

Shanmuga Patro Vs Ministry of Finance

Court: Delhi High Court

Date of Decision: April 20, 2012

Acts Referred: Benami Transactions (Prohibition) Act, 1988 & Section 3, 4, 5, 5(1), 5(2)

Citation: (2012) 2 BC 717 : (2012) 189 DLT 132

Hon'ble Judges: A.K. Sikri, Acting C.J.; Rajiv Sahai Endlaw, J

Bench: Division Bench

Advocate: A.S. Chandhiok, ASG with Ms. Sweety Manchanda, for the Respondent

Judgement

Rajiv Sahai Endlaw, J.

This petition filed in public interest seeks a direction to the respondent to appoint "Competent Authority

contemplated in Section 5 of the Benami Transactions (Prohibition) Act, 1988 and to frame Rules in relation to the procedure to be adopted by

the said Authority for acquiring benami properties. It is the plea of the petitioner that notwithstanding the law having been enacted more than 20

years back in 1988, it has been allowed to remain toothless. Notice of the petition was issued and a counter affidavit has been filed stating that

during the process of formulating the Rules, it was found that owing to the grave infirmities in the legislation, it would not be possible to formulate

the Rules without a comprehensive legislation by repealing the Act; that the new legislation has been introduced in the Parliament in the form of

Benami Transactions (Prohibition) Bill, 2011; that the lacunas in the law could not be filled merely by framing the Rules.

2. We have heard the counsel for the parties.

3. The Act as per its preamble, was enacted "to prohibit benami transactions and to recover property held benami and for matters connected

therewith". Section 3 of the Act prohibits benami transactions and makes the same punishable with imprisonment for a term extending to three

years or with fine or with both. Section 4 of the Act prohibits enforcement of rights in any property held benami against the person in whose name

the property is held. Section 5(1) makes all properties held benami subject to acquisition by "such authority, in such manner and after following

such procedure, as may be prescribed". Section 5(2) of the Act provides that no amount shall be payable for such acquisition.

4. The respondent in their counter affidavit has stated that the power vested in the Central Government u/s 8 of the Act to make Rules for carrying

out the purposes of the Act was not found to be sufficient for constituting the Authority and for prescribing the manner and procedure for

acquisition of the property held benami. It is pleaded that powers of a Civil Court are required to be conferred on such an Authority and which

could not be conferred under the rule making powers. It is further pleaded that there is no provision in the Act as to in whom, the property held

benami so acquired by the Authority, to vest and need was felt for providing for vesting of such acquired property with the Central Government

and which also could not be done in exercise of Rule making powers. It is also argued that in the absence of any appellate structure provided in the

Act, it was felt that the Rules would not stand the test of law. It is yet further argued that there is no provision in the Act barring the jurisdiction of

Civil Courts against the action of the Authority under the Act and which lacuna also could not be filled in exercise of the Rule making power.

5. The petitioner in rejoinder has contended, that the implementation of a constitutionally valid legislation in force cannot be deferred owing to

pendency of some Bill in the Lok Sabha; Reliance in this regard is placed on State of Punjab Vs. Dalbir Singh, that the approach of the

Government in the matter has been lackadaisical; that the attempt to make the Rules was made only after the petitioner had made RTI queries and

in which it was stated that the efforts for making the Rules had been commenced; the impact of non implementation of the aforesaid provisions are

highlighted; it is argued that there is a political unwillingness against implementation of the Act.

6. The petitioner has also invited our attention to :

(i) Attorney General for India and Others Vs. Amratlal Prajivandas and Others, where it was observed that it is not possible for the legislature to

anticipate all facets and thus the Courts must adjudge the constitutionality of legislation by the generality of its provisions and not by its crudities or

its inequities;

(ii) A.K. Roy and Others Vs. Union of India (UOI) and Others, observing that amendments to statutes come into effect only when they are

brought into force;

(iii) Para 67 of Canbank Financial Services Ltd. Vs. The Custodian and Others, where observations were made of the evil of benami transactions

and the non- workability thereof rued.

7. Howsoever laudatory the objective in filing this petition may be, we cannot shut our eyes to the lacunas pointed out in the Act and to the

difficulties being faced in removing the same through the exercise of the Rule making power. Though the delay in application of mind in this regard

may be unpardonable and there is merit in the argument of the petitioner of the unwillingness of the Legislature and the Executive in this regard but

the reason now given cannot be brushed aside as frivolous. We therefore are of the opinion that no purpose will be served in issuing a direction as

sought, for appointment of the Competent Authority under the Act and for framing of the Rules. Any action of acquisition in pursuance thereto is

likely to be mired in unnecessary litigation, without serving any purpose whatsoever. We rather are of the opinion that the exercise, of amendment

to the Act / new legislation which has now been commenced, be expedited.

8. We may however notice that this Court in *Common Cause Vs. Union of India*, has held that Court cannot issue a direction for notifying of a law.

