R. RAJAGOPAL REDDY (DEAD) BY LRS. AND ORS. A

v.

PADMINI CHANDRASEKHARAN (DEAD) BY LRS.

JANUARY 31, 1995

B

[KULDIP SINGH, B.L. HANSARIA AND S.B. MAJMUDAR, JJ.]

Benami Transactions (Prohibition) Act, 1988—Sections 4(1) and 4(2)—Effect of Section 4(1) on pending proceedings—Claim to property on account of it being held benami—Proceedings not finally disposed of when sec. 4(1) came into operation—Whether Section 4(1) can be applied to such proceedings—Held, No. C

Various suits were filed years back before coming into operation of Section 4(1) of the Benami Transactions (Prohibition) Act, 1988, to enforce right in property held benami against person in whose name such property was held or any other person by or on behalf of persons claiming to be real owner thereof. These proceedings were pending either at the first appeal stage or Second Appeal stage or in revision before the High Court or in civil appeals before this court when Section 4(1) came into operation. The question raised was whether Section 4(1) of the Act could be applied to such pending proceedings. The Division Bench of this Court in *Mithilesh Kumari* v. *Prem Behari Khare,* [1989] 1 SCR 621, had taken an affirmative view. The correctness of that view came up for consideration before another Bench of this court. Ultimately the matters were placed for final hearing before a three Judge Bench. D E

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The appellants submitted that litigations were already filed by the parties prior to the coming into force of the Act and the relevant provisions thereof and therefore, they had to be governed by the then existing law which held the field at the time of intiation of these proceedings; that there is nothing in the Act to indicate that any of the provisions of the Act including Section 4(1) had any retrospective effect; that even the Division Bench of this Court in *Mithilesh Kumari's* case had taken the view that Section 3(1) of the Act is prospective in operation; that it would be inconsistent to hold that though the Act is not retrospective it would apply to all pending proceedings at whatever stage they might be and such proceedings would incur dismissal u/s 4(1); that there was a substantive G H

A right in the plaintiff under the existing laws under which consistently such benami transactions were recognized and could be enforced by courts of law and that this substantive right was sought to be taken away by Section 4(1) and unless there was anything to suggest that it is retrospective in operation, it could not be treated to be retrospective.

B The respondents/defendants submitted that even though the Act may be perspective, at least to the extent it is roping in all past transactions of benami purchases of properties and when rights arising therefrom are sought to be put to an end by Section 4(1) which covers any or every property held benami, there was no reason why that Section could not C apply to such proceedings at any stage till they got finally decided by the highest court and that if there is any change in law by which any pending litigation becomes incompetent, such change in law can be applied to such pending proceedings at whatever stage they might be pending before higher Courts.

D Disposing of the matter, this Court

HELD : 1.1 Section 4(1) of the Benami Transactions (Prohibition) Act, 1988, cannot be applied to suit, claim or action to enforce any right in property held benami against person in whose name such property is E held or any other person, if such proceeding is initiated by or on behalf of a person claiming to be real owner thereof, prior to the coming into force of Section 4(1) of the Act. [720-H, 721-A]

Mithilesh Kumari v. *Prem Behari Khare,* [1989] 1 SCR 621 (DB), overruled.

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1.2. The preamble of the Act itself states that it is an Act to prohibit benami transactions and the right to recover property held benami, for matters connected therewith or incidental thereto. Thus it was enacted to efface the then existing rights of the real owners of properties held by others benami. Such an act was not given any retrospective effect by the G legislature. Sub-section (1) of Section 4 states 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 shall lie by or on behalf of a person claiming to be the real owner of such property. As per Section 4(1) no such suit shall thenceforth lie to recover the H possession of the property held benami by the defendant. Plaintiff's right

to that effect is sought to be taken away and any suit to enforce such a right after coming into operation of Section 4(1) that is 19th May, 1988, shall not lie. The legislature in its wisdom has nowhere provided in Section 4(1) that no such suit, claim or action pending on the date when Section 4 came into force shall not be proceeded with and shall stand abated. On the contrary, clear legislative intention is seen from the words "no such claim, suit or action shall lie", meaning thereby no such suit, claim or action shall be permitted to be filed or entertained or admitted to the portals of any Court for seeking such a relief after coming into force of Section 4(1). [728-C-F] A B

The word 'lie' in connection with the suit, claim or action is not defined by the Act. If one goes by the dictionary meaning it would mean that such suit, claim or action to get any property declared benami will not be admitted on behalf of such plaintiff or applicant against the concerned defendant in whose name the property is held on and from the date on which this prohibition against entertaining of such suits comes into force. [728-H, 729-A] C D

The legislature in its wisdom has not expressly made Section 4 retrospective. Then to imply by necessary implication that Section 4 would have retrospective effect and would cover pending litigation filed prior to coming into force of the Section would amount to taking a view which run counter to the legislative scheme and intent projected by various provisions of the Act. On the express language of Section 4(1) any right inhering in the real owner in respect of any property held benami would get effaced once Section 4(1) operated, even if such transaction had been entered into prior to the coming into operation of Section 4(1), and hence-after Section 4(1) applied no suit can lie in respect to such a past benami transaction. To that extent the Section may be retroactive. [729-C-D] E F

Mithilesh Kumari v. *Prem Bihari Khare,* [1989] 1 SCR 621, approved.

