BENAMI TRANSACTION (PROHIBITION) ACT, SECTION 2(c)
LEASEHOLD INTEREST IS A KIND OF PROPERTY

(D. G. Karnik, J.)

ANIL SITAL HANSRAJANI and another *Petitioners.*

vs.

SITAL T. HANSRAJANI *Respondent.*

Benami Transaction (Prohibition) Act (45 of 1988), S. 2(c) — *Word "property" — The leasehold interest is a kind of property within the meaning of section 2(c).*

A lease of a property, whether a long lease or a monthly lease, creates interest in the property in favour of the lessee. The interest, which the lessee or a monthly tenant has, is commonly known as leasehold interest. This leasehold interest is a kind of property within the meaning of section 2(c) of the Benami Act. No person is entitled to buy or acquire a property, which includes an interest in the property, in the name of another. In view of clear provisions of sections 3 and 4 of the Benami Act, the arbitrator was justified in not permitting the petitioners to make a claim that they were the real lessees (tenants) and the rent receipts stood in the name of the petitioners only benami. The view taken by the arbitrator of not allowing the petitioners to make a claim of benami tenancy cannot be faulted with. (Para 7)

For petitioners : *A. M. Talreja*

For respondent : *Vivek Kantawala with Ms. Bhairavi Waravdekar* instructed by *Vivek Kantawala and Co.*

ORAL JUDGMENT :— By this petition under section 34 of the Arbitration and Conciliation Act, 1996 (for short "the Arbitration Act"), the petitioners challenge the award dated 22nd September, 2009 passed by the learned arbitrator.

2. The petitioners are brothers and are sons of the respondent. The petitioners and the respondent appear to have taken several premises on rent. However, the dispute in the present petition relates only to the commercial premises bearing shop Nos. 1 and 2 situated at 46-48, Walka House, Tribhuvan Road (Grant Road), Mumbai (hereinafter referred to as "the suit premises"). The building in which the suit premises are situate belongs to HIMS Botawala Charities and is also known as Botawala Building. Prior to the year 1995, the suit premises were let out to one Vinod Agarwal. It is the case of the petitioners that they were carrying on business along with Vinod Agarwal in the suit premises prior to 1995 when Vinod Agarwal surrendered the tenancy to the landlords who created a fresh tenancy in favour of the respondent on or about 10th October, 1995. First as well as all subsequent receipts are issued in the name of the respondent individually. According to the respondent, he was unlawfully evicted from the suit premises by his two sons, namely the petitioners, on or about 21st August, 2002. On 20th May, 2003, the respondent filed a suit, bearing Suit No. 1970 of 2002, in this Court against the petitioners on title (leasehold title) alleging that he was the tenant in occupation of the suit premises and that the petitioners had no right, title or interest therein and had wrongfully entered and

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Arbitration Petition No. 951 of 2009 decided on 13-4-2012. (O.O.C.J., Bombay)

trespassed in the suit premises. He accordingly prayed for a decree for eviction. On 21st October, 2005, this Court by consent of the parties, referred the dispute in the suit to arbitration at the hands of the sole arbitrator Mr. Justice D. R. Dhanuka (Retd.). The learned arbitrator passed his award on 22nd September, 2009. That award is impugned in the present petition.

3. Learned counsel for the petitioner submitted that the learned arbitrator did not give proper and adequate hearing to the petitioners and consequently the award was liable to be set aside. In order to appreciate the contention, it is necessary to state a few facts which are given below.

4. Before the learned arbitrator, by consent of the parties, the plaint in Suit No. 1970 of 2003 was regarded as statement of claim. The petitioners filed their written statement 22 arbitration meetings were held prior to 31st March, 2009 and the 23rd meeting was held on 31st March, 2009. Till that time, the entire evidence of the respondent was recorded and the matter was adjourned for evidence of the petitioners. In that meeting, the learned arbitrator noted that in the affidavit of evidence filed by the petitioners they had referred to large number of matters which were beyond the scope and ambit of the arbitral reference. They had sought to bring the disputes relating to other properties which were not the subject-matter of the arbitration. The learned arbitrator therefore gave two options to the petitioners, one to file fresh affidavits of evidence in respect of the suit premises only and the other to restrict the affidavits which were already filed only to the suit premises. Mr. Talreja, learned advocate appearing for the petitioners, chose the first option and stated that the petitioners would file fresh affidavit of evidence only as to shop Nos. 1 and 2 (i.e. the suit premises). This fact was recorded by the learned arbitrator in paragraph 3 of the minutes of the 23rd arbitral meeting. The learned arbitrator accordingly passed an order granting liberty to the petitioners to file fresh affidavits of evidence within 2 weeks. Accordingly the petitioners filed two fresh affidavits of evidence on 13th April, 2009. In the next arbitral meeting held on 16th June, 2009, the advocates were heard. It was pointed out to the learned arbitrator that the two fresh affidavits dated 13th April, 2009 filed by the petitioners also contained the matters which were not the subject-matter of arbitration, i.e. they not only contained the matters relating to the suit premises but also referred to the disputes between the parties regarding other properties. The learned arbitrator also noted that the petitioners were seeking to make a counter-claim in the sum of ₹ 61,88,133.50. After hearing the parties, the learned arbitrator held that he had no jurisdiction to adjudicate upon the counter-claim nor had he the jurisdiction regarding the disputes other than those relating to the suit premises. He rejected the affidavits dated 13th April, 2009 as they were not in respect of right to lead "Rebuttal Evidence" in respect of mesne profits. The evidence of the parties was closed and and matter was adjourned to the next date, i.e. 17th June, 2009 for arguments by consent of the parties. The learned arbitrator also noted the agreement which was reached between the parties that the counsel for the claimant would argue first. Next arbitration meetings were held on 17th June, 2009 and thereafter on 14th July, 2009. The arguments of the respondent's advocate was concluded on 14th July, 2009. By consent of the parties, the arbitration proceedings were then adjourned for arguments of the petitioners to 17th and 25th August, 2009. On

