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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ CS(OS) No.498/2016 & IA No.12006/2016 (under Order XXXIX
Rules 1&2 CPC).

HARISH PESWANI

..... Plaintiff

Through: Mr. J.P. Sengh, Sr. Adv. with Mr.
A.C. Bhasin and Ms. Manisha Mehta,
Advvs.

versus

JAISHREE PESWANI & ORS.

..... Defendants

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

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29.11.2016

1. It is the case of the plaintiff Harish Peswani in the plaint (i) that the plaintiff and the defendant no.3 Sh. Deepak Peswani are the sons of defendant no.1 Smt. Jaishree Peswani, while the defendants no.2(a) to 2(c) namely Smt. Divya Peswani, Ms. Varsha Peswani and Ms. Khushboo Peswani are the widow and daughters respectively and only legal heirs of Shri Naresh Peswani deceased son of defendant no.1; (ii) that the father of the plaintiff Shri Parmanand Peswani died intestate on 1st May, 2009 leaving the plaintiff and the defendants as his only heirs; (iii) the entire family was residing in property no.481, Jahangir Puri, Delhi and having a common kitchen; (iv) Shri Parmanand Peswani started running the business in the name and style of M/s Jaishree Box Makers, of manufacturing of

boxes, from A-481, Jahangir Puri, Delhi; after sometime the said business was shifted to A-524, Jahangir Puri, Delhi which property was purchased out of joint family funds; (v) Shri Naresh Peswani, being the predecessor of the defendants no.2(a) to 2(c), defendant no.3 Sh. Deepak Peswani and the plaintiff, as and when each came of age, also started assisting the father Shri Parmanand Peswani in the business of M/s. Jaishree Box Makers; (vi) in or around 1992-1993 another joint family business of Cable was started in the name and style M/s. Naresh Cables but was closed in the year 2002-2003; (vii) that pursuant to mutual understanding/arrangement all the income generated from the said joint business was put under the control of defendant no.1 who used to give only Rs.500/- per month as pocket expenses to each of the sons; (viii) that from time to time immovable properties were purchased in the name of Shri Parmanand Peswani and defendant no.1 and the same “belong to the Hindu Undivided Family (HUF)”; (ix) properties no.A-413, A-420, A-481 and A-524 all at Jahangir Puri, Delhi and property no.BB(East)-64 D, Shalimar Bagh, Delhi were purchased in the name of Shri Parmanand Peswani and the properties no.A-489, first floor and A-526, second floor, both at Jahangir Puri, Delhi were purchased, after the death of Shri Parmanand Peswani, in the name of

defendant no.1 out of joint family funds; (x) none of the properties were self acquired properties either of Shri Parmanand Peswani or defendant no.1 and all the properties were purchased with the aid of joint family funds and not from any individual income of either of the parties; (xi) that property no.A-420, first floor, Jahangir Puri, Delhi is in the exclusive possession of the plaintiff and the ground floor portion of the said property is in possession of defendant no.1; (xii) the defendant no.1 is also in possession of ground floor of A-481, Jahangir Puri and the second floor whereof is in occupation of defendants no.2(a) to 2(c); (xiii) property no.A-489, first floor, Jahangir Puri is in occupation of defendant no.3; (xiv) properties no. A-413, A-420 (second floor) and A-481 (first floor) and A-526 (second floor) all at Jahangir Puri have been let out and fetching a total rent of over Rs.50,000/- per month; (xv) the defendant no.1 is a housewife having no independent income from any quarter; (xvi) behaviour of defendant no.1 has become strange; and, (xvii) the defendant no.1 has appropriated to herself the sale proceeds of BB (East), 64D, Shalimar Bagh, Delhi and has also started appropriating to herself earnings from the business.

2. The plaintiff has thus sought the relief of (i) partition of A-413, A-420, A-481, A-489 (first floor), A-524 and A-526 (second floor) all at

Jahangir Puri, Delhi – 110 033; (ii) rendition of accounts and permanent injunction etc.

3. The suit came up first before this Court on 27th September, 2016 when *inter alia* the following order was passed:-

“3. The plaintiff has sued for partition with respect to as many as six immoveable properties.

4. Of the said six properties, four of the properties are stated to be in the name of the father of the plaintiff and the other two properties are admittedly in the name of the mother of the plaintiff impleaded as defendant no.1.

5. It is the case of the plaintiff that all the six properties were purchased out of joint family funds and savings and thus the plaintiff has a share therein.

6. The plaintiff has not filed any document and has not made any averment to show that there was any such joint family fund, for the plaintiff to have a share in the property admittedly in the name of the mother of the plaintiff.

7. The plaintiff can at best have a share as an heir of the father in the property in the name of the father of the plaintiff.

8. The counsel for the plaintiff on enquiry states that neither the mother of the plaintiff nor the other heirs of the father have till now set-up any Will of the father.