1.3. Section 4(2) provided that if a suit is filed by a plaintiff who claims to be the owner of the property under the document in his favour and holds the property in his name, once Section 4(2) applies, no defence will be permitted or allowed in any such suit, claim or action by or on behalf of a person claiming to be the real owner of such property held benami. The disallowing of such a defence which earlier was available, itself suggests that a new liability or restriction is imposed by Section 4(2) G H

A on a pre-existing right of the defendant. Such a provision also cannot be said to be retrospective or retroactive by necessary implication. Section 4(2) does not expressly seek to apply retrospectively. So far as such a suit which is covered by the sweep of Section 4(2) is concerned, the prohibition of Section 4(1) cannot apply to it as it is not a claim or action filed by the plaintiff to enforce right in respect of any property held benami. On the B contrary, it is a suit, claim or action flowing from the sale deed or title deed in the name of the plaintiff. Even though such a suit might have been filed prior to 19-5-1988, if before the stage of filing of defence by the real owner is reached, Section 4(2) becomes operative from 19th May, 1988, then such a defence, as laid down by Section 4(2) will not be allowed to C such a defendent. However, that would not mean that Section 4(1) and 4(2) only on that score can be treated to be impliedly retrospective so as to cover all the pending litigations in connection with enforcement of such rights of real owners who are parties to benami transactions entered into prior to the coming into operation of the Act and specially Section 4 D thereof. It is also pertinent to note that Section 4(2) enjoins that no such defence 'shall be allowed' in any claim, suit or action by or on behalf of person claiming to be the real owner of such property. That is to say no such defence shall be allowed for the first time after coming into operation of Section 4(2). If such a defence is already allowed in a pending suit prior to the coming into operation of Section 4(2), enabling an issue to be raised E on such a defence, then the Court is bound to decide the issue arising from such an already allowed defence as at the relevant time when such defence was allowed Section 4(2) was out of picture. [729-H, 730-A-F]

1.4. In the operation of Sections 4(1) and (2), no discrimination can F be said to have been made amongst different real owners of property. In fact, those cases in which suits are filed by real owners or defences are allowed prior to coming into operation of Section 4(2), would form a seprate class as compared to those cases where a stage for filing such suits or defences has still not reached by the time Section 4(1) and (2) start operating. Consequently, latter type of cases would form a distinct category G of cases. There is no question of discrimination being meted out while dealing with these two classes of cases differently. A real owner who has already been allowed defence on that ground prior to coming into operation of Section 4(2) cannot be said to have been given a better treatment as compared to the real owner who has still to take up such a defence and H in the meantime he is hit by the prohibition of Section 4(2). Equally there

cannot be any comparison between a real owner who has filed such suit earlier and one who does not file such suit till Section 4(1) comes into operation. All real owners who stake their claims regarding benami transactions after Section 4(1) and (2) came into operation are given uniform treatment by these provisions, whether they come as plaintiffs or as defendants. [731-H, 732-A-C]

1.5. A conjoint reading of Section 82 of the Indian Trusts Act and Section 6(b), (d) and (e) of the General Clauses Act clearly enjoins that if suits are pending wherein the plaintiff have put forward claims under the then existing Section 82 of the Indian Trusts Act, such proceedings are to be continued by assuming that the repealing of Section 82 has not been effected in connection with such pending proceedings. [733-E]

2. Where a statutory provision which is not expressly made retrospective by the legislature seeks to affect vested rights and corresponding obligation of parties, such provision cannot be said to have any retrospective effect by necessary implication. [734-A]

Maxwell on *Interpretation of Statutes,* 12th Edn. (1969), referred to.

In *Re Athlumney* [1898] 2 QB 551; *Garikapati* v. *N. Subbiah Chaudhary,* AIR (1957) SC 540, relied on.

There is nothing in the Act to show that Section 4(1) has to apply retrospectively to all pending proceedings wherein such a right is sought to be exercised by the plaintiff or such a defence has already got allowed by the concerned defendant. [734-G]

3. The Act cannot be treated to be declaratory in nature. Declaratory enactment declares and clarifies the real intention of the legislature in connection with an earlier existing transaction or enactment, it does not create new rights or obligations. On the express language of Section 3, the Act cannot be said to be declaratory but in substance it is prohibitory in nature and seeks to destroy the rights of the real owner qua properties held benami and in this connection it has taken away the right of the real owner both for filing a suit or for taking such a defence in a suit by benamidar. Such an Act which prohibits benami transactions and destroys rights flowing from such transactions as existing earlier is really not a declaratory enactment. [734-H, 735-A-B]

A *Mithilesh Kumari* v. *Prem Behari Khare,* **[1989] 1 SCR 621, overruled.**

G.P. Singh, *Principles of Statutory Interpretation* **5th Ed. 1992, referred to.**

B **Section 4 or for the matter the Act as a whole is not a piece of declaratory or curative legislation. It creates substantive rights in favour of benamidars and destroys subtantive rights of real owners who are parties to such transactions and for whom new liabilities are created by the Act. [736-E]**

C **4. The words 'no suit shall lie' as found in Section 4(1) and 'no defence based on rights in respect of property shall be allowed' as found in Section 4(2) have limited scope and operation and consequently this consideration also cannot have any effect on the conclusion which can be reached in this case. Future defences of real owners against benamidars** D **holders have been nullified as are covered by the sweep of Section 4(2) and not others. Section 4(2) will have a limited operation even in cases of pending suits after Section 4(2) came into force if such defences are not already allowed earlier. [736-F, 737-B]**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5653 of E 1990 etc. etc.

