2026:AHC-LKO:35522

HIGH COURT OF JUDICATURE AT ALLAHABAD
LUCKNOW

SECOND APPEAL No. - 308 of 2018

Dr. Brij Bhushan And Ors.

.....Appellant(s)

Versus

Satya Bhudhsn Verma

.....Respondent(s)

Counsel for Appellant(s)	:	Dr. Ramsurat Pande, Ankit Pande, Shashank Bhushan Singh, Virendra Bhatt
Counsel for Respondent(s)	:	Yogendra Singh, Ashok Kumar Srivastava

AFR

Reserved on 03.02.2026
Pronounced on 18.05.2026

Court No. - 27

HON'BLE RAM MANOHAR NARAYAN MISHRA, J.

1. Heard submissions of Sri R.S. Pandey, learned Senior Advocate, assisted by Sri Ankit Pandey and Sri Shashank Bhushan Singh, learned counsel for the appellants, Shri Yogendra Singh and Sri Ashok Kumar Srivastava appearing on behalf of the respondent and perused the record.

2. By means of instant second appeal preferred under Section 100 Code of Civil Procedure, the defendant-appellants in Original Suit No.391 of 2000, Shukhnandan Satya Bhushan Verma versus Dr. Brij Bhushan and two others, have assailed the concurrent findings of judgments of both courts below. The Additional Civil Judge (Senior Division), Court No.22, Lucknow, had decreed the suit of the plaintiff-respondents in respect of the suit property, which is House No.531/16Ga, situated at Bhindiya Tola, Bara Chaandganj, Lucknow. The learned trial court issued a mandatory injunction to defendant-appellant Dr. Brij Bhushan to vacate one-half of the western portion of the said house under his occupation, which consists

of a room and veranda, kitchen, latrine, bathroom, gallery and staircase on the ground floor and construciton raised on the first floor thereof within prescribed period and hand over the possession of the said portion of the house to the plaintiff no.2. The learned trial court decreed the suit of the plaintiff vide judgment and order dated 17/01/2006. This judgment and decree was assailed by the defendant-appellant before the Court of District Judge, Lucknow by preferring a civil appeal i.e. Regular Civil Appeal No.6500026 of 2006, Dr. Brij Bhushan and others versus Satya Bhushan Verma. The civil appeal was decided by Additional District Judge/Special Judge EC Act, Lucknow, vide judgment and order dated 27/07/2018, whereby the civil appeal preferred by the defendant was dismissed and the judgment and decree passed by the learned trial court dated 17/01/2006 and decree dated 31/01/2006 was affirmed.

3. This Court, at the stage of admission of the second appeal, framed the following substantial questions of law, which are extracted below:

> (E) Whether the finding recorded by the courts below are tenable in law as it has held that the prohibition of Benami Property Transaction Act 1988 has retrospective operation and the plea of Benami transaction is barred under Section 4 of the said Act without considering the definition of Benami property and Benami Transaction contained in Section 2(8) and (9) of the aforesaid Act.
>
> (F) Whether the judgment and decree passed by the courts below is perverse in law and facts, both.

4. Learned counsel for the defendant appellants submitted that the plaintiff No.2/respondent along with Sukhnandan filed a suit for possession and Mandatory Injunction which was registered as Regular suit No.331/2000 before the Additional Civil Judge (Senior Division

Court No.22 Lucknow with the averments that the suit is being filed for possession and damages as well as for Mandatory Injunction in respect of the house No.531/16Ga, situate in Bhindia Tola Bara Chaandganj, Lucknow towards Western portion of residential part of the house of which ½ portion is in the ownership of defendant /appellant No.2 and 1/2 portion under plaintiff No.2/Respondent. The said land has been purchased in the name of the defendant/appellant No.2 and plaintiff/respondent by his father late Sukhnandan (plaintiff no.1 in Original Suit) in order to settle his sons as Dr. Brij Bhushan Verma had already got employment in the Government job. The said land was purchased through sale deed dated 10.2.1977 in the name of Satya Bhushan and Sabitur Bhushan which was registered in Zild No.2309 at page No.148-154 at serial No.1718 on 18.6.1977 before the Sub Registrar Lucknow. It has further been alleged that Sukhnandan, father of appellant and respondent has provided sufficient money for construction of the house in question over the land purchased through sale deed dated 10.2.1977 in the name of Satya Bhushan Verma (Plaintiff No.2/respondent) and Sabitur Bhushan Defendant/appellant No.2. It has further been alleged that after construction of the house, the same was recorded in the name of the aforesaid transferees in the Nagar Maha palika, Lucknow and the house was assessed at Rs.1800/- per annum. It has further been alleged that Dr. Brij Bhushan Verma was transferred to Lucknow in the year 1980 and under the instructions of Sukhnandan father of the appellant and respondent, the appellant No.1 was allowed to occupy the house in question as a licensee on the basis of license granted by Satya Bhushan Verma plaintiff No.2/respondent. It has further been alleged that the house constructed over the plot No.531/16Ga was divided between the Vendees and 1/2 portion in the Eastern side was given to

Defendant/Appellant No.2 and 1/2 Western portion was given to respondent by a mutual understanding. It may be pointed out here that no partition took place between the alleged co-owners by metes and bounds by the competent court of law. It has further been alleged that plaintiff/respondent demanded damages @ Rs.500/-per month from the defendant/appellant No.1 in lieu of license granted to him but the defendant/appellant No.1 failed to pay the damages and as such a legal notice was given to him for vacating the premises in question. The suit was filed on 29 November 2000.

5. He next submitted that it has further been averred in the plaint that during pendency of the suit the defendant/appellant No.1 had raised construction over the first floor of the house in question without any authority of law and as such a decree be passed for demolition of the aforesaid construction.

6. He next submitted that the defendant/appellant No.1 filed written statement on 6.1.2001 denying the plaint allegations and stated therein that the land was purchased in 1977 by providing funds by the defendant/plaintiff No.1 but the sale deed has been executed in the name of plaintiff No.2 and defendant No.2 by showing cleverness by plaintiff/respondent. The money for purchasing the plot was supplied by the defendant/appellant No.1 and thereafter the building along with shops was constructed from the money provided by defendant/appellant No.1. It has further been stated that after construction of the house and shops over the plot in question, a family settlement arrived at between the four brothers i.e. plaintiff and defendants by which 2 shops were given to respondent and 2 shops were given to plaintiff defendant/appellant No.2 and residential area came in the share of appellant No.1. The house

assessment was also made in Nagar Nigam Lucknow on the basis of the aforesaid family settlement in 1986. The house property was subsequently mutated in the name of Defendant/appellant No.1 also and two shops were mutated in the name of plaintiff/respondent and rest two shops were mutated in the name of defendant/appellant No.2 at the request made by the plaintiff/respondent by means of affidavit filed by him and since then their names are continuing over the property in question in the Nagar Nigam, Lucknow. It has further been stated in statement that the the written defendant/appellant No.1 is residing in the house as owner and he is not a licensee as alleged in the plaint and four brothers are equal owners of house in suit.