15th August, 2009 (i.e. holiday for Independence Day), the advocate for the petitioners sent a telefax to the learned arbitrator requesting for an adjournment on the ground that the petitioners wanted to challenge the order dated 16th June, 2009. On 17th August, 2009, neither Mr. A. M. Talreja, Advocate, nor Mr. V. M. Talreja, Advocate, who were representing the petitioners all along, were present. However, Mr. Anand Talreja, Advocate, attended the arbitration meeting and requested for an adjournment on the ground that Mr. A. M. Talreja, Advocate, was unable to attend the arbitration proceeding as he was busy in the Court at Kalyan. The ground for adjournment mentioned in the written application submitted on 17th August, 2009 was different than the ground for adjournment sought by the telefax dated 15th August, 2009. By the telefax dated 15th August, 2009, adjournment was sought on the ground that the petitioners wanted to challenge the earlier order dated 16th June, 2009. In the application dated 17th August, 2009, the adjournment was sought on the ground that Mr. A. M. Talreja, Advocate, could not attend the arbitration proceeding as he was busy in the Court at Kalyan. The learned arbitrator rejected both the applications and closed the matter for his decision. He thereafter considered the oral and the documentary evidence adduced by the parties and passed the award on 22nd September, 2009.

5. After having heard the parties and perusing the documents annexed to the petition as well as the copies of the record of the proceeding before the learned arbitrator handed over by the parties at the time of the hearing, I am satisfied that the grievance by the petitioners that they were not given a reasonable opportunity of hearing has no merit. I am inclined to agree with the submission of the learned counsel for the respondent that the adjournment was sought on 17th August, 2009 only for the purpose of delaying the arbitral proceeding and, in any event, the learned arbitrator was justified in rejecting the adjournment on 17th August, 2009. It may be noted that the arbitral meeting fixed to be held on 17th August, 2009, was first sought to be adjourned by a telefax sent on a holiday (15th August, 2009) on the ground that the petitioners wanted to challenge the earlier orders dated 31st March, 2009 and/or 16th June, 2009. The order dated 31st March, 2009 having been passed by consent of the parties when the petitioners chose the option of filing fresh affidavits could not have been challenged. Not only had the petitioners consented to this order but they filed two affidavits on 13th April, 2009 in pursuance of it. The petitioners having consented to this course of action, firstly by giving consent before the learned arbitrator and secondly acting upon it by filing two affidavits, cannot make a grievance about the said order. As regards the order dated 16th June, 2009, again it may be noted that the petitioners themselves gave consent for conclusion of recording of evidence and adjourning the matter for hearing of arguments. Paragraph 11 of the minutes of the arbitral meeting dated 16th June, 2009 clearly says that the advocates had agreed the manner in which the arguments were to be advanced, that is who should advance the arguments first. The petitioners never objected to this order dated 16th June, 2009 which also was passed by consent of the parties. The petitioners therefore cannot be allowed to resile from the said consent and challenge the said order. There is one more reason for which the learned arbitrator committed no error in not adjourning the matter on 17th August, 2009 on the ground that the petitioners wanted to

challenge the orders dated 31st March, 2009 and/or 16th June, 2009. After the order dated 31st March, 2009, the petitioners allowed the respondent's advocate to address his arguments on 17th June, 2009 and 14th July, 2009 without raising any objection for the respondent's advocate advancing the arguments on two dates thereafter and thereby waived the right of the alleged challenge.