From the Judgment and Order dated 7.11.89 of the Madras High Court in O.Side A. No. 27 of 1980.

P. Chidambaram, M.L. Verma, V. Balachandran, V. F Ramasubramaniam, T. Harish Kumar, K.K. Mani, Raju Ramachandran, V. Krishnamurthy, E.M.S. Anam, M.K.D. Namboodri, P.K. Pillai, R.C. Misra, R.D. Upadhyay, Ms. Vijay Lakshmi Menon, S.B. Upadhyay, B. Mohan, Vineet Kumar, P. Mahale, Ms. Kiran Suri, Mr. A Mariarputham, Mr. R. Mohan, Joseph Pokkatt, R.A. Perumal and Kamal Kumar Bhatia for the G appearing parties.

The Judgment of the Court was delivered by

MAJMUDAR, J. In this group of matters a common question arises for our consideration. It is to the following effect 'whether Section 4(1) of H the Benami Transactions (Prohibition) Act, 1988 (hereinafter referred to

'Act') can be applied to suit, claim or action to enforce any right in property held benami against person in whose name such property is held or any other person, if such proceeding is initiated by or on behalf of a person claiming to be real owner thereof, prior to the coming into force of Section 4(1) of the Act'. Section 4 with its relevant sub-sections reads as under :-

> "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 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 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."

In fact the question is answered in the affirmative by a Division Bench of this Court in *Mithilesh Kumari & Anr.* v. *Prem Behari Khare,* [1989] 1 S.C.R. 621. In that case two learned Judges of this Court constituting the Division Bench have taken the aforesaid affirmative view. The correctness of that view came up for consideration before another Division Bench of this Court. That Division Bench by its order dated 10th March, 1992 directed that these matters be placed for hearing at the bottom of the miscellaneous list for final hearing on 22nd March, 1992 before a three

Judge Bench. Ultimately this group of matters came to be placed for final hearing before this Bench.

We have heard learned counsel for the respective parties on this question. Learned advocates were aggreeable that though the order of the Division Bench dated 10th March, 1992 has resulted in placing these matters before three-Judge Bench for final hearing, we may after answering the question canvassed before us, sent back the matters to the Bench of two learned Judges who can dispose of the same on merits in accordance with law, in the light of answer given by us on the aforesaid question.

In order to appreciate the nature of the controversy posed for our consideration, we may note a few relevant facts leading to these proceedings. In most of the proceedings various suits were filed years back before coming into operation of Section 4(1) of the Act. These proceedings were pending either at the First Appeal stage or Second Appeal stage or in revision before the High Court or in civil appeals before this Court when Section 4(1) came into operation. The question is whether these pending proceedings at various stages in the hierarchy can get encompassed by the sweep of Section 4(1) and such suits would be liable to be dismissed as laid down by that section.

Learned counsel appearing for the concerned plaintiffs submitted before us that Sections 3, 5 and 8 of the Act came into force on 5th September, 1988 when the Act received the President's assent and the remaining Sections were deemed to have come into force on 19th May, 1988 and that prior to the coming into force of the Act and the relevant provisions thereof, litigations were already filed by the parties and they had to be governed by the then existing law which held the field at the time of initiation of these proceedings and that there is nothing in the Act to indicate that any of the provisions of the Act including Section 4(1) has any retrospective effect. They further contended that even the Division Bench of this Court in *Mithilesh Kumari's* case (supra) has taken the view that Section 3(1) of the Act is prospective in operation. Under these circumstances, they submitted that it would be inconsistent to hold that though the Act is not retrospective it would apply to all pending proceedings at whatever stage they might be and such proceedings would incur dismissal under Section 4(1). They submitted that there was a substantive right in the plaintiff under the existing laws which had sanction of more

than a century, under which consistently such benami transactions were recognised and could be enforced by courts of law. That this substantive right is sought to be taken away by Section 4(1) and unless there is anything to suggest that it is retrospective in operation, it could not be treated to be retrospective.

Learned counsel appearing for the respondents/defendants on the other hand submitted that even though the Act may not be retrospective, at least to the extent it is roping in all past transactions of benami purchases of properties and when rights arising therefrom are sought to be put to an end by Section 4(1) which covers any or every property held benami, there is no reason why the said Section cannot apply to such proceedings at any stage till they get finally decided by the highest court in the hierarchy. If there is any change in law by which any pending litigation becomes incompetent, such change in law can be applied to such pending proceedings at whatever stage they might be pending before higher Courts. In short they submitted that the decision rendered by Saikia J. in *Mithlesh Kumari's* case (supra) lays down correct law and requires no reconsideration.