7. He next submitted that the defendant/appellant No.2 filed separate written statement on 6.4.2001 and admitted therein that the land in question was purchased from the fund provided by defendant/appellant No.1 as the plaintiff No.2/respondent and defendant/appellant No.2 were students at the time of purchase of the land and they had no source of income. It has further been stated that defendant/appellant No.1 was in service, he had provided entire money for purchase of the plot as well as for construction of the house and shops over the land in question. In para 8 of the written statement it has been clearly stated by defendant/appellant No.2 who is also co-A 150 transferee along with plaintiff/respondent that the property in suit was acquired by the defendant/appellant No.1 in 1977 and he built accommodation in question as described in the written statement because at the time of purchase of the property in suit plaintiff/respondent and defendant/appellant No.2 and 3 were school going students and they had no independent source of income. It has further been stated in the written statement by the defendant/appellant

No.2 that the plaintiff/respondent is not owner in possession; and he had no right, title or interest in the property in question and as such the suit is liable to be dismissed with costs.

8. He next submitted that the defendant/appellant No.3 Bharat Bhushan filed separate written statement before the trial court on 19.12.2001 denying the plaint allegations and in para 8 of the additional pleas, it has been specifically mentioned that the property in question was purchased in the name of Satya Bhushan and Sabitur Bhushan from the joint Hindu family fund by the Karta of the family as the plaintiff No.2/respondent Satya Bhushan Verma was merely a student of Science Graduation and he had no independent income at that time when the property was purchased. Similarly Sabitur Bhushan defendant/appellant No.2 was a student being youngest brother and he had also no income. The property in question has been subsequently divided amongst the co-parceners on the basis of the family settlement. There was Hindu undivided family of Sukhanandan and his three sons. His two other sons Chandrabhushan and Ravi Bhushan (deceased) had got separated long ago.

9. He next submitted that from the facts stated in the preceding para it is clearly established that all the three brothers namely Brij Bhushan, Sabitur Bhushan and Bharat Bhushan had admitted that the property in question was acquired by joint family fund as Satya Bhushan was a student of Science graduation and Sabitur Bhushan was also a student and they had no independent source of income. Father of the appellants and respondent was Karta of the family and was earning from the agriculture and Dr. Brij Bhushan defendant/appellant No.1 had already Joined medical service in the State Ayurvedic department and he was also an earning member and supporting the family.

10. He also submitted that it is pertinent to mention here that Satya Bhushan plaintiff/respondent himself filed affidavit before the Municipal board stating there in that the property is a joint family property and all the four brothers have share in it. In the circumstances two shops constructed on the property in question were given to him and two shops constructed over the land in question were given to Sabitur Bhushan defendant/appellant No.2 and the residential house constructed over the plot in question was given in the share of Dr Brij Bhushan Defendant/appellant No.1. Accordingly, names of all the three brothers were recorded in the Municipal records on the application moved by the plaintiff/respondent as is evident from the various documents filed along with the written statement filed by defendant/appellant No.1. The application moved by Satya Bhushan Verma before the Tax Superintendent Nagar Mahapalika Lucknow on 28.1.1982 is on record which is the admission of plaintiff/respondent and plaintiff/respondent is stopped from raising contrary plea and by filing plaint and as such he is stopped from raising such plea of ownership of 1½ share on the basis of the sale deed.

11. He next submitted that the other co-owners on the basis of sale deed i.e. defendant/appellant No.2 had filed affidavit before the trial court in the suit in question saying that no partition by metes and bounds has ever taken place as alleged in the plaint but by a family settlement all the brothers have share in it. ½ share as per sale deed is of defendant/appellant No.2 and he has denied claim of plaintiff/respondent with regard to the ½ share under occupation of defendant no.1 and the alleged plea of grant of license to defendant/appellant No.1 which itself shows the false case set up by plaintiff/respondent.

12. He further submitted that both parties lead evidence and plaintiff/respondent examined Sukhnandan plaintiff No.1 as PW-1, and plaintiff No.2/respondent was examined as PW-2. No other independent witness was examined on behalf of the plaintiff No.2/respondent. Plaintiff No.1, father of appellants plaintiff No.2, died during pendency of the suit. The plaintiffs also filed various documents in support of their case. The defendant/appellant examined Brij Bhushan Defendant/appellant No.1 as DW-1 and Sabitur Bhushan Defendant/appellant No.2 as DW-2 and filed various documents such as lease deed executed in favour of tenants, various documents filed before the Nagar Mahapalika Lucknow and the documents issued by the Nagar Mahapalika Lucknow showing that the property is a joint family property and the same is in the joint names of sons of Suknandan, father of appellants and plaintiff/respondent.. It is also pertinent to mention here that the allegations made by the plaintiff/respondent with regard to the partition between Satya Bhushan and Sabitur Bhushan by father of the appellants and respondent have been denied by all the three brothers. It has also been established from the own conduct of the plaintiff/respondent that the property was joint family property and the same has been purchased from the joint family fund though maximum contribution has been made for purchasing the property in question by appellant No.1 which has been admitted by a co-owner of the property as per sale deed executed in favour of the two brothers only and they were students at the time of purchase of the property and construction raised over it and as such the plaintiff/respondent is estopped from raising such a plea of being owner of ½ share of the property.

13. Learned counsel for the appellant submitted that the learned trial court has wrongly and illegally decreed the suit of the plaintiff-respondent on

17/01/2006 without considering the material evidence on record. The plea of the Benami transaction was misread and misconstrued by the trial court. The trial court wrongly and illegally held that there was no joint family and also there was no fiduciary relationship between the plaintiff and the defendants. It has also been incorrectly held that the Prohibition of Benami Property Transaction Act, 1988, has retrospective operation. The provision contained in Section 2 (8) and (9) have not been taken into consideration while deciding the ownership of the property in question.