9. The counsel for the plaintiff seeks time to satisfy this Court that this suit qua properties in the name of the defendant no.1 is maintainable.

10. List on 19th October, 2016 as sought”.

4. Thereafter on 19th October, 2016, the following order was passed:-

“1. The counsel for the plaintiff today also, instead of addressing the queries raised in the order dated 27th September, 2016, states that once summons of the suit and notice of the application are issued and the defendants file their written statement, the position will become clear.

*2. A suit cannot be set in motion, without the plaintiff making out a case. The plaintiff is suing for partition not as an heir of his father but on the basis of existence of a joint family and a joint family fund but of the existence whereof neither there are any proper pleadings nor any prima facie case. Attention of the counsel for the plaintiff is drawn to **Surender Kumar Vs. Dhani Ram** 2016 SCC Online Del. 333, **Santosh Vishweshwarnath Wadhwa Vs. Gulshan Chhabra** MANU/DE/1029/2016 and **Mukesh Kumar Vs. Pavitra** MANU/DE/2287/2016. The counsel to study the same and then address the Court.*

3. The counsel for the plaintiff has also referred to Section 4 of the Benami Transactions (Prohibition) Act, 1988.

4. However, Section 4 of the Act applies to purchase of property benami in the name of wife or unmarried daughter. The case of the plaintiff however is of the purchase of benami property in the name of the mother after the demise of the father of the plaintiff. It thus cannot be said that the purchase of the property in the name of the mother of the plaintiff was by her husband or by her father, for Section 4 of the Act to be attracted.

5. The counsel to look up the said aspect also and address thereon on the next date of hearing. If Section 4 of the Act were not to apply, then the bar to Benami Transactions (Prohibition) Act would squarely apply to the case set up at least qua the properties in the name of the mother of the plaintiff.

6. List on 29th November, 2016, as sought.”

5. The plaintiff has filed IA No.14734/2016 to amend the plaint to

incorporate paras 15-A and 15-B in the plaint as originally filed pleading (i) that during the lifetime of Shri Parmanand Peswani there was a joint family who were living jointly in property no.A-481, Jahangir Puri, Delhi carrying on joint business; (ii) all the income generated from the said family business was deposited either in the account of Shri Parmanand Peswani or of the defendant no.1 or of any of the sons i.e. plaintiff Harish Peswani or defendant no.3 Mr. Deepak Peswani or Naresh Peswani; (iii) that the defendant no.1 at no point of time had any job or was employed or had any independent source of income to purchase the properties and during the lifetime of her husband was totally dependent upon him and thereafter on her sons and the properties were purchased in the name of defendant no.1 out of love and affection and as a trustee for the benefit of the other joint family members; (iv) the entire consideration for purchase of the properties in the name of the defendant no.1 was paid out of joint family funds of the family; and ,(v) the plaintiff is one of the co-parceners in the aforesaid properties and is entitled to his share in the moveable and immoveable properties under the law.

6. I do not see as to how the amendments sought, even if allowed, advance the case of the plaintiff. Be that as it may, IA No.14734/2016 is

allowed and the amended plaint is taken on record. The maintainability of the suit of the plaintiff is being gauged vis-a-vis the amended plaint.

7. The suit as aforesaid is for partition of as many as six immoveable properties. The plaintiff has neither filed documents of title of any of the properties nor the documents to show the ownership of the business. It is not shown whether the business being carried on and from the income whereof all the properties are stated to have been acquired is of a sole proprietary or of a partnership or of a joint Hindu family firm and what is the status thereof in the various Governmental records and who are the proprietors/partners thereof. The plaintiff has only filed, site plans of the properties, electricity bills of the properties, *Adhar* cards of the plaintiff and his wife and son, copies of the legal notices stated to be issued, Ration card and passbooks of bank accounts in the name of the defendants no.1 and 3.

8. According to the plaint, four of the six properties are in the name of the father Shri Parmanand Peswani and the other two properties are in the name of defendant no.1. The plaintiff as an heir of his father who is stated to have died intestate could have sought partition of the four properties owned by the father. However the plaintiff is not seeking partition of the said four properties also as an heir of the father but as having a right/share in the said

property since the lifetime of his father. The plaintiff claims such a right in the said four properties owned by the father, pleading the four properties to have been acquired from the business which the plaintiff calls the joint family business.

9. A perusal of the plaint shows a total lack of pleadings of any ancestral property in the hands of the father which may have formed the nucleus for commencing the business and a specific plea that the business of M/s Jaishree Box Makers was commenced by the father in the year 1981 and the plaintiff, defendant no.3 and Sh. Naresh Peswani started assisting the father in the said business on coming of age. Such a plea is not a plea of existence of a HUF or joint Hindu family firm or of a coparcenary. Merely because the father of the plaintiff may have commenced the business and the plaintiff and his brothers on coming of age may have started assisting the father in the said business would not make the plaintiff and his brothers the owners of the said business along with the father and the ownership of the business commenced by the father would remain with the father Shri Parmanand Peswani only. There is thus no basis pleaded in the plaint for the plaintiff to claim a share in the four properties in the name of the father, along with the father.