Having given our anxious consideration to these rival contentions, we have reached the conclusion that the question has to be answered in the negative and it must be held that the decision of the Division Bench taking a contrary view does not lay down correct law.

The reasons are these. Under various legal provisions holding the field, prior to the coming into operation of this Act, benami transactions were a recognised specie of legal transactions pertaining to immovable properties. Under the Indian Trusts Act, 1882 almost 113 years back the then legislature enacting the law laid down in Section 82 as under :-

> "Transfer to one for consideration paid by another - where property is transferred to one person for a consideration paid or provided by another person, and it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration.
>
> Nothing in this section shall be deemed to affect the Code of Civil Procedure, Section 317, or the Act No. XI of 1859 (to improve the law relating to sales of land for arrears of revenue in the Lower

A Provinces under the Bengal Presidency), Section 36."

Therefore, it was a legal right of the plaintiff to contend in those days that even though the transfer of the property had been effected in the name of defendant benamidar for the plaintiff from whom the consideration had B moved the plaintiff was the real owner and, therefore, the defndant was bound to restore such property to the real owner. If the benamidar took up a defiant attitude then the law provided a substantive right to the plaintiff to come to the Court for getting appropriate declaration and relief of possession on that ground. Various Courts in India over a century used to entertain such suits and such suits on proof of relevant facts used to be C decreed. The legislature, however, in its wisdom considered the question of enacting an appropriate legislation for prohibiting such benami transactions. For that purpose earlier Benami Transactions (Prohibition of the Right to Recover Property) Ordinance, 1988, was promulgated by the President and it was followed by the Act, the different sections of which D came into force on the respective dates as mentioned hereinabove. It may also be kept in view that these exercises were undertaken in the light of India Law Commission's 57th Report on benami transation. This Report was submitted on 7th August, 1973 by the Law Commission after studying benami system as operating in India and England. The Law Commission also examined implications of the provisions of the Indian Trusts Act, 1882 E and other statutory modifications of the benami law as contained in the Code of Civil Procedure, the Transfer of Property Act, the Indian Penal Code and the Income Tax Act. In that Report, the Law Commission suggested retrospective effect to be accorded to the proposed legislation. 15 years, however, passed by and the Parliament did not take any steps in F this connection. In the meantime, many more suits concerning benami transactions not only saw the light of day but also got successfully disposed of. Some of them, however, were pending in first appeals or second appeals or revisions. Then, as noted earlier, on 19th May, 1988 the President of India promulgated the Ordinance to prohibit the right to recover property held benami and for matters connected therewith and incidental thereto G based on the suggestion of the Law Commission of India. Thereafter the Law Commission was requested to take up the question of benami transactions for detailed examination and to give its considered views as early as possible so that a Bill to replace the Ordinance could be drafted on the basis of its recommendations and got passed by the Parliament. Indian Law H Commission by its 130th Report on August 14, 1988 recommended passing

of appropriate legislation and accordingly the Benami Transactions (Prohibition) Bill 1988, drafted after getting the Report, was introduced in the Rajya Sabha on 31st August, 1988 and the Bill was passed. In para 3.18 of its Report, the Law Commission made the following recommendation in connection with the retrospective operation of the proposed legislation:-

> "3.18. Therefore viewed from either angle, the Law Commission is of the firm opinion that the legislation replacing the ordinance should be retroactive in operation and that no *locus penitentia* need be given to the persons who had entered into benami transactions in the past. They had notice of one and a half decades to set their house in order. No more indulgence is called for."

It is thereafter that the Act came to be passed by both the Houses of Parliament and came into force as stated above. It might be appreciated that though the Law "Commission recommended retrospective applicability of the proposed legislation, the Parliament did not make the Act or any of its Sections expressly retrospective in its wisdom. A bird's eye view of the Act clearly establishes this position. The Act being Act No. 45 of 1988 in its preamble states that it is an act to prohibit benami transactions and the right to recover property held benami, for matters connected therewith or incidental thereto. Section 3 which is the heart of the Act imposes the required prohibition of benami transactions. It reads as under :-

> "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.
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> (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 1974), an offence under this section shall be

A non-cognizable and bailable."