14. The trial court has recorded a finding to the effect that the property has been purchased in the name of plaintiff no.2/respondent defendant no.2 by the plaintiff no.1 i.e. father of the plaintiff and defendants and at the same time, a contrary finding has been recorded that the property is owned by the person in whose name said deed was executed, without considering the definition of "Benami property" as provided in Section 2 (8) and (9) of the Act of 1988.

15. He next submitted that the trial court has failed to consider that when another co-owner is denied the plaint allegations with regard to the ownership and grant of a license to other brother for residential purposes and the alleged partition made by the father of the appellant and respondent, then the finding recorded by the trial court is contrary to it and it is based on its assumption and presumption and against the strength of evidence on record.

16. He next submitted that feeling aggrieved by the judgment and decree of the trial court, the defendant-appellant filed a civil appeal before the Court of the District Judge, Lucknow, but it was dismissed by the learned Additional District Judge / Special Judge EC Act, Lucknow on

27/07/2018 without considering the factual and legal issues involved in the case, which were duly raised by the appellant before the lower appellate court.

17. The defendant / appellant no.1 and 2, have stated on oath that the property had been purchased with the funds provided by applicant no.1 i.;e. Dr. Brij Bhushan, and since the family was a joint family and karta of the family is the father of the appellant and respondent, as such, after the death of the father, all brothers have share in it. The appellant no.2 has stated on oath before the trial court that the property was purchased from the money provided by the defendant/appellant no.1 but it was purchased in the name of the two brothers, namely, Satya Bhushan Verma (plaintiff/ respondent) and Sabitur Bhushan Verma (defendant/appellant no.2).

18. Learned lower appellate court failed to consider that the property in question was a joint property and it was purchased in the name of two brothers. Whereas there were four sons of Sukh Nandan, the karta of the family, namely, Satya Bhushan Verma, Sabitur Bhushan, Dr.Brij Bhushan and Bharat Bhushan. The property was purchased in the name of the two brothers, who had no independent income as they were students at the time. Thus, the finding recorded by the trial and lower appellate court is perverse and against the evidence on record. The case taken by the plaintiff that the occupation of a portion of the house in question is in the capacity of licensee and not a co-owner, is not supported by the evidence, and said finding has been recorded without considering the statutory provisions contained in Section 2-(A) of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972. The license could not be granted for more than months without any order of the allotment under Section 16 of the Act. It is the admitted case of the parties that the

building in question is within the purview of Act No.13 of 1972.

19. Both the courts below have failed to appreciate the provisions contained in Section 60 of the Indian Easement Act, 1882, which provides that *(the license could not be revoked where the licensee, acting upon the license, has executed the work of permanent character and incurred expenses in the execution of the work)*. It has been alleged in the plaint itself by amending the plaint that the appellant no.1 has raised construction over the first floor of the house, but without any authority. The plaintiff-respondent has failed to prove that the construction on the first floor has been raised during the pendency of the suit. The lower appellate court has framed four points for determination in the appeal in view of the provisions contained in Order 41 rule 31 CPC.

20. He lastly submitted that the first point for determination was raised with regard to the effect of the Prohibition of the Benami Property Transactions Act, 1988 (hereinafter referred to as "the Act") on the sale deed executed at the instance of the father of the appellant in the name of the plaintiff and appellant no.2:-

(i) Whether it is prospective or retrospective?

The second question was with regard to the status of the appellant in the premises in question:

(ii) Whether as a licensee or co-owner?

The third question was :

(iii) Whether the partition has taken place between the co-owners of the property?

21. The lower appellate court decided the point No.1 wrongly contrary to law and held that the Act has retrospective operation and the property is not covered by the said Act, but at the same time it misread and misconstrued the written statements filed by the defendant / appellant no.1 by saying that no such plea of prohibition of Benami Transaction Act was taken in the written statement and as such the trial court has not committed any error in not framing issue on this point. The defendant-appellant no.1 has stated in paragraphs 4, 5, 7, 9 and 11 of the written statements that it was Benami property purchased in the name of the plaintiff and respondent no.2. No issue was framed by the trial court on the question of Benami property, despite the fact that a specific plea in this regard had been taken in the written statement filed by the defendant-applicant no.1 and a contrary finding has been recorded by the lower appellate court, saying that no plea of benami transaction has been taken in the written statement. The findings on the question of partition recorded by the lower appellate court are perverse, as this fact is proved on record that no partition by metes and bounds has taken place between the parties by mutual partition. The share in the house were given to all brothers, being members of the joint Hindu property, and the property was joint Hindu property.

22. Per contra, learned counsel for the plaintiff respondent submitted that there is no infirmity in the findings recorded by the trial court as well as the learned lower appellate court while decreeing the suit of the plaintiff and affirming the same in the civil appeal. The impugned judgments are based on evidence on record and no interference is warranted in the second appeal against concurrent findings of both the courts below. It is trite law that questions of fact which are settled at the stage of the lower

appellate court cannot be re-agitated in second appeal before the High Court. The lower appellate court has rightly held that Act of 1988 has retrospective operation and it is applicable on the sale deed executed on **10/02/1977** with regard to the house in question, in the name of the plaintiff and appellant no.2 executed by Smt. Prabhavati, widow of Ganga Prasad. The occupation of defendant appellant no.1 in said house in the western portion of the ground floor was that of the licensee and not in the capacity of co-owner and after revocation of the license by the owners of the house, the occupation of plaintiff-appellant no.1 has become unauthorized and for that reason, the decree of eviction and restoration of possession was granted in favour of the plaintiff respondent.

23. In the first week of September, 2004, defendant/appellant no.1 started carrying out construction of a room and verandha on the first floor of the western residential part of the House No.531/16 GA, Bhindiya Tola, Bara Chandganj, Lucknow in disregard of and violating the order dated 8th December, 2000, wherein trial court was pleased to direct maintenance of status quo over property during pendency of suit for which plaintiff/respondent moved an application under Order 39 Rule 2A CPC

24. Learned counsel for the plaintiff placed reliance on the judgment of the Supreme Court in **R. Rajagopal Reddy (dead) by L.R.S. and others versus Padmini Chandrasekharan (dead) by L.R.S.,** reported in **AIR 1996 Supreme Court 238**, which held that Section 4(1) of the Benami Transactions (Prohibition) Act cannot be applied to any suit, claim or action to enforce any right in property held benami against a 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. So far as Section