The Supreme Court in *A.K. Roy (supra)* itself has held that neither it is for the Courts to censure the Executive nor is it for the Courts to take over

the function of Parliament. To the same effect is the *State of Himachal Pradesh Vs. A Parent of a Student of Medical College, Simla and Others*,

holding the directions of the High Court of Himachal Pradesh in a public interest litigation for implementation of the recommendations contained in

the report of the Anti Ragging Committee to be wholly unsustainable. It was held that though the direction of the High Court ostensibly did no more

than call upon the Chief Secretary to inform the Court as to what action the State Government proposed to take on the recommendations to initiate

legislation for curbing ragging, it was, in fact and substance, intended to require the State Government to initiate legislation on the subject. It was

held that such a direction was nothing short of an indirect attempt to compel the State Government to initiate legislation and which the Court was

not entitled to do. It was further held that it is entirely a matter for the Executive Branch of the Government to decide whether or not to introduce a

particular legislation and is not a matter which is within the sphere of the functions and duties allocated to the judiciary under the Constitution. The

Supreme Court held that the Court cannot group the function assigned to the Executive and the Legislature under the Constitution and it cannot

even indirectly require the Executive to introduce a particular legislation or the Legislature to pass it or assume to itself a supervisory role over the

law making activities of the Executive and the Legislature.

9. In *State of Himachal Pradesh and Another Vs. Umed Ram Sharma and Others*, the High Court had directed the State Government to allot a

particular sum for expenditure on account of a particular project. The Supreme Court posed the questions, how far the Court could give directions

which are administrative in nature and whether any direction could be given to build roads where there are no roads and whether the Court could

direct that the administration should report from time to time so that action taken can be supervised by the Court. The Supreme Court found that

the Executive was not oblivious of its obligation though in its sense of priority there may have been certain lethargy and inaction. It was observed

that there had been at the highest a slow application of energy in the action by the Executive. In these circumstances, it was held that by the

process of judicial review, if the High Court activates or energizes executive action, it should do so cautiously.

10. The aforesaid dicta squarely applies to the situation before us. Maybe, there has been some lethargy or even unwillingness in framing the Rules.

However, now the matter has been studied and the difficulties expressed, are found to be genuine; that is why, process of enacting a new

legislation has been commenced. In such situation, this Court must know its limitations; the Court should remember that the Judges are not to

innovate at pleasure and are to exercise discretion informed by tradition.

11. A seven-Judge Bench of the Supreme Court in P. Ramachandra Rao Vs. State of Karnataka, held that instances of judicial excessivism that fly

in the face of the doctrine of separation of powers which envisages that the legislature should make law, the Executive should execute it and the

judiciary should settle disputes in accordance with the existing law; the Court went to the extent of holding various dictas of two- Judge and three-

Judge Benches of the Supreme Court in Public Interest Litigations to be not legitimate exercise of judicial power. It was observed that giving

directions of a legislative nature is not a legitimate judicial function.

12. Reference may also be made to Common Cause (A Regd. Society) Vs. Union of India (UOI) and Others, holding that Courts cannot create

rights where none exist nor they can go on making orders which are incapable of enforcement or direct legislation or proclaim that they are playing

the role of a law maker merely for an exhibition of judicial valour.

13. Division Benches of this Court in Bhagwat Dayal Sharma Vs. UOI ILR (1974) Del 847 and Peoples Union for Democratic Rights Vs.

Ministry of Home Affairs ILR (1987) Del 235 have held that where the power to do or not to do a thing is optional and discretionary and there is

no statutory obligation, direction to the Executive to do a particular thing cannot be given even where matter is of public importance.

14. In the present case also, no obligation on the part of the respondents to frame the Rules, notwithstanding the impracticality thereof, is

established. It is purely a policy matter. The Supreme Court in Kanhaiya Lal Sethia and Another Vs. Union of India (UOI) and Another, held that

it is not open to a petitioner to seek a direction to the Union of India to introduce an official Bill in the Parliament or to sponsor a Private Member's

Bill to be introduced on the subject. It was held that Courts do not interfere in policy matters of the State unless the policy violates the mandate of

the Constitution or any statutory provision or is otherwise actuated by mala fides.

15. The petitioner after the judgment was reserved has filed an application to place other materials on record and which application was allowed.

The petitioner by the said application has drawn attention to the answer in the Lok Sabha to Unstarred Question 5645 relating to amendment in

Anti Corruption Act and contends that the same demonstrates that the Act as it exists has not been examined and the Bill aforesaid introduced in

the Parliament is not the outcome of any study of the law and the study undertaken is still ongoing. The petitioner also invites attention to the

correspondence with the CVC, also emphasizing the need and feasibility of benami law as it exists. On the basis thereof it is contended that the

respondent has not followed the prescribed Parliamentary procedure for formulating statutory regulation. The petitioner yet further invites attention

to the judgment dated 22nd February, 2012 of the Mumbai High Court in Sanjay Dinanath Tiwari Vs. Director General of Police (Anti

Corruption) [WP(C) 51/2010] directing the State to attach the properties of the respondent therein held benami. On the basis thereof it is

contended that no detailed procedure as pleaded by the respondent in its counter affidavit is required to be formulated. The petitioner again relying

on Dalbir Singh (supra) has further argued that the delay caused in implementing the benami law is obstinate and this Court is empowered to issue

the directions sought.

16. We are afraid none of the aforesaid persuades us to take a view different from the one expressed above. The petitioner has been unable to

show as to how the framing of Rules inspite of difficulties expressed, will not lead to large volume of futile litigation. We therefore find ourselves

unable to grant the reliefs sought and dispose of this writ petition merely expressing and conveying our belief and confidence that immediate steps

shall be taken for removing the lacunas aforesaid in the law and / or for having the law amended / replaced so that the purpose which the Act was

intended to serve, is enforced.