A mere look at the above provisions shows that the prohibition under Section 3(1) is against persons who are to enter into benami transactions and it has laid down that no person shall enter into any benami transaction which obviously means from the date on which this prohibition comes into B operation i.e. with effect from September 5, 1988. That takes care of future benami transactions. We are not concerned with sub-section (2) but sub-section (3) of Section 3 also throws light on this aspect. As seen above, it states that whoever enters into any benami transaction shall be punishable with imprisonment for a term which may extend to three years or with fine C or with both. Therefore, the provision creates a new offence of entering into such benami transactions. It is made non-cognizable and bailable as laid down under sub-section (4). It is obvious that when a statutory provision creates new liability and new offence, it would naturally have prospective operation and would cover only those offences which take place after section 3(1) comes into operation. In fact Saikia J. speaking for D the Court in *Mithilesh Kumari's* case (supra) has in terms observed at page 635 of the report that Section 3 obviously cannot have retrospective operation. We respectfully concur with this part of the learned Judge's view. The real problem centres round the effect of Section 4(1) on pending proceedings wherein claim to any property on account of it being held benami by E other side is on the anvil and such proceeding had not been finally disposed of by the time Section 4(1) came into operation, namely, on 19th May, 1988. Saikia J. speaking for the Division Bench in the case of *Mithilesh Kumari* (supra) gave the following reasons for taking the view that though Section 3 is prospective and though Section 4(1) is also not expressly made F. retrospective, by the legislature, by necessary implication, it appears to be retrospective and would apply to all pending proceedings wherein right to property allegedly held benami is in dispute between parties and that Section 4(1) will apply at whatever stage the litigation might be pending in the hierarcy of the proceedings :-

G (1) Section 4 clearly 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 real owner of such property. This naturally relates to past transaction as well. The expression 'any property H held benami' is not limited to any particular time, date or duration. Once

the property is found to have been held benami, no suit, claim, or action to enforce any right in respect thereof shall lie. A

(2) Similarly sub-section (2) of Section 4 nullifies the defences 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 in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property. It means that once a property is found to have been held benami the real owner is deprived of such a defence against the person in whose name the property is held or any other person. In other words, in its sweep Section 4(2) engulfs past benami transactions also. B

(3) When an Act is declaratory in nature, the presumption against retrospectivity is not applicable. A statute declaring the benami transactions to be unenforceable belongs to this type. The presumption against taking away vested right will not apply in this case in as much as under law it is the benamidar in whose name the property stands, and law only enabled the real owner to recover the property from him which right has now been ceased by the Act. In one sense there was a right to recover or resist in the real owner against the benamidar. *Ubi jus ibi remidium.* Where the remedy is barred, the right is rendered unenforceable. C D

(4) When the law nullifies the defences available to the real owners in recovering the benami property from the benamidar, the law must apply irrespective of the time of the benami transactions. The expression "shall lie" under Section 4(1) and "shall be allowed" in Section 4(2) are prospective and shall apply to present (future stages) and future suits, claims or action only. E F

(5) The word "suits" would include appeals and further appeals as appeals are in continuation of the suits. This is an aspect of procedural law and, therefore, when procedure is changed for deciding any such proceedings between the parties the provisions of such procedureal law can be applied to such pending proceedings by necessary implication. G

(6) Repelling the contention that rights of the parties to a suit would be determined on the basis of rights available to them on the date of filing of the suit and distinguishing the judgment of this Court in *Nand Kishore Marwah* v. *Samundri Devi,* [1987] 4 S.C.C. 382, it was observed that the aforesaid case was for eviction where the rights of the parties on the date H

A of suit were material unlike in this case where subsequent legislation has nullified the defences of benami holders.

Before we deal with these six considerations which weighed with the Division Bench for taking the view that Section 4 will apply retrospectively in the sense that it will get telescoped into all pending proceedings, B howsoever earlier they might have been filed, if they were pending at different stages in the hierarchy of the proceedings even upto this Court, when Section 4 came into operation, it would be apposite to recapitulate the salient feature of the Act. As seen earlier, the preamble of the Act itself states that it is an act to prohibit benami transactions and the right to C recover property held benami, for matters connected therewith or incidental thereto. Thus it was enacted to efface the then existing rights of the real owners of properties held by others benami. Such an act was not given any retrospective effect by the legislature. Even when we come to Section 4, it is easy to visualise that sub-section (1) of Section 4 states that no suit, claim or action to enforce any right in respect of any property held benami D against the person in whose name the property is held or against any other shall lie by or on behalf of a person claiming to be the real owner of such property. As per Section 4(1) no such suit shall thenceforth lie to recover the possession of the property held benami by the defendant. Plaintiff's right to that effect is sought to be taken away and any suit to enforce such E a right after coming into operation of Section 4(1) that is 19th May, 1988, shall not lie. The legislature in its wisdom has nowhere provided in Section 4(1) that no such suit, claim or action pending on the date when Section 4 came into force shall not be proceeded with and shall stand abated. On the contrary, clear legislative intention is seen from the words "no such F claim, suit or action shall lie", meaning thereby no such suit, claim or action shall be permitted to be filed or entertained or admitted to the portals of any Court for seeking such a relief after coming into force of Section 4(1). In Collins English Dictionary, 1979 Edition as reprinted subsequently, the word 'lie' has been defined in connection with suits and proceedings. At page 848 of the Dictionary while dealing with topic No. 9 under the G definition of term 'lie' it is stated as under :-

"For an action, claim appeal ect. to subsist; be maintainable or admissible."

