant No. 2, for the Respondent

**Final Decision:** Dismissed

**Judgement**

S. Mukherjee, J.

An interesting question has arisen regarding the interplay of the provisions of the Sections 2(a), 3(2) and 4(3) of the Benami Transactions (Prohibition) Act, 1988 by which Sections 81 and 82 in Chapter IX of the Indian Trusts Act, 1982, were deleted in the year 1988, while side-by-side with the enacting of the Benami Act.

2. This application (LA. No. 8243/2001) has been preferred by the plaintiff under Order 6 Rule 17 of the Code of Civil Procedure, seeking leave to amend the plaint, by incorporating inter-alia, the following prayers :

1. plaintiff wishes to add sub-para to the existing para 3, which is as under:

"plaintiff respectfully submits that Smt. Raj Rani Bhasin had purchased certain immovable properties either in her name or in other's name including the

defendant No. 3. The properties purchased by her in other's names were held in trust as trustee. The same were held in fiduciary capacity and for the sole benefit of Smt. Raj Rani Bhasin. The same also devolved upon the parties hereto and are liable to be partitioned. It is submitted that Smt. Raj Rani Bhasin purchased property No. 2-R, Second Floor, DCM Building, 16-Barakhamba Road, New Delhi, in the name of defendant No. 3. She also purchased office bearing No. 1110, Ashoka Estate, Barakhamba Road, New Delhi, in the name of defendant No. 3. She also purchased office bearing No. 1110, Ashoka Estate, Barakhamba Road, New Delhi, admeasuring 640 sq. feet in the name of defendant No. 3. It is submitted that the defendant No. 3 held the said property as trustee to Smt. Raj Rani Bhasin and for her benefit. The said property was purchased in the name of defendant No. 3 in fiduciary capacity and the same also devolved upon the parties hereto after the demise of Smt. Raj Rani Bhasin. Smt. Raj Rani Bhasin also purchased three flats on second, third and fourth floors of DCM Building, Barakhamba Road, New Delhi, a Farm House of Ansal Properties situated at Mehrauli-Gurgaon Road, and plot No. 918-A, DLF City, Gurgaon, from the sale proceeds of the property bearing No. E-205, Greater Kailash-II, New Delhi, and the fixed deposits which devolved upon her by virtue of Will dated 25th January, 1980, executed by late Shri Rajinder Kumar Bhasin. Smt. Raj Rani Bhasin sold the property No. E-205, Greater Kailash-II, New Delhi for Rs. 50 lakhs. It is submitted that Smt. Raj Rani Bhasin also succeeded fixed deposits which were worth Rs. 10,30,000/- in the year 1994. The same were the self-acquired funds of late Shri Rajinder Kumar Bhasin. The said fixed deposits matured in the year 1997 and were worth Rs. 14.80 lakhs. Smt. Raj Rani Bhasin, after the maturity, invested in the fixed deposits a sum of Rs. 5,50,000/- and balance of Rs. 9,30,000/-was utilised by her for purchase of properties. The said properties were purchased by her either in her own name or in the name of defendant No. 3, who held the said property in trust, as trustee to her. Needless to say, the said properties were purchased for her benefit and the same are also liable to be partitioned between the parties hereto.

II. That the plaintiff also wishes to add the aforesaid immovable properties in para 4 at the end of list of the existing list of immovable properties.

3. The objection of the defendant is that the averments sought to be included by amendment, are hit by the Benami Transactions (Prohibition) Act 1988, and as such cannot be allowed. Reliance is placed upon the decision of the Hon'ble Himachal High Court in the case reported as [Dr. Om Prakash Rawal Vs. Mr. Justice Amrit Lal Bahri](#), wherein it has been inter alias held as under :

"19. The next question is about the plea of Benami nature as also of the adverse possession. Sub-section (2) of Section 4 of the Act says that no defense, 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. In view of the ratio of the judgment in Mithilesh Kumari's case (supra), the act has retrospective operation. What can be noticed from the defense taken by the defendant is that the plot in fact was purchased by him in the name of his brother Bal Krishan Rawal. In other words, that the plot was purchased Benami. Thus, this plea with respect to the purchase of plot being a Benami transaction being prohibited under law cannot be put to an issue. This Court in Smt. Nirmala Devi v. Shri Karam Chand, Civil Revision No. 45 of 1992 decided on 1.5.1992, held that:

