

HIGH COURT OF CHHATTISGARH, BILASPUR**Civil Revision No. 17 of 2019****Reserved on 06.12.2019****Pronounced on 07.01.2020**

1. Jyoti Agrawal Wd/o Late Rupesh Agrawal Aged About 40 Years R/o Civil Lines Panjab Rice Mill Gali, Gandhi Mandir Ward Bhatapara, Tahsil Bhatapara, District Baloda Bazar- Bhatapara Chhattisgarh.
 2. Minor Anjali Agrawal D/o Late Rupes Agrawal Aged About 17 Years Through Natural Guardian Mother Jyoti Agrawal Wd/o Late Rupesh Agrawal, R/o Civil Lines Panjab Rice Mill Gali, Gandhi Mandir Ward Bhatapara, Tahsil Bhatapara, District Baloda Bazar- Bhatapara Chhattisgarh.
- Applicants**

Versus

1. Indu Bai Wd/o Devendra Kumar Agrawal Aged About 70 Years R/o Gandhi Mandir Ward Bhatapara, Tahsil Bhatapara, District Baloda Bazar- Bhatapara Chhattisgarh.....Plaintiff.
2. Rakesh Kumar S/o Devendra Kumar Agrawal Aged About 48 Years R/o Gandhi Mandir Ward Bhatapara, Tahsil Bhatapara, District Baloda Bazar- Bhatapara Chhattisgarh.....Defendant No.1
3. State Of Chhattisgarh Through Collector, Baloda Bazar, District Baloda Bazar- Bhatapara Chhattisgarh. **---- Non-applicants**

For Applicants:	Shri Pankaj Agrawal, Advocate.
For Non-applicant No.1:	Shri Abhishek Vinod Deshmukh, Advocate.
For Non-applicant No.2:	Shri Harshmandar Rastogi, Advocate.
For State/Non-applicant No.3:	Shri Vimlesh Bajpai, G.A.

Single Bench:Hon'ble Shri Sanjay S. Agrawal, J**CAV Order/Judgment**

1. This Revision Petition has been preferred by the Defendants under Section 115 of the Code of Civil Procedure, 1908 (hereinafter referred to as the 'CPC') questioning the legality and propriety of the order dated 11.10.2018 passed by the Civil Judge Class-I, Bhatapara, District Balodabazar (C.G.) in Civil Suit No.09A/17, whereby the application filed by the Defendants under Order 7 Rule 11 of CPC has been rejected.

2. Briefly stated the facts of the case are that the Plaintiff Smt. Indubai instituted a suit claiming declaration of title and injunction with regard to the property in question, i.e., part of Khasra No. 33/4 admeasuring 1975 sq.ft. of land constructed with a house over the part of it, situated at Gandhi Mandir Ward Bhatapara, District Balodabazar. According to the Plaintiff, it was purchased by her from one Hirendra Kumar Agrawal for a consideration of Rs.6,812/- from her *Stridhan* under the registered deed of sale dated 12.07.1982 while showing her sons' names also owing to love and affection, who were minors at that time. It is pleaded further that the Defendants, without any interest, started demanding their share while interfering in her peaceful possession on 20.02.2017, therefore, she has been constrained to institute a suit in the instant nature.

3. Upon receiving the summons of the suit, the Defendants instead of filing their written statements raised an objection regarding the maintainability of the suit by moving an application enumerated under Order 7 Rule 11 read with Section 151 of CPC and praying for rejection of the plaint stating therein that the averments as made in the plaint while claiming her exclusive ownership over the suit property by the Plaintiff on the premises that the entire sale consideration was paid by her from her *Stridhan* and names of her sons have been shown in the alleged sale owing to love and affection is specifically a plea of benami transaction and as such, the suit is barred by the provisions prescribed under Section 4(1) of the Prohibition of Benami Property Transactions Act, 1988 (hereinafter referred to as the 'Act, 1988').

4. In reply to the aforesaid application, it is stated by the Plaintiff that the alleged transaction does not come within the purview of the benami

transaction as it was purchased by her from her known source of income and since the alleged sale was made much prior to the enforcement of the Act, 1988, therefore, the plaint cannot be rejected under Order 7 Rule 11 of CPC.