H The word 'lie' in connection with the suit, claim or action is not defined by

the Act. If we go by the aforesaid dictionary meaning it would mean that such suit, claim or action to get any property declared benami will not be admitted on behalf of such plaintiff or applicant against the concerned defendant in whose name the property is held on and from the date on which this prohibition against entertaining of such suits comes into force. With respect, the view taken by that Section 4(1) would apply even to such pending suits which were already filed and entertained prior to the date when the Section came into force and which has the effect of destroying the then existing right of plaintiff in connection with the suit property cannot be sustained in the face of the clear language of Section 4(1). It has to be visulised that the legislature in its wisdom has not expressly made Section 4 retrospective. Then to imply by necessary implication that Section 4 would have retrospective effect and would cover pending litigations filed prior to coming into force of the Section would amount to taking a view which would run counter to the legislative scheme and intent projected by various provisions of the Act to which we have referred earlier. It is, however, true as held by the Division Bench that on the express language of Section 4(1) any right inhering in the real owner in respect of any property held benami would get effaced once Section 4(1) operated, even if such transaction had been entered into prior to the coming into operation of Section 4(1), and hence-after Section 4(1) applied no suit can lie in respect to such a past benami transaction. To that extent the Section may be retro-active. To highlight this aspect we may take an illustration. If a benami transaction has taken place in 1980 and suit is filed in June 1988 by the plaintiff claiming that he is the real owner of the property and defendant is merely a benamidar and the consideration has flown from him then such a suit would not lie on account of the provisions of Section 4(1). Bar against filing, entertaining and admission of such suits would have become operative by June, 1988 and to that extent Section 4(1) would take in its sweep even past benami transactions which are sought to be litigated upon after coming into force of the prohibitory provision of Section 4(1); but that is the only effect of the retroactivity of Section 4(1) and nothing more than that. From the conclusion that Section 4(1) shall apply even to past benami transactions to the aforesaid extent, the next step taken by the Division Bench that therefore, the then existing rights got destroyed and even though suits by real owners were filed prior to coming into operation of Section 4(1) they would not survive, does not logically follow.

So far as Section 4(2) is concerned, all that is provided is that if a

A suit is filed by a plaintiff who claims in his favour and holds the property in his name, once Section 4(2) applies, no defence will be permitted or allowed in any such suit, claim or action by or on behalf of a person claiming to be the real owner of such property held benami. The disallowing of such a defence which earlier was available, itself, suggests that a new liability or restriction is imposed by Section 4(2) on a pre- existing right of the defendant. Such a provision also cannot be said to be retrospective or retroactive by necessary implication. It is also pertinent to note that Section 4(2) does not expressly seek to apply retrospectively. So far as such a suit which is covered by the sweep of Section 4(2) is concerned, the prohibition of Section 4(1) cannot apply to it as it is not a claim or action filed by the plaintiff to enforce right in respect of any property held benami. On the contrary, it is a suit, claim or action flowing from the sale deed or title deed in the name of the plaintiff. Even though such a suit have been filed prior to 19.5.1988, if before the stage of filing of defence by the real owner is reached, Section 4(2) becomes operative from 19th May, 1988, then such a defence, as laid down by Section 4(2) will not be allowed to such a defendant. However, that would not mean that Section 4(1) and 4(2) only on that score can be treated to be impliedly retrospective so as to cover all the pending litigations in connection with enforcement of such rights of real owners who are parties to benami transactions entered into prior to the coming into operation of the Act and specially Section 4 thereof. It is also pertinent to note that Section 4(2) enjoins that no such defence 'shall be allowed' in any claim, suit or action by or on behalf of a person claiming to be the real owner of such property. That is to say no such defence shall be allowed for the first time after coming into operation of Section 4(2). If such a defence is already allowed in a pending suit prior to the coming into operation of Section 4(2), enabling an issue to be raised on such a defence, then the Court is bound to decide the issue arising from such an already allowed defence as at the relevant time when such defence was allowed Section 4(2) was out of picture. Section 4(2) nowhere uses the words "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 to be raised or continued to be raised in any suit." With respect, it was wrongly assumed by the Division Bench that such an already allowed defence in a pending suit would also get destroyed after coming into operation of Section 4(2). We may at this stage refer to one difficulty projected by learned advocate for the respondents in his written

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submissions, on the applicability of Section 4(2). These submissions read as under :-

> "Section 4(1) places a bar on a plaintiff pleading 'benami', while Section 4(2) places a bar on a defendant pleading 'benami', after the coming into force of the Act. In this context, it would be anamolous if the bar in Section 4 is not applicable if a suit pleading 'benami' is already filed prior to the prescribed date, and it is treated as applicable only to suit which he filed thereafter. It would have the effect of classifying the so-called 'real' owners into two classes - those who stand in the position of plaintiffs and those who stand in the position of defendants. This may be clarified by means of an illustration. A and B are 'real' owners who have both purchased properties in say 1970, in the names of C and D respectively who are ostensible owners viz. benamidars. A files a suit in February 1988 i.e. before the coming into force of the Act against C, for a declaration of his title saying that C is actually holding it as his benamidar. According to the petitioner's argument, such a plea would be open to A even after coming into force of the Act, since the suit has already been laid. On the other hand, if D files a suit against B at the same for declaration and injunction, claiming himself to be the owner but B's opportunity to file a written statement comes in say November 1988 when the Act has already come into force, he in his written statement cannot plead that D is a benamidar and that he, B is the real owner. Thus A and B, both 'real' owners, would stand on a different footing, depending upon whether they would stand in the position of plaintiff or defendant. It is respectfully submitted that such a differential treatment would not be rational or logical."