4(2) is concerned, all that is provided is 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 behlaf of a person claiming to be the real owner of such property held benami. The disallowing of such a defence which earlier was available, suggests that a new liability or restriction is imposed by Section 4(2) on a pre-existing right and such a provision cannot be said to be retrospective or retroactive by necessary implication. It is obvious that when the 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) come into force. In **Marcel Martins versus M. Printer and others**, reported in **AIR 2012 Supreme Court 1987**, the Hon'ble Supreme Court held in paragraph 23, which is extracted as under;

> *" In determining whether a relationship is based on trust or confidence, relevant to determining whether they stand in a fiduciary capacity, the Court shall have to take into consideration the factual context in which the question arises for it is only in the factual backdrop that the existence or otherwise of a fiduciary relationship can be deduced in a given case. Having said that, let us turn to the facts of the present case once more to determine whether the appellant stood in a fiduciary capacity vis-à-vis the plaintiffs-respondents. "*

25. In **Iftkharul Haq and another v. Lala Data Ram and another reported in AIR 1975 All 670,** this Court held that Section 60 of the Indian Easements Act embodies two exceptions to the general rule that a licence is revocable. The instant case is covered by clause (b) of Section 60 which is based on the principle of estoppel by acquiescence. When the

licensee acting upon a licence has executed a work of permanent character and incurred expenses in the execution of the licence cannot be revoked by the grantor. The man who stands by and allows another person to build on his land, in the belief that he has power or authority to do so, and incurs expenses in such building, cannot turn around and claim the removal of such building on the ground that the latter had an authority to build. He is estopped by his conduct from adopting that course and the law will presume an authority from him in such cases.

26. Hon'ble Supreme Court in **Hira Lal versus Gajjan, AIR 1990 SC 723** held that where First appellate court discarded the evidence as inadmissible, but High Court is satisfied that evidence was admissible, High Court can arrive at its independent decision. High Court is well within its power in appreciating the evidence and arriving at its own conclusion.

27. In **Narendra Gopal Vidyarthi versus Rajat Vidyarthi, 2010 (28) LCD 703,** Hon'ble Supreme Court held that "substantial question of law" as provided under Section 100 CPC connotes that " the High Court should be satisfied that the case involves a substantial question of law and not a mere question of law. A question of law having a material bearing on the decision of the case i.e. a question, answer to which affects the rights of parties to the suit, will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the court below has decided the matter, either ignoring or

acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law. The general rule is that the High Court will not interfere with the concurrent findings of the courts below. But it is not an absolute rule. Some of the well-recognized exceptions are where: (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to decision based on no evidence, it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding.

28. **Substantial question of law (E),** A judgement of Hon'ble Supreme Court in Review Petition (Civil) No.359 of 2023 in Civil Appeal No.5783 of 2022 In **Union of India and another versus M/s Ganpati Dealcom Pvt. Ltd.** is relevant for the purposes of second appeal. Paragraphs 2 to 6 of the said judgement are extracted below:

> 2. The review has been sought in these proceedings of the judgment of a three-Judge Bench of this Court in **Union of India and Another v Ganpati Dealcom Private Ltd, (2023) 3 SCC 315**. The only question which was framed for consideration by this Court was in the following terms:
>
> > "3. The short legal question which arises for this Court's consideration is whether the Prohibition of Benami Property Transactions Act, 1988 (for short

> "the 1988 Act"), as amended by the Benami Transactions (Prohibition) Amendment Act, 2016 (for short "the 2016 Act") has a prospective effect. Although a purely legal question arises in this appeal, it is necessary to have a brief factual background in mind before we advert to the analysis."

3. The conclusion which was arrived at by the Court, was in the following terms:

> "127.1. Section 3(2) (sic Section 3) of the unamended 1988 Act is declared as unconstitutional for being manifestly arbitrary. Accordingly, Section 3(2) of the 2016 Act is also unconstitutional as it is violative of Article 20(1) of the Constitution.
> 127.2. In rem forfeiture provision under Section 5 of the unamended 1988 Act, prior to the 2016 Amendment Act, was unconstitutional for being manifestly arbitrary.
> 127.3. The 2016 Amendment Act was not merely procedural, rather, prescribed substantive provisions.
> 127.4. In rem forfeiture provision under Section 5 of the 2016 Act, being punitive in nature, can only be applied prospectively and not retroactively.
> 127.5. The authorities concerned cannot initiate or continue criminal prosecution or confiscation proceedings for transactions entered into prior to the coming into force of the 2016 Act viz. 25-10-2016. As a consequence of the above declaration, all such prosecutions or confiscation proceedings shall stand quashed.
> 127.6. As this Court is not concerned with the constitutionality of such independent forfeiture proceedings contemplated under the 2016 Amendment Act on the other grounds, the

> aforesaid questions are left open to be adjudicated in appropriate proceedings."

4. The Court has declared Section 3(2) of the unamended provisions of the Prohibition of Benami Property Transactions Act 1988 as unconstitutional for being manifestly arbitrary and as violative of Article 20(1) of the Constitution. The provisions of Section 5 of the unamended Act, prior to the Amendment of 2016, have been declared to be unconstitutional on the ground that they are manifestly arbitrary.

5. It is not disputed that there was no challenge to the constitutional validity of the unamended provisions. This is also clear from the formulation of the question which arose for consideration before the Bench in paragraph 3 of the judgment, which has been extracted above. In the submissions of parties which have been recorded in the judgment, the issue of constitutional validity was not squarely addressed.

6. A challenge to the constitutional validity of a statutory provision cannot be adjudicated upon in the absence of a lis and contest between the parties. We accordingly allow the review petition and recall the judgment dated 23 August 2022. Civil Appeal No 5783 of 2022 shall stand restored to file for fresh adjudication before a Bench to be nominated by the Chief Justice of India on the administrative side.

29. The learned court of first instance framed the following issues for the framing of the suit, which may be reproduced as under:

(i) Whether the plaintiff is the owner of room in question, the verandah, kitchen, latrine, bathroom, gallery and staircase and is entitled to recover its possession?

(ii) Whether the plaint is under valued and court fee paid is insufficient?

(iii) Whether the suit is time-barred?

(iv) The relief, if any, to which the plaintiff is entitled?

(v) Whether the plaintiff is entitled to get possession of the construction raised on the first floor of the western portion of the house in question i.e. House No.531/16 Ga after getting it demolished, if yes, its effect.

30. PW-1, Sukh Nandan, the father of the parties, appeared as a witness as PW-1. He is also the original plaintiff no.1, in Original Suit No.391 of 2000. The plaintiff examined as PW-2, and the plaintiffs also examined PW-2 Satya Bhushan Verma, plaintiff no.2, in support of the plaintiff's case, whereas, the defendant-appellant had examined DW-1, Dr. Brij Bhushan Verma and DW-2 Sabitur Bhushan.

