

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

CIVIL REVISION APPLICATION st. NO.11600 OF 2018

Shri Kondiram Vitthal Bhosale ... Applicant

Vs.

Shri Tukaram Vithal Bhosale & Ors. ... Respondents

Mr. Tejesh Dande with Bharat Ghadvi and Krupanshu Nandu i/b
Tejesh Dande & Associates for the Applicant

Mr. Rajiv Chavan, Senior Advocate with Priyanka Chavan,
Anupama Pawar and Sonali Lolage i/b Rajiv Jadhav for
Respondent Nos. 1 & 2

**CORAM: Mrs. MRIDULA BHATKAR, J.
DATED: JULY 4, 2018**

ORAL JUDGMENT:

1. This Civil Revision Application is directed against the order dated 2.4.2018 passed by the learned Civil Judge, Junior Division, Karjat below exhibit 22 in R.C.S. No.112 of 2017. The applicant is the original defendant No.1 against whom and other defendants, the plaintiff, who is the respondent herein, has filed a suit for partition and permanent injunction in respect of the suit property. The applicant / defendant No.1 moved application under Order 7 Rule 11(d) of the Civil Procedure Code for rejection of the plaint, mainly on the ground that the property stands in the name of

defendant No.1 and this being a Benami property, there is a bar u/s 4(1) of the Prohibition of Benami Property Transactions Act 1988 to file any proceedings in respect of such properties. The said application was opposed by the present respondents and the learned Judge rejected the said application holding that the property was purchased in the name of defendant No.1 out of nucleus of joint Hindu family property and hence, there is no bar u/s 4(1) of the Act. Hence, this revision application.

2. The learned Counsel for the applicant has submitted that in the plaint, the respondent – original plaintiff, has made statement that the property was purchased in the name of the defendant No.1 and it stands in his name. The learned Counsel submits that this statement discloses that the property is benami property and in view of the statement made by the plaintiff in the plaint, the suit is barred under section 4(1) of the Act. The learned Counsel pointed out section 4 of Prohibition of Benami Property Act as amended and w.e.f. 1.11.2016. Section 4 states prohibition of the right to recover 'benami; property and no suit, claim or action against the person in whose name the benami property stands, can lie even if it is filed by a person, who claims to be the real

owner of such property. So also, no defence is also permissible on the ground of benami.

3. Per contra, the learned Senior Counsel for respondent/original plaintiff, has supported the order passed by the learned trial Judge and has relied on the averments made and pleadings in the plaint. He has submitted that the plaintiff has specifically mentioned that the plaintiff and the defendants are the members of the joint Hindu family having a joint family property and out of the income of the joint family property, the suit property is purchased by their father in the name of defendant No.1 i.e., the applicant. The plaintiff has averred specifically that the source of income of purchasing the suit property is the joint family property and for convenience or due to custom, the property was purchased in the name of the eldest son i.e., the applicant. The learned Counsel has further argued that such purchase cannot be treated as a benami transaction. He relied on the definition of benami property u/s 2(8) and benami transaction under 2(9) of the Act. He pointed out that if the property is purchased in the name of Karta or any member of Hindu undivided family, then, that property is held in the benefit of all the members of joint Hindu family and

such purchase or transaction is an exception and not covered under the definition of benami transaction. In view of the specific averments in the plaint, it cannot be said that it is benami property. In support of his submissions, he relied on the judgment of the Division bench of Madhya Pradesh High Court in the case **Subhash Chandra Gupta vs. Gyanchand & Ors.**¹ on the point of benami transaction and also on Order 7 Rule 11(d). He relied on the judgment in the case of **Babita Pal & Ors. vs. Jagdish Bansal**²; and **Smt.Mridula Singh alias Bulbul & Ors. vs. Brahmdeo Pd.Singh & Ors.**³ On the point of Order 7 Rule 11 of Civil Procedure Code and on section 4(1) of the Prohibition of Benami Property Transactions Act 1988.

4. Considered the submissions of the learned Counsel and also the learned Senior Counsel. Perused the plaint; the plaintiff has claimed partition of the suit property wherein it is stated that defendant No.1 i.e., the applicant is the eldest son and therefore, their father has purchased the suit properties out of the income of joint family property in the name of the applicant/defendant No.1 on behalf of all the members of the family. The question is whether

1 1994 1 MP JR 29

2 2013 196 DLT 792

3 AIR 2006 Pat 27

property purchased out of income of the joint Hindu family in the name of Karta or any member of the joint Hindu family, is a benami property and a benami transaction.

5. In order to understand the nature of the transaction as argued by the learned Senior Counsel, the definition of benami property and benami transaction is to be looked into. Section 2(8) and 2(9) read thus:

“(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 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;

.....

....

.....

.....

.....”

6. Subsection (9) of section 2 refers to the property which is a subject matter of benami transaction. Hence, the definition of benami transaction is the basis to verify whether property can be called as benami. Before dealing with benami transaction, one has to consider the object of the Act. The Legislature had passed this Act after coming across the false claims made and defences put in the name of benami transaction, which obstructed the smooth functioning of the economy in the society. The properties are purchased in the name of other person to avoid tax liability or to divert illegal income. With this object, all benami transactions are taken within the sweep of the Act to stop the abuse and defrauding public revenue.