According to us this difficulty is inbuilt in Section 4(2) and does not provide the rationale to hold that this Section applies retrospectively. The legislature itself thought it fit to do so and there is no challenge to the vires on the ground of violation of Article 14 of the Constitution. It is not open to us to re-write the section also. Even otherwise, in the operation of Section 4(1) and (2), no discrimination can be said to have been made amongst different real owners of property, as tried to be pointed out in the written objections. In fact, those cases in which suits are filed by real owners or defences are allowed prior to coming into operation of Section

A 4(2), would form a separate class as compared to those cases where a stage for filing such suits or defences has still not reached by the time Section 4(1) and (2) starts operating. Consequently, latter type of cases would form a distinct category of cases. There is no question of discrimination being meted out while dealing with these two classes of cases differently. A real owner who has already been allowed defence on that ground prior to B coming into operation of Section 4(2) cannot be said to have been given a better treatment as compared to the real owner who has still to take up such a defence and in the meantime he is hit by the prohibition of Section 4(2). Equally there cannot be any comparison between a real owner who has filed such suit earlier and one who does not file such suit till Section C 4(1) comes into operation. All real owners who stake their claims regarding benami transactions after Section 4(1) and (2) came into operation are given uniform treatment by these provisions, whether they come as plaintiffs or as defendants. Consequently, the grievances raised in this connection cannot be sustained.

D At this stage, we may also usefully refer to Section 7(1) of the Act which lays down that Sections 81, 82 and 94 of the Indian Trusts Act, 1882 (2 of 1882), Section 66 of the Code of Civil Procedure, 1908 (5 of 1908), and Section 281-A of the Income Tax Act 1961 (43 of 1961), are thereby repealed. We have already seen Section 82 of the Indian Trusts Act which E gave almost for a period of a century or more a legal right to the real owner to claim against the purported owner that the consideration paid was by the real owner and the transferee held the property for the benefit of the person paying consideration for supporting the transaction. It is this right which got destroyed by Section 7 of the Act with effect from 19th May, 1988. If any suits or proceedings were pending prior to that date, invoking F Section 82 of the Indian Trusts Act, what is to happen to such suits is not answered by Section 4(1) of the Act or by any other provisions of the Act. We have, therefore, to turn the General Clauses Act, 1897 for finding out an answer. Section 6 of the General Clauses Act lays downee where this Act, or any (Central Act) or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, G then, unless a different intention appears the repeal shall not -

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

H (b) affect the previous operation of any enactment so repealed or anything

duly done or suffered thereunder; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) affect any investigation, legal proceeding or remedy in respoect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed". It becomes, therefore, obvious that the Act by Section 7 has effected a repeal of Section 82 of the Indian Trusts Act and while repealing this provision no different intention appears from the Act to affect any right, privilege or liability acquired under Section 82 by either side or any pending proceedings regarding such obligation or liability. Therefore, such pending proceedings will have to be continued or enforced as if the repealing Act had not been passed. A conjoint reading of Section 82 of the Indian Trusts Act and Section 6(b), (d) and (e) of the General Clauses Act clearly enjoins that if suits are pending wherein the plaintiffs have put forward claims under the then existing Section 82 of the Indian Trusts Act such proceedings are to be continued by assuming that the repealing of Section 82 of the Indian Trusts Act has not been effected in connection with such pending proceedings. Unfortunately, this aspect was not pressed for consideration before the Division Bench and, therefore, the view taken by the Division Bench is likely to result in an incongruous situation. If a view is to be taken that a pending suit wherein plaintiff might have contended that the real consideration flowed from him and the defendant was not the real owner and held the property benami as per Section 82 of the Indian Trusts Act, 1882, has to be continued by ignoring the present Act, it will be inconsistent with the conclusion reached by the Division Bench. As per the Division Bench, such suits must necessarily be dismissed at whatever stage they might be pending between the parties. Therefore, interpretation of Section 4(1) by the Division Bench would directly conflict with the legislative scheme emanating from Section 82 of the Indian Trusts Act, 1882 read with Section 6 of the General Clauses Act discussed above. Even otherwise,

A it is now well-settled that where a statutory provision which is not expressly made retrospective by the legislature seeks to affect vested rights and corresponding obligations of parties, such provision cannot be said to have any retrospective effect by necessary implication. In Maxwell on the Interpretation of Statutes, 12th Edition (1969), the learned author has made the following observations based on various decisions of different B Court, specially in Re *Athlumney* (1898) 2 Q.B. 551, at pp. 551, 552 :-

> "Perhaps no rule of construction is more firmly established than this - that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as C regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only." The rule has, infact, two aspects, for it "involves another and subordinate rule, to the effect that a statute is not to be construed so as D to have a greater retrospective operation than its language renders necessary."

In the case of *Garikapati* v. *N. Subbiah Choudhary,* A.I.R. (1957) SC 540, P. 553 in para 25 of the report Chief Justice S.R. Das speaking for this E Court has made the following pertinent observations in this connection;-

> "The golden rule of construction is that, in the absence of anything in the enactment to show that it is to have retrospective operation, it cannot be so construed as to have the effect of altering the law applicable to a claim in litigation at the time when the Act F was passed."