31. Learned Civil Judge, after appreciation of the evidence adduced by both the parties, came to the conclusion that it is an admitted fact that the building in question is built on land purchased by a registered sale deed on 10.02.1977 in the name of Satya Bhushan Verma, plaintiff no.1 and Sabitur Bhushan, Defendant No.2. Initially, the names of Sabitur Bhushan and Satya Bhushan Verma were recorded in the record of the Nagar Nigam on the basis of the sale deed of 1977, but later on, the name of defendant no.1, Dr. Brij Bhushan Verma, and Bharat Bhushan, who is

another brother, was also mutated in the record of the Nagar Nigam. The plaintiff has alleged that this act of getting his name mutated in municipal records by the defendant is a fraudulent act and by mutation, no right, title, or interest passed in favor of the defendant.

32. Learned Civil Judge has given a finding that the sale deed of 1977 was executed in favour of plaintiff no.2 and defendant no.2 and they are owners of the said house on the basis of the said sale deed; thus, ownership of plaintiff no.2 is proved on the basis of the evidence and record. Learned Civil Judge decided legal issues in the negative, as these were not pressed by the defendant. Learned Civil Judge also held that the occupation of defendant no.1 in the said house began in the year 1980 when he was transferred to Lucknow and on his request, he entered into the house as a licensee with the consent of plaintiff no.1, the father of the parties. Thus, his status in the said house is that of a licensee under Section 54 of the Indian Easements Act. The defendant has taken inconsistent pleas regarding his title in the said house, sometimes on the strength of benami transactions, sometimes as Hindu Undivided Family properties of the parties and sometimes on the basis of adverse possession. His his occupation in said house is not adverse to the real owners. The learned Civil Judge finally concluded that the defendant no.1 has raised construction on the first floor of the western portion of the house during pendency of the suit. Plaintiff no.2 is found to be the owner of the western portion of the house on which said construction has been raised. Therefore, he is entitled to get possession of the disputed property, but he is not entitled to seek demolition of the construction raised on the first floor.

33. With above findings of fact, the learned Civil Judge (Senior Division)

has decreed the suit of the plaintiff and issued a mandatory injunction to defendant no.1 to restore the possession of half portion of the house along with construction raised on its first floor to plaintiff no.2 within stipulated period.

34. Feeling aggrieved by the judgment and order of the learned Civil Judge, the defendant appellant had preferred First Appeal before the Court of District Judge, which was decided in which the learned Additional District Judge framed the following points of determination:

(i) Whether prohibition of Benami Property Transactions Act 1988 has retrospective effect?

(ii) Whether the plaintiff respondent had given the western portion of House No.531/16-C, situated at Bhindiya Tola Bara Chandganj, Lucknow as a licensee to the appellant?

(iii) Whether the property in suit has already been partitioned and the defendant appellant is not co-owner of the same?

(iv) Whether the appeal is liable to be allowed?

35. Learned Appellate Court, placing reliance on the judgment of the Supreme Court in ***Mithilesh Kumari & Anr vs Prem Behari Khare, AIR 1989 SUPREME COURT 1247*** and ***Fakhrey Aalam Khan & Ors. v. Smt. Salma Waheed*** **& Ors 2012 (30) LCD 97 Allahabad High Court** and **Rajagopal Reddy v. Padmini Chandrasekharan (1995) 2 SCC 630** , considered the guidelines issued in said cases in ***Fakhrey Aalam Khan & Ors.***(supra) for examination of benami transaction. It examined the evidence of PW-1 Sukh Nandan, patriarch of the the family of parties, who stated that he was a pensioner. He owned 50-60 bighas of land. And,

from the earnings from the said agricultural land, he had purchased the said house. The defendant, Dr. Brij Bhushan, also admitted this fact in his evidence that his father was earning freedom fighter's pension and had 50-60 bighas of land in his name. The said house was purchased in the year 1977 for Rs.12,000/-. D.W.-1 has admitted that he was appointed in the year 1975, and then his basic pay scale was Rs.500-1200. He retired from service on 31/01/2004. He has earned money from private practice also, but he lived separately from his father.

36. The learned appellate court has considered the fact that on one hand, defendant no.1 was residing far away in connection with his employment and his Pay Scale in 1975 was Rs.500-1200. The property was purchased after two years of joining the service and on the other hand, P.W.-1, Sukh Nandan, was earning pension as a freedom fighter and was cultivating 50-60 bighas (10 acres) of agricultural land. Thus, the defendant was not in a position to pay the sale consideration of Rs. 12,000 in the year 1977 that after two years of his service on meager annual income was Rs.6,000. He was not in a position to purchase the said house benami in the name of his brothers, plaintiff no.2 and defendant no.2. The mutation was only due to the fact that the name of defendant appellant no.1 got mutated later on in the record of Nagar Nigam in respect of the house in question. It is not determinative of the title of the parties in suit property on the basis of evidence adduced by the parties before the trial court. The only inference that can be drawn is that the said property was not purchased as benami by defendant appellant. He cannot be held as owner on the basis of the alleged benami transaction for want of pleadings, the learned Civil Judge has not committed any error, for not framing any issue regarding the benami transaction.

37. The learned appellate court has also given a finding on the basis of the evidence of P.W.-1, Sri Sukh Nandan, who subsequently died. Occupation of the defendant appellant in house in question is that of licensee and not co-owner. The father of the parties has categorically stated in his evidence that when the defendant came to Lucknow on transfer, he was in need of accommodation and he was his real son, he gave a portion of the house for his residence, as a licensee. The plaintiffs had canceled the license through notice dated 11/10/2000 issued to the appellant. The learned appellate court has also given a finding on reappraisal of evidence that the property in suit was purchased in the year 1977 by the father of the parties (PW-1) in the name of plaintiff no.2 and defendant no.2 and he got the house partitioned between the vendees of sale deed of 1977, namely Satya Bhushan and Sabitur Bhushan. This partition was accepted by by both sides. Defendant no.1 was never owner or co-owner of the property in suit. Thus, the appeal was dismissed with the above findings.

38. This Court, upon the admission of the second appeal, framed the following substantial question of law, which is extracted below:

> (E) Whether the findings recorded by the courts below are tenable in law as it has held that the prohibition of Benami Property Transactions Act, 1988 has retrospective operation and the plea of Benami transaction is barred under Section 4 of the said Act without considering the definitions of Benami property and Benami Transaction contained in Sections 2(8) and (9) of the aforesaid act.
>
> (F) Whether the judgment and decree passed by the courts

below is perverse in law and facts, both.