6. On merits of the award, learned counsel for the petitioners submitted that the learned arbitrator erred in holding that the suit premises were taken on rent by the respondent. According to him, there was an overwhelming evidence to show that the petitioners were the real tenants. Prior to the suit premises being taken on rent in the name of the respondent, they were rented out to Mr. Vinod Agarwal. The petitioners were carrying on the business along with Mr. Vinod Agarwal. It were the petitioners who induced Mr. Vinod Agarwal to surrender the tenancy and that too for consideration so that the premises could be let out to them. The petitioners paid money to Mr. Vinod Agarwal who, upon receipt of the same, surrendered the tenancy in favour of the landlord. The premises were then taken on rent by the petitioners, but rent receipt was taken in the name of the respondent being the father and head of the family. This has not been considered by the learned arbitrator on the ground that this defence amounted to the defence of benami tenancy which was not permissible under the Benami Transaction (Prohibition) Act, 1988 (for short "the Benami Act").

7. The defence of the petitioners before the arbitrator was that the leasehold right in the suit premises were held benami in the name of the respondent and real lessees were the petitioners. Though the rent receipts stood in the name of the respondent, the real tenants were the petitioners and not the respondent. Since the learned arbitrator has not allowed this defence to be raised in view of the provisions of the Benami Act, it would be appropriate to refer to certain provisions of the Benami Act. Section 2(a) of the Benami Act defines a benami transaction to mean any transaction in which the property is transferred to one person for a consideration paid or provided by another person. The word "property" has been defined in section 2(c) of the Benami Act to mean property of any kind, whether movable or immovable, tangible or intangible, and includes any right or interest in such property. Undoubtedly, a lease of a property, whether a long lease or a monthly lease, creates interest in the property in favour of the lessee. The interest, which the lessee or a monthly tenant has, is commonly known as leasehold interest. This leasehold interest is a kind of property within the meaning of section 2(c) of the Benami Act. Section 3 of the Benami Act provides that no person shall enter into a benami transaction. No person is entitled to buy or acquire a property, which includes an interest in the property, in the name of another. Section 4 of the Benami Act prohibits a person to make a claim for recovery of the property held as benami. In view of this clear provisions of sections 3 and 4 of the Benami Act, the learned arbitrator was justified in not permitting the petitioners to make a claim that they were the real lessees (tenants) and the rent receipts stood in the name of the petitioners only benami. The view taken by the learned arbitrator of not allowing the petitioners to make a claim of benami tenancy cannot be faulted with.

8. No other point was urged.

9. There is no merit in the petition which is hereby dismissed.

10. After this order was dictated in the open Court, learned counsel for the petitioners prays for stay of the operation of this order as the petitioners want to challenge the order before the appellate forum. Since the petitioners are in possession of the suit premises, operation of this order is stayed for a period of 6 weeks.

Petition dismissed.

CIVIL PROCEDURE CODE, ORDER 1, RULE 10

(R. D. Dhanuka, J.)

MULCHAND K. RANKA and another *Plaintiffs.*

vs.

HITESH C. JHAVERI and others *Defendants.*

And

JUGRAJ K. RANKA and others *Applicants.*

Civil Procedure Code, O. 1, R. 10 — *Suit for specific performance of contract — Impleadment of necessary or proper party — Applicants have already filed a separate suit — No relief can be allowed in the present Chamber Summons taken out by the Applicants — Applicant is neither necessary party nor proper party and his presence is not necessary in order to enable the court to effectually and completely adjudicate all the questions involved in the suit — Claim of the Applicant that the property in question is HUF property cannot be decided in this suit for specific performance of agreement which is all together for a different relief.* (Paras 10 and 11)

For plaintiffs : *Darshan Zaveri,* instructed by *Bharat Zaveri*

For applicants-Intervenors : *P. B Shah* instructed by *Vivek Salunke*

For defendant Nos. 1A to 1E : *Anand R. Pande*

List of cases referred :

1. *Kasturi vs. Iyyamperumal and others, 2005(3) Mh.L.J. (S.C.) 1 = AIR 2005 SC 2813* (Para 8)
2. *Vijay Pratap and others vs. Sambhu Saran Sinha, (1996) 10 SCC 53* (Para 8)

P.C. :— The applicants have taken out this Chamber Summons for impleading themselves as party to Suit No. 2674 of 2006 claiming to be necessary party. The plaintiffs have filed the suit for seeking specific performance of the Agreement dated 12th January, 1991 and in the alternative, for damages to the tune of ₹ 27 crores together with interest. It is case of the applicant that plaintiff No. 1 is the brother of the applicants and all brothers belong to Undivided Joint Hindu family. It is his case that his father late Kaluchand Hanjarimal Ranka had initially started the business of watch repairing and subsequently he closed down the said business and had ventured into business of construction and development of properties. It is his case that several properties in and around Mumbai came to be developed jointly. It is his case that till date, no partition oral or written by metes and bounds have taken place and all the business are carried out for the joint Hindu family of the applicants and plaintiffs and their mother Devubai K. Ranka. It is the case of the plaintiffs that though plaintiffs had entered into an agreement with the defendant, the applicants

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Chamber Summons No. 1600 of 2009 in Suit No. 2674 of 2006 decided on 9-3-2012. (O.O.C.J., Bombay)