We have already discussed earlier that there is nothing in the Act to show that Section 4(1) and 4(2) have to apply retrospectively to all pending proceedings wherein such a right is sought to be exercised by the plaintiff or such a defence has already got allowed to the concerned defendant. As G a result of the aforesaid discussion, it must be held that reasons nos. 1 and 2 which weighed with the Division Bench are not well sustained.

As regards, reason no. 3, we are of the considered view that the Act cannot be treated to be declaratory in nature. Declaratory enactment H declares and clarifies the real intention of the legislature in connection with

an earlier existing transaction or enactment, it does not create new rights or obligations. On the express language of Section 3, the Act cannot be said to be declaratory but in substance it is prohibitory in nature and seeks to destroy the rights of the real owner qua properties held benami and in this connection it has taken away the right of the real owner both for filing a suit or for taking such a defence in a suit by benamidar. Such an Act which prohibits benami transactions and destroys rights flowing from such transactions as existing earlier is really not a declaratory enactment. With respect, we disagree with the line of reasoning which commanded to the Divison Bench. In this connection, we may refer to the following observatons in 'Principles of Statutory Interpretation', 5th Edition 1992, by Shri G.P. Singh, at page 315 under the caption 'Declaratory statutes' :-

> "The presumption against retrospective operation is not applicable to declaratory statutes. As states in CRAIES and approved by the Supreme Court : "For modern purposes a declaratory Act may be defined as an Act to remove doubts existing as to the common law, or the meaning or effect of any statute. Such Acts are usually held to be retrospective. The usual reason for passing a declaratory Act is to set aside what Parliament deems to have been a judicial error whether in the statement of the common law or in the interpretation of statutes. Usually, if not invariably, such an Act contains a preamble, and also the word 'declared' as well as the word enacted". But the use of the words 'it is declared' is not conclusive that the Act is declaratory for these words may, at times be used to intoduce new rules of law and the Act in the latter case will only be amending the law and will not necessarily be retrospective. In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is to explain an earlier Act, it would be without object unless construed retrospective. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended. The language 'shall be deemed always to have meant' is declaratory, and is in plain terms retrospective. In the absence of clear words indicating that the amending Act is declaratory, it would not be so construed when the pre-amended provision was clear and unambiguous. An

A amending Act may be purely clarificatory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect and, therefore, if the principal Act was existing law when the constitution came into force the amending Act also will be part of the existing law.

B

In *Mithilesh Kumari* v. *Prem Bihari Khare,* Section 4 of the Benami Transactions (Prohibition) Act, 1988 was, it is submitted, wrongly held to be an Act declaratory in nature for it was not passed to clear any doubt existing as to the common law or the C meaning or effect of any statute. The conclusion however, that section 4 applied also to past benami transactions may be supportable on the language used in the section."

No exception can be taken to the aforesaid observations of learned D author which in our view can cartainly be pressed in service for judging whether the impugned section is declaratory in nature or not. Accordingly it must be held that Section 4 or for that matter the Act as a whole is not a piece of declaratory or curative legislation. It creates substantive rights in favour of benamidars and destroys substantive rights of real owners who are parties to such transactions and for whom new liabilities are created E by the Act.

Qua reason No. 4, we may refer to our discussion earlier that the words 'no suit shall lie' as found in Section 4(1) and 'no defence based on rights in respect of property shall be allowed' as found in Section 4(2) have F limited scope and operation and consequently this consideration also cannot have any effect on the conclusion which can be reached in this case. As to reason No. 5, it is observed that even though suit may include appeal and further appeals in the hierarchy, at different stages of the litigation, Section 4(1) and 4(2) cannot be made applicable to these subsequent stages as already seen by us earlier. Otherwise, they would cut across the G very scheme of the Act.

As to reason No. 6 relating to nullification of all the defences of benami holders, we say with respect that according to us, as already discussed future defences of real owners against benamidars holders have H been nullified as are covered by the sweep of Section 4(2) and not others.

As a result of the aforesaid discussion it must be held, with respect, that the Division Bench erred in taking the view that Section 4(1) of the Act could be pressed in service in connection with suits filed prior to coming into operation of that Section. Similarly the view that under Section 4(2) in all suits filed by persons in whose names properties are held no defence can be allowed at any future stage of the proceedings that the properties are held benami, cannot be sustained. As discussed earlier Section 4(2) will have a limited operation even in cases of pending suits after Section 4(2) came into force if such defences are not already allowed earlier. It must, therefore, be held, with respect, that the decision of this Court in *Mithilesh Kumari's* case does not lay down correct law so far as the applicability of Section 4(1) and Section 4(2) to the extent hereinabove indicated, to pending proceedings when these Sections came into force, is concerned. Accordingly, the question for consideration is answered in the negative. Registry will now place all these matters before an appropriate Division Bench for disposing them of on merits in the light of the answer given by us.

A B C D

R.A. Appeals and Petitions disposed of.