39. Section 2(8)(9) of the Prohibition of Benami Property Transactions Act, 1988 defines Benami transaction as under:

> "(8) "benami property" means any property which is the subject matter of a benami transaction and also includes the proceeds from such property;
>
> (9) "benami transaction" means,—
>
> (A) a transaction or an arrangement—
>
> (a) where a property is transferred to, or is held by, a person, and the consideration for such property has been provided, or paid by, another person; and
>
> (b) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration,
>
> except when the property is held by—
>
> (i) a Karta, or a member of a Hindu undivided family, as the case may be, and the property is held for his benefit or benefit of other members in the family and the consideration for such property has been provided or paid out of the known sources of the Hindu undivided family;
>
> (ii) a person standing in a fiduciary capacity for the benefit of another person towards whom he stands in such capacity and includes a trustee, executor, partner, director of a company, a depository or a participant as an agent of a depository under the Depositories Act, 1996 (22 of 1996) and any other person as may be notified by the Central Government for this purpose;
>
> (iii) any person being an individual in the name of his spouse or in the name of any child of such individual and the consideration for such property has been provided or paid out of the known sources of the individual;
>
> (iv) any person in the name of his brother or sister or lineal ascendant or descendant, where the names of brother or sister or lineal ascendant or descendant and the individual appear as joint-owners in any document, and the consideration for such property has been provided or paid out of the known sources of the individual; or
>
> (B) a transaction or an arrangement in respect of a property

carried out or made in a fictitious name; or

(C) a transaction or an arrangement in respect of a property where the owner of the property is not aware of, or, denies knowledge of, such ownership;

(D) a transaction or an arrangement in respect of a property where the person providing the consideration is not traceable or is fictitious; "

40. Section 3 of the Act, as amended by Act No.43 of 2016 (with effect from 1/11/2016), provides that "no person shall enter into any benami transaction and whoever enters into any benami transaction shall be punishable with imprisonment for a term which may extend to three years or with a fine or with both.

Sub-section (3) provides that "whoever enters into any benami transaction on and after the date of commencement of the Benami Transactions (Prohibition) Amendment Act, 2016, shall, notwithstanding anything contained in sub-section (2), be punishable in accordance with the provisions contained in Chapter VII.

41. Section 4 provides as follows:

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 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.

42. Sub-section (3) of Section 4 of the Act was omitted by Act No.43 of

2016 (w.e.f. 01/11/2016); before omission, it stood as:

> (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."

43. From perusal of aforesaid provisions, it appears that after commencement of the Benami Act, 1988 on 05/09/1988, benami transaction was not only prohibited, but it was made punishable also. Neither a person can file a claim or action to enforce any right in respect of any property held benami or any 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. However, prior to the amendment of 2016, there were two exceptions to the prohibitory clause of Section 4:

> (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) whether the person in whose name the property is held is a trustee or other person standing in fiduciary capacity.

44. Hon'ble Supreme Court, a three-judge bench judgment, in **R.**

Rajagopal Reddy (Dead) L.Rs. and Others vs. Padmini Chandrasekharan (Dead) by L.Rs. reported in **A.I.R. 1996 S.C. 238** has observed as under:

> *"1. In this group of matters a common question arises for our consideration. It is to the following effect 'whether Section 4(1) of 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 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.

2. In fact the question is answered in the affirmative by a Division Bench of this Court in ***Mithilesh Kumari and Anr. v. Prem Behari Kliare****. 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.*

3. We have heard learned counsel for the respective parties on this question. Learned advocates were agreeable 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.

7. 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.

8. 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 Provinces under the Bengal Presidency), Section 36.*

10. 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.*
>
> *(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 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 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 subsection (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 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 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 centers round the effect of Section 4(1) on pending proceedings wherein claim to any property on account of it being held benami by 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 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 hierarchy of the proceedings :-

> *(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 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.*
>
> *(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.

(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. Ubijus ibi remidium. Where the remedy is barred, the right is rendered unenforceable.

(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.

(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 procedural law can be applied to such pending proceedings by necessary implication.

(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 , it was observed that the aforesaid case was for eviction where the rights of the parties on the date of suit were material unlike in this case where subsequent legislation has nullified the defences of benami holders.

13. 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 corning into operation of Section 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 hy 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 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 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.

15. In the case of Garikapati v. N. Subbiah Choudhary of the report Chief Justice S.R. Das speaking for this 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 was passed.

16. 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 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.

19. 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 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 very scheme of the Act.

20. 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 been nullified as are covered by the sweep of Section 4(2) and not others.

21. 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."

45. On perusal of three judge Bench of Hon'ble Supreme Court, it is obvious that rigors of Section 4(2) of the Act will have limited operation even in cases of pending suits filed after Section 4(2) came into force. Meaning thereby, no defense vest in any right in respect of any property held benami, whether against the person in whose name the property is held or against any person, shall be allowed in any suit or claim or action, or by or on behalf of a person claiming to be the real owner of such property, if such suit was filed after coming into force of the Act of 1988. Although the sale deed in question was executed in the name of plaintiff no. 2 and defendant no. 2 was executed way back in the year 1997, long before coming into force of the Act of 1988, i.e. 19.05.1988, but as the suit in which the appellant has taken defense of Benami transaction was

filed in the year 2000 and written statement therein was filed by the defendant no. 1 on 06/01/2001, he will not be permitted to take a plea of Benami transaction showing himself as a real owner regarding property in question, safe to the extent the pleas covered under Section 4(3) of the Act which has been deleted by amending Act of 2016 w.e.f 01/11/2016.