".....The plea which is sought to be raised, namely, that it was a Benami transaction in the name of the defendant is clearly prohibited by the Benami Transactions (Prohibition) Act, 1988 (Act No. 45 of 1988). May be that it is an additional approach for getting the same relief but no amendment can be allowed having the effect of allowing an additional plea to be raised which is prohibited by law. As such, it is not permissible for the plaintiff to take up such a plea which is prohibited by virtue of Section 4 of the said Act."

4. The plaintiff/applicant on the other hand, has relied upon the Proviso to Section 4 of the Benami Act, which excludes, from the prohibition of the said section, the situation 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 a capacity.

5. It may be pertinent at this stage to discuss some basic facts of this case as per the pleadings of the parties, for the purposes of properly understanding and appreciating the legal aspects of the objections raised by the defendant to the proposed amendment, and the rebuttal thereof by the plaintiff/applicant.

6. It is the case of the plaintiff in the amendment application, that the mother of the plaintiff, had purchased certain properties in the name of her son (who is defendant No. 3), out of the consideration amount paid by the said mother.

7. By way of this amendment application, the plaintiff seeks to include those two properties of the mother of plaintiff, which according to her, had been purchased by the mother in the name of defendant No. 3

8. The defendant submits that even if the pleadings of the plaintiff/applicant in the amendment application, are accepted in their totality, the transaction is clearly a "benami" transaction, since all the ingredients of Section 2(a) which defines "benami transaction", are duly satisfied on the averments made by the plaintiff himself.

9. Sections 2(a), 3(2)(a) and 4(3)(b) of the Benami Act, may be quoted here for convenience of reference :

"Definitions--In this Act, unless the context otherwise requires,--

2(a) "Benami transaction" means any transaction in which property is transferred to one person for a consideration paid or provided by another person;

(3) Prohibition of benami transactions--

(2) Nothing in Sub-section (1) shall apply to--

(a) 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;

4. Prohibition of the right to recover property held benami--

(3)(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."

10. The plaintiff on the other hand submits that at the stage of amendment, the matter is not to be examined on the merits of the averments, but only on the aspect as to whether the proposed amendments are to be allowed or not under the well established and liberal law regarding amendments to a plaint.

11. The contention of the learned Counsel for the plaintiff/applicant, is that defendant No. 3 being the son of Smt. Raj Rani Bhasin (mother of both plaintiff and defendant No. 3), Therefore, the property was held by the said only son/defendant No. 3 as a trustee, or as a person standing in fiduciary capacity qua the mother, and, Therefore, was falling within the scope of Section 4(3) of the Benami Act, and as such not hit by the prohibition contained in Section 4.

12. On the other hand, the contention of Mr. Vijay Kishan, learned Counsel appearing for defendants, is that the transaction referred to in the amendment application [viz of mother paying the consideration for the property which was transferred in the name of son (defendant No. 3)], is clearly a "benami" transaction u/s 2(a) of the Act, and, Therefore, prohibited by Section 3 thereof, as also u/s 4. According to Mr. Vijay Kishan, no suit, claim or action to enforce any right in respect of any property held benami, would be maintainable. Furthermore, on the admitted averments made regarding the property being benami, the related plea with respect to the purchase of the plot being a benami transaction being specifically prohibited under law, cannot be put to issue, in terms of the judgment of the Himachal Pradesh High Court, [Dr. Om Prakash Rawal Vs. Mr. Justice Amrit Lal Bahri,](#)