7. The property standing in the name of Karta or any member of HUF, is carved out as an exception to the definition of benami transaction. In the benami transaction, a party who pays the consideration is another person whose source of income is independent to the income of the person in whose name that property is purchased and stands. However, in the purchase of the property in the name of any member of the joint Hindu family, the income is jointly owned by all the members of the joint Hindu family. Thus, such Karta or member in whose name the property stands has a share in the income and all the other members also have their shares or claim in the income being a joint family property. So, the consideration which is paid cannot be said as paid by altogether different persons, whose source of income is independent to the person who claims property and in whose name the property stands. Thus, such member of HUF or Karta cannot be labelled as benamidar as contemplated under the Act, and all the members of HUF are owner to the extent of their share.

8. Chapter 2 of the Act of 1988 and also the Act of 2016 states about the prohibition of benami transactions. Section 4 under the

said Chapter is in respect of prohibition of the right to recover property held benami. In the earlier Act, under the said section, subsection (3) was an exception to section 4, which is now deleted. Section 4(3) reads thus:

“(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.”

9. Thus, prior to amendment of 2016, if the property was held in the name of coparcener of HUF, then, it was presumed that the property was for the benefit of coparceners in the family and there was no prohibition to recover such benami property. However, that subsection (3) is deleted under the new amended Act of 2016 and therefore, the learned Counsel for the petitioner based his submissions mainly on the point of deletion of subsection (3) of section 4 of the Act. However, this deletion will not help the petitioner in view of definition of benami transaction under subsection (9) of section 2 of the Act. It is interesting to note that the

property held by Karta or coparcener of HUF which is for the benefit of the family and if the consideration paid for purchase of the property is from the common hotchpotch, then, that transaction is not covered under benami transaction itself, as defined under subsection (9). Thus, if such property or transfer of the property is not treated as a benami transaction, then, there is no issue of prohibiting such transaction. Thus, the property which is subjected to transaction as per sub-section (9) of section 2 of the Act, is the benami property. In order to avoid repetition in view of the definition of benami transaction in subsection (9) of section 2 of the Act, it appears that subsection (3) of section 4 of the old Act in the new Act, is deleted. The exception under section 2(9) sufficiently protects the interest of the each coparcener of HUF though it apparently stands in the name of Karta or one of the coparceners.

10. In the case of **Subhash Chandra Gupta (supra)**, the Division Bench of the Madhya Pradesh High Court has held that the property which is jointly acquired by the members of the joint family with the head of ancestral property, becomes a joint family property and it will be a misnomer to say that to hold it as a benami property.

11. This application is moved for rejection of plaint under Order 7 Rule 11(d) of the Civil Procedure Code. If a suit, from the statement in the plaint, is barred under any law, then, the plaint is to be rejected. For bringing the plaint within Order 7 Rule 11d, it is necessary for the Court to look into the averments made in the plaint. The learned Senior Counsel has rightly pointed out the pleadings wherein the respondent/plaintiff has stated the property was purchased in the name of the petitioner from the joint income of the family as a matter of convenience and thus, all the members of the HUF are coparceners and have shares in the consideration paid for the purchase of the property and thus, in the said property.

12. In the case of **Babita Pal & Ors. (supra)**, the Division Bench of the Delhi High Court had an opportunity to deal with the application on the background of Order 7 Rule 11 of the Civil Procedure Code where the challenge is given in view of section 4 of the Benami Property Transactions Act. While stating how to appreciate the application filed under Order 7 Rule 11 of the Civil Procedure Code, the Division Bench held that the averments made in the plaint are to be seen so also the documents filed with the

plaint and the documents which are going to be filed are to be considered. The defence that the defendants may set up in the written statement cannot be the basis of the application under Order 7 Rule 11 of the Civil Procedure Code. The Division Bench has referred to the said case to the ratio laid down in the case of **Canbank Financial Services Ltd. vs. Custodian & ors.**⁴ and held thus:

“It may be noted at this juncture that in the Canbank Financial Services Ltd. Case (supra), the Supreme Court while dealing with the Benami Transactions Act emphasized that benami transactions in India were generally recognized by the Courts unless such transactions (a) violated the provisions of any law; or (b) defeated the rights of innocent transferees for value; or (c) when the object of the benami transaction was to defraud creditors; or (d) when it was against public policy. The Supreme Court held that benami transactions as such had not been declared to be invalid in law by any statute including the Benami Transactions Act and as a matter of fact the Benami Transactions Act was required to be strictly construed. “

13. In the case of **Smt.Mridula Singh alias Bulbul & Ors.** (supra), the application was made under Order 7 Rule 11(d) of the Civil Procedure Code on the ground that no suit can be filed as the property is benami. The learned Single Judge of the Patna High Court while deciding the matter, has held that it is yet to be proved

4 (2004) 8SCC 355

in the instant case, by valid evidence that whether the ingredients of benami transactions were present and the property in question was purchased benami and that at the time of the said purchase, what was the intention of the buyers actual or name-lender. These issues can be decided only after considering the merits of the respective claims of the parties on the basis of their evidence and specific provisions of law. Therefore, only on the basis of section 4 of the Act, the entire suit cannot be allowed to fall at this preliminary stage.”

14. Thus, in view of the ratio laid down in the above cases and considering the averments made in the plaint in the present case, I am of the view that the order passed by the learned Judge of the trial Court of rejecting the application under Order 7 Rule 11(d) of the Code of Civil Procedure, is legal and correct and hence, no interference is required.

15. With this, the Civil Revision Application is dismissed.

(MRIDULA BHATKAR, J.)

Vishwanath
Satyanarayana
Sherla

Digitally signed by
Vishwanath
Satyanarayana Sherla
Date: 2018.08.21
14:47:14 +0530