46. In another judgement, Hon'ble Supreme Court is relevant on this issue cited as **Marcel Martins versus M. Printer and others**, decided on 27/4/2012. reported in **AIR 2012 SC 1987.** In that case, the suit property comprises a residential house bearing Municipal No. 33 and two blocks A and B, in Bangalore, which was originally owned by the Corporation of the City of Bangalore. The said property was let out by the Corporation to Smt. Stella Martins-mother of the parties before the court. In the year 1978, the Corporation took a decision to sell the said property and presumably similar other properties to those in occupation of the same. The state government also approved the said proposal with a note of caution that care should be taken to correctly identify the occupants of the property being sold. Before effecting the sale in her favour. Stella Martins passed away in November 1982, leaving behind her husband, Shri C.F. Martins, their daughters and the appellant, who happens to be the only son of his parents. The corporation desired the transfer of the tenancy rights held by Smt. Stella Martins should be made to only one individual out of her several legal representatives and for that reason, her husband and daughters consented to the transfer of tenancy rights in favour of the defendant appellant. In due course, on demand of sale consideration, the father of the parties transferred a sum of Rs.35,636/- to an account jointly held by respondent no.1 and her husband for purchasing a bank draft. A demand draft of Rs.48,636/- the agreed sale consideration was paid by respondent no1 and her husband. After payment of sale consideration, the sale deed was executed in favour of the appellant, the son of the deceased tenant. The case of the plaintiff respondent was that C.F. Martins, father of the litigating parties, (plaintiff no.1) executed a registered Will on 16.08.1989, whereby he bequeathed his entire estate, including the suit schedule property equally to all his children.

47. A dispute relating to the suit schedule property had arisen between the parties, including their father and OS No. 3119 of 1990 was filed in City

Civil Court by the plaintiff for a declaration to the effect that they were co-owners in the schedule property to the extent of their contribution and they also prayed for an injunction restraining the defendant appellant from interfering with the possession of plaintiff no.1 and 2 over the same.

48. The defendant appellant filed a written statement, inter alia, averment that the entire sale consideration towards purchase of the schedule from his premises was provided by him, which made him the absolute owner of the suit property.

49. The trial court dismissed the suit filed by the plaintiffs. Aggrieved by the judgment of the trial court, the plaintiff respondents filed regular first appeal before the High Court, and the High Court, by the impugned judgment and order, reversed the findings recorded by the trial court and decreed the suit filed by the plaintiffs respondents. The High Court on reappraisal of the evidence took the view that the appellant had not succeeded in proving that he had paid the entire amount of consideration for the purchase of the suit property.

50. The Hon'ble Supreme Court, in Civil Appeal referred against the judgment of High Court, affirmed the judgment of the High Court with the following observations made is paragraphs 12 and 13, which are extracted as under:

> *"12. Section 3 forbids benami transaction while sub-section (2) thereof excludes such a transaction enumerated therein from the said provision. Section 4 of the Act, upon which heavy reliance was placed by Mr. Chaudhary, may be extracted in extenso:*
>
> > *Section 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."

13. A plain reading of the above will show that no suit, claim or action to enforce a right in respect of any property held benami shall lie against the person in whose name the property is held or against any other person at the instance of a person claiming to be the real owner of such property. It is common ground that although the sale deed by which the property was transferred in the name of the appellant had been executed before the enactment of above legislation yet the suit out of which this appeal arises had been filed after the year 1988. The prohibition contained in Section 4 would, therefore, apply to such a suit, subject to the satisfaction of other conditions stipulated therein. In other words unless the conditions contained in Section 4(1) and (2) are held to be inapplicable by reason of anything contained in sub-section (3) thereof the suit

filed by plaintiffs- respondents herein would fall within the mischief of Section 4."

51. Having considered the aforementioned judgment of the Hon'ble Supreme Court in the light of the facts of the case, this Court is of the considered opinion that no retrospective effect can be given to the provisions of the Act 1988 with regard to transactions entered prior to the commencement of the Act, particularly in respect of Section 3 and 4 which came into force on 19/5/1988 and 05/09/1988, respectively. At present the suit was filed in the year 2000 by the plaintiff respondent and the defense of Benami transaction was taken by the appellant in the year 2001 in written statement. He will not be permitted to take defence of Benmai transcation due to the fact that the suit was filed after coming into the force of the Act, save to the extent, the rigors of Section 4, which creates an embargo on right to recover property held benami are excepted in sub-section (3) of the Act. However, defendant/appellant failed to prove the fact that his case comes within the purview of saving clause of (3) of Section 4 prior to amendment in the year 2016.

52. Substantial questions (E) is decided accordingly.

53. **Substantial question of law (F),** insofaras the status and occupation of the appellant (defendant no.1) in suit property, is concerned, he has taken plea in written statement, the land on which the entire accommodation along with the four shops were purchased by the defendant from his fund in 1977 when he was posted as Medical Officer outside Lucknow. The plaintiff no.1 was residing in rural area of District Barabanki in the year 1977, and the plaintiff no.2 and defendant no.2 were students and had no independent income or any source of money to purchase the suit property by all means or by virtue of family settlement,

the defendant no.1 is the sole owner and also in possession of the suit property. He provided the funds for purchasing the land on the disputed house on personal request of plaintiff no.2 and defendant no.2, the purchasers of the suit property on record. Thereafter, the said property along with the four shops was constructed by the defendant with his salaried income and there was no partition of the said property from the side of the plaintiff no.1, the father of the parties.

54. Learned Civil Judge has recorded a clear finding that the suit property was purchased in the name of the plaintiff no.2 and defendant no.2 in the year 1977 and at that time, the defendant no.1 had completed two years of service and his salary was at that time so small that he was not in a position to pay the sale consideration of Rs.10,200 at that time to the vendor. Inasmuch as there is no documentary or independent evidence in support of the plea that he had paid the sale consideration substantially.

55. It is difficult to believe that defendant no.1 paid entire sale consideration of the suit property and did not get his name entered therein as at least a co-purchaser along with his two brothers. The learned Civil Judge rightly gave finding that the plaintiff no.1, the father of the parties possessed huge chunk of agricultural land and he was also getting monthly pension as a freedom fighter. Thus, on the facts of the case, it is natural that it was plaintiff no.1, who purchased the suit property in the name of his two sons. Plaintiff no.2 and defendant no.2, who were students at that time and paid the sale consideration. This is admitted fact that the defendant no.1 took entry in the suit property in the year 1980 when he came to Lucknow on transfer and the plaintiff no.1 has stated in his statement that being a real son, he admitted the defendant no.1 in a portion of the house as licensee and the learned trial court has rightly