13. To counter the contention put forward by the plaintiff, regarding the son being a trustee or a person standing in fiduciary capacity towards the mother, the learned Counsel for defendant has referred to me certain amendments which took place contemporaneously in the year 1988 itself when the Benami Transaction Prohibition Act was enacted, and in particular to Section 7 of the said Act, which provides for

repeal of Sections 81,82 and 94 of the Indian Trusts Act, 1982. According to the learned Counsel for judgment debtor, the repeal of Sections 81 and 82, of the Trusts Act by the Benami Transactions Act of 1988, itself established that the intention of the Legislature, was not to allow the concept of trustee and/ or of fiduciary capacity of the pre-1988 period, to continue to remain as an available defense. Otherwise, the repeal of Sections 81 and 82 of the Trusts Act, would have no meaning since then many persons holding property, which had been paid for by another, would simply by claiming that the person holding the property is a trustee or in fiduciary relationship, avoid the prohibition of the Benami Transactions Act itself.

14. Similarly on that interpretation, the provisions of Section 3(2)(a) of the Benami Transactions Act, 1988, will also be rendered irrelevant, if the contention of the plaintiff is allowed to prevail. According to Mr. Vijay Kishan learned Counsel for defendant, it is only the purchase of property by a person in the name of his wife or unmarried daughter which is exempt from the prohibition of the Benami Act. Even purchase in the name of a son or a married daughter, have not been given that status. Therefore, once the Legislature has expressly conferred exemption only qua property held in the name of wife, or in the unmarried daughter, it is to be deemed that such restricted exclusion, cannot be extended or made applicable to other family members, such as even a son.

15. It is obvious that in view of Section 7 of the Benami Transactions Act, which repealed Sections 81 and 82 of the Indian Trusts Act, 1882, there cannot be the same concept of trusteeship or fiduciary capacity, or that of the transferee being deemed to be holding for the benefit of the person buying or providing the consideration as was the position prior to the amendment of 1988.

16. At the same time, there exists the provisions of Section 4(3)(b) of the Benami Transactions Act, 1988, being in the nature of a proviso excluding from the prohibition, the right to recover property held benami, in such situations where the person in whose name the property is held, is a trustee or other persons standing in a fiduciary capacity.

17. To my mind, the only interpretation which can reconcile all the provisions, is to hold that after the repeal of Sections 81 and 82 of the Indian Trusts Act, 1882, it is only those instances of fiduciary capacity such as property of partnership firm held in the name of one of the partners, or property which Mr. X wanted Mr. Y to buy in the name of Mr. X, but in violation of that instruction, Mr. Y has bought the property in his (Y's) own name. In such a case Mr. Y being in fiduciary capacity and a trustee of Mr. X, the provisions of Section 4(3)(b) will ensure that prohibition of Benami Transaction does not stand in the way of a legal proceeding by Mr. X to enforce any right in respect of the said property.

18. The distinction is subtle, but significant. If Mr. X asks Mr. Y to purchase in his own name certain property, of which consideration has been paid by Mr. X, then that is a

benami transaction. On the other if Mr. X were to ask Mr. Y to buy the property in the name of Mr. X, but for any reason Mr. Y purchases the property in his own name (viz name of Mr. Y), then the relationship of trustee and/or fiduciary capacity is available in the former case, but not in the latter case.

19. In the application seeking amendment of the plaint, it is found that the plaintiff has very categorically, alleged that the mother had paid the property which was purchased in the name of her son. It is not even suggested that the mother wanted the property to be purchased for herself and/or that it was the son (defendant No. 3) who by transgressing directions purchased the property in his own name.

20. Thus the contention of learned Counsel for the defendant, that on the averments as made by the plaintiff/applicant himself in his application seeking amendment, the transaction is clearly a "benami" transaction, and, Therefore, legal proceedings are prohibited in relation to such a transaction, are clearly hit by the Prohibition of the Benami Act.

21. Resultantly, the amendment as proposed, cannot be allowed on account of the legal bar arising from the provisions of the Benami Transactions Act, 1988, when applied to the averments of the plaintiff in the amendment application in question.

22. The same view as of the Himachal Pradesh High Court, is also in Sant Ram v. Abdul Haq, AIR 1971 J&K 81; Sohan Lal Mehta v. Shiv Das Mehta 1976 (78) PLR 424.

23. The application for amendment is accordingly dismissed with costs.