5. After considering the aforesaid contention of the parties, it has been observed by the trial Court vide its order impugned that the alleged transaction appears to have been made for the benefit of the family member and, as a consequence of it, the claim cannot be held to be hit or barred by virtue of Section 4 of the said Act, 1988. This is the order which has been impugned by the Defendants by way of preferring this revision petition.

6. Shri Pankaj Agrawal, learned counsel appearing for the Applicants/Defendants while inviting attention to the plaint averments submits that the property in question was purchased admittedly in joint names, yet the Plaintiff is claiming her exclusive ownership on the premises that though it was purchased as such in joint names but the entire sale consideration was paid by her from her *Stridhan*. It, therefore, reveals specifically that it is a transaction of a benami nature and the suit is, therefore, specifically barred by sub-section (1) of Section 4 of the Act, 1988. Without considering the said provision in its proper manner, the trial Court has committed an illegality in holding that the suit is not barred by the said provision. At last, it is contended by him that instead of recording a finding as such, the Court below ought to have kept the said issue opened for its decision at the time of trial. Having failed so, the trial Court has erred in passing the order impugned.

7. Countering the aforesaid contention, Shri Abhishek Vinod

Deshmukh, learned counsel appearing for the Plaintiff/Non-applicant No.1 while referring to the exceptional clause (iii) of sub-clause (b) of clause (A) of Section 2(9) of the said Act, 1988 submits that from a bare perusal of the plaint averments, it is clear that the property in question was purchased by the Plaintiff from her *Stridhan*, i.e., known source of her income, therefore, the trial Court has not committed any illegality in recording such a finding.

8. I have heard learned Counsel for the parties and perused the entire relevant papers annexed with this petition carefully.

9. From perusal of the order impugned, it appears that the trial Court while rejecting the alleged application filed under Order 7 Rule 11 of CPC has held that the suit as framed is not barred by the provision prescribed under Section 4 of the Act, 1988. The said provision is relevant for the purpose, which reads as under:-

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.

10. By virtue of the aforesaid provision, it is evident that neither the claim nor the defence in order to enforce any right in respect of any property held *benami* against the person in whose name the property is held, could be held to be maintainable on coming into enforcement of the said Act, 1988. The applicability of this provision would come into play only

if the transaction alleged to have made is a benami transaction and that is the *sine qua non* for its applicability. At this juncture, the provision provided under Section 2(9) of the Act, 1988 is required to be seen, where it defines “*benami* transaction” as under:-

2. Definitions.— In this Act, unless the context otherwise requires,—

- (1) xxxx xxxx xxxx xxxx xxxx xxxx
- (2) xxxx xxxx xxxx xxxx xxxx xxxx
- (3) xxxx xxxx xxxx xxxx xxxx xxxx
- (4) xxxx xxxx xxxx xxxx xxxx xxxx
- (5) xxxx xxxx xxxx xxxx xxxx xxxx
- (6) xxxx xxxx xxxx xxxx xxxx xxxx
- (7) xxxx xxxx xxxx xxxx xxxx xxxx
- (8) xxxx xxxx xxxx xxxx xxxx xxxx

(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;

(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”

11. From a bare perusal of the exceptional clause (iii) as provided in sub-clause (b) of the aforesaid provision, it is clear that if the property is held by a person in the name of his spouse or in the name of his child while paying consideration for acquiring such property of his known source of income, it would not come within the definition of benami transaction and the applicability of Section 4 mentioned hereinabove would not be applicable. It, however, would come into play only if it is established that the alleged transaction falls within the definition of benami transaction, else the suit cannot be held to be barred by the said provision.

12. According to the plaint averments, the Plaintiff is claiming her exclusive ownership over the suit property on the premises that it was acquired by her from her *Stridhan*, i.e., known source of her income. In order to get the benefit of the aforesaid exceptional clause for claiming her exclusive ownership over the property in question, it is required to be established by the Plaintiff by way of cogent and reliable evidence that it is her self-acquired property purchased by way of her *Stridhan* and this fact could be determined only at the time of trial and not prior to that.

13. What has been observed by the trial Court by rejecting the application filed under Order 7 Rule 11 of CPC that the suit property appears to have been purchased by the Plaintiff for the benefit of the family members, and therefore, the suit as framed is not barred by virtue of Section 4 of the Act, 1988. The