declined to grant money decree @ Rs.500 to the plaintiffs as monthly license fee for the entire period from 1982 to 2000 because there was no evidence in this regard that any license fee was agreed between the plaintiffs, and defendant no.1. Particularly in view of the close relations of the parties. This is also admitted fact that the plaintiff no.1, Sukh Nandan, (the deceased) was blessed with six sons, namely: Chandra Bhushan, Brij Bhushan (defendant no.1), Ravi Bhushan (since deceased), Sabitur Bhushan (defendant no.2), Bharat Bhushan (defendant no.3). The fact is not denied that Ravi Bhushan and Chandra Bhushan had got separated from their father and brothers long before the filing the suit and they are not concerned with suit property and at present, they and their legal representatives are not interested in any manner with the suit property. The real contest is between the defendant no.1 (Dr. Brij Bhushan) and plaintiff no.2 (Satya Bhushan) because it appears from the record that two brothers, Satya Bhushan and Chandra Bhushan, are associated with the defendant no.1. The reason behind that is Chandra Bhushan was never given a share in suit property and he never resided therein. Sabitur Bhushan, is although one of the named purchasers of the suit property in the sale deed of 10-02-1977. He has admitted in his cross-examination that the agricultural land lying in the share of the brother Dr. Brij Bhushan is being cultivated by him at their native village and for that reason, he might have taken the side of defendant no.1. PW-1 Sukh Nandan, the father of the parties, has stated in his evidence before the trial court as P.W-1 in the year 2002 that he is the head of the family, and was blessed with six sons and two daughters. He had purchased the the suit property with his own earnings in the names of his sons Satya Bhushan and Sabitur Bhushan, and constructed house thereon for them.

56. He testified before the trial court that in private partition between the purchaser, half eastern portion was allotted to Sabitur Bhushan, and the half western portion was allotted to Satya Bhushan. Rent of two shops lying eastwards is received by Sabitur Bhushan and that of two shops lying westwards is taken by Satya Bhushan. He permitted his son, Brij Bhushan, to reside in a portion of the house due to his necessity for Rs.500 per month rent, but Brij Bhushan never paid the rent. A notice to vacate the accommodation was issued by Satya Bhushan to Brij Bhushan, but instead of vacating the house, he raised unauthorized construction on the first floor. His son Ravi Bhushan had died, he had purchased land in Lucknow and handed it over to Brij Bhushan. He received Rs.6,000/- monthly pension as a freedom fighter and own sufficient land in his native place, District Barabanki. The property was mutated in 1979 in the name of Sabitur Bhushan and Satya Bhushan. Chandra Bhushan did agricultural work with him, but his dining is separated. Sabitur Bhushan resides with him. He owns 40-45 pakka Bigha land. His age was 95 years when he testified in court. 16 Bigha pakka land was lying in his name and remaining chaks were allotted in the name of his sons. The agricultural land of Brij Bhushan is cultivated by Sabitur Bhushan. He apprehends danger to his life from his sons, namely, Brij Bhushan, Bharat Bhushan and Sabitur Bhushan. He was receiving Rs.5,800 monthly pension. It is wrong to say that the house and four shops were constructed by Brij Bhushan. He had purchased the suit property from a old lady, who was his relative.

57. Both courts below have rightly given a finding that the suit property has not been purchased by defendant nol.1, instead it was purchased by his father, Sukh Nandan, who possessed sufficient monetary means to

purchase a suit property in the year 1977.

58. Under facts of law if a father purchases some property in the name of his two sons to the exclusion of other sons for their welfare and pays the sale consideration himself, the transaction is held to be a gift deed in favour of the sons whose names are shown as purchasers unless it was purchased with joint family fund. On the facts of the present case also, this fact is proved that the sale consideration of the transaction of the year 1977, was paid by the Plaintiff no.1, Sukh Nandan, the father of the parties, by his own funds to the exclusion of four other sons, the property cannot be held as coparcenery property, rather in essence, it is a gift deed in favour of the sons whose names are shown in the sale deed as purchasers. The property in question is self acquired property of father. Thus, the plea of benami transaction taken by the defendant in written statement during the pendency of the suit, which was filed after the commencement of the Act of 1988 that he is the real owner of the property and he had paid the sale consideration is not tenable. This defense is not permitted to be raised by defendant no.1 in view of the rigors of Section 4 of the Act and the defendant no.1 on whom burden of proof lies to prove that the sale transaction of 1977 was a benami transaction could not prove this fact. Section 4(3) (since repealed in the year 2016) although saves coparcenery property rights, but with condition that the said property was purchased by the karta of the family for the benefit of coparceners in the family. In the present case, it is not proved that plaintiff no.1 purchased the suit property in the name of his two sons for the benefit of all coparceners in the family, including himself. He had stated in his evidence that the purchasers were non-earning members and he supplied the sale consideration from his own funds. Thus, the plea of

benami transaction is not applicable on the facts of the present case. Even otherwise, ZA&LR Act, a bhumidar with transferable rights, is the absolute owner of the property, which is recorded in his name as bhumidhar, and Mitakshara law of coparcenery rights is not applicable on agricultural land, which is dealt with under provisions of the Act of 1950. Thus, it cannot be presumed that at that time a joint family (father and four sons), the said property was purchased by the father as Hindu Undivided Family property or coparcenery property. It is also not proved that the father, (PW-1) paid the sale consideration from joint family funds. The purchaser sons, (Sabitur Bhushan and Satya Bhushan) have admitted that they were not earning at that time and that they had not contributed to sale consideration. It is also not proved on record that the purpose of the sale transaction entered in the year 1977 was to throw the property purchased in joint family funds in joint family assets. Therefore, I find no perversity in concurrent findings recorded by both the courts below, while decreeing the suit of the plaintiff respondent. The defendant no.1 will not get the benefit of admission of defendant no.2 and defendant no.3 before the court in his favour.

59. Hon'ble Supreme Court reiterated the settled position with regard to second apeal in **K.N. Nagarajappa & others versus H. Narasimha Reddy** in **Civil Appeal No(s). 5033-5034 of 2009, reportable decided on September 09, 2021** and observed in paragraph 14 as under:

> *Undoubtedly, the jurisdiction which a High Court derives under Section 100 is based upon its framing of a substantial question of law. As a matter of law, it is axiomatic that the findings of the first appellate court are final. However, the rule that sans a substantial question of law, the High Courts cannot interfere with findings of the lower Court or concurrent findings of fact, is subject to two important caveats. The first is*

that, if the findings of fact are palpably perverse or outrage the conscience of the court; in other words, it flies on the face of logic that given the facts on the record, interference would be justified. The other is where the findings of fact may call for examination and be upset, in the limited circumstances spelt out in Section 103 CPC.

60. Substantial question of law (F) is decided accordingly against the appellants

61. With the above findings, I find no factual or legal error or perversity in concurrent findings of both courts below and no interference is warranted in second appeal by this Court. Consequently, the second appeal is **dismissed**.

(Ram Manohar Narayan Mishra,J.)

May 18, 2026
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