10. There is similarly no case of existence of any HUF or co-parcenary made out from the pleadings. Merely because after coming of age, a son continues to reside with the father or joins the father in the business being run by the father does not result in creation of a co-parcenary to which the principles of ancient or customary *Hindu* Law and recognised in section 6 of the Hindu Succession act, 1956 would apply. Need to expound further on the said aspect is not felt as the issues have been discussed threadbare in the judgments referred to in order dated 19th October, 2016 *supra*.

11. Thus the plaintiff, on the pleas made, is not found to have a right of partition of the four properties owned by the father though may have a claim for partition thereof as an heir of the father. However when the plaintiff has not approached the Court for partition as an heir of the father but has approached the Court for partition as having a right in the properties even during the lifetime of the father, the suit for partition of the said properties cannot be entertained.

12. The other two properties for partition of which the suit is filed are admittedly in the name of defendant no.1 being the mother of the plaintiff.

13. The claim of the plaintiff of the four properties in the name of the father of the plaintiff and the two properties in the name of the mother of the

plaintiff being owned not by the father and mother respectively but by the father and mother along with the plaintiff and the other two defendants is also found to be barred by the Prohibition of *Benami* Property Transactions Act, 1988 (as per Amendment w.e.f. 1st November, 2016 of the *Benami* Transactions (Prohibition) Act, 1988). The said Act even prior to its amendment w.e.f. 1st November, 2016 prohibited any suit or claim or action to enforce any right in respect of any property held *benami* against the person in whose name the property was held or against any other person and on behalf of a person claiming to be the real owner of such property. The claim of the plaintiff of the properties though being held in the name of the father and mother respectively of the plaintiff being owned by the father and mother along with the plaintiff and the other defendants is in the teeth of such a claim.

14. Though sub-section (3) of Section 4 of the said Act as it stood prior to amendment w.e.f. 1st November, 2016 exempted the application of Section 4(1) thereof where the person in whose name the property is held was a co-parcener in a HUF and the property was held for the benefit of co-perceners in the family but the plaintiff, on the pleadings has not made out a case for existence of a co-parcener or a HUF or of the property being held by the

father and mother respectively for the benefit of co-parceners in the family. Moreover the said sub section (3) of Section 4 has been deleted vide the amendment of the Act w.e.f. 1st November, 2016 though corresponding changes have been made to definition of benami transaction in Section 2(9) of the Act.

15. In the aforesaid chronology of events, in my view the claim of the plaintiff, of being one of the real owners of the properties held in the name of his father or mother would also be barred by the Prohibition of *Benami* Property Transactions Act, 1988.

16. Supreme Court recently in ***Om Prakash Sharma Vs. Rajendra Prasad Shewda*** (2015) 15 SCC 556 held that purchase of property by a Hindu in the name of his wife is a specie of Benami purchase that had been prevalent in India since ancient times; such a practice appears to have been prevalent on account of the position of Hindu women to succession until the enactment of the Hindu Succession Act and the amendments made thereto from time to time; in a situation where a Hindu widow had a limited right to the estate of the deceased husband under the Hindu Women's Right to Property Act, 1937, the purchase of immovable property by a husband in the name of the wife in order to provide the wife with a secured life in the event

of the death of the husband was an acknowledged and accepted feature of Indian life which finds recognition in the explanation clause to Section 3 of the Benami Transactions (Prohibition) Act, 1988; this is a fundamental feature that must be kept in mind while determining the nature of a sale/purchase transaction of immoveable property by a husband in the name of his wife. It was also reiterated that if the property belongs to the wife and the husband manages the property on her behalf, it would be idle to contend that the management by the husband of the properties is inconsistent with the title of his wife to the properties. It was also held that even if the wife is the owner of the property, possession may continue with the husband as a matter of convenience and that the purchase of the property by a female in her own name though the consideration paid for such transaction had been received by her from her husband would not make the husband the owner of the property.

17. The plaint thus does not disclose a cause of action for the relief claimed of partition as co-owner of the four properties held in the name of the father of the plaintiff and of two properties held in the name of defendant no.1 being the mother of the plaintiff.

18. The plaint is therefore rejected.

19. It is however clarified that the same would not come in the way of the plaintiff, if entitled as an heir of the father, to claim a share in the four properties in the name of the father.

No costs.

RAJIV SAHAI ENDLAW, J

NOVEMBER 29, 2016

‘pp/gsr’ ..

(Corrected and released on 21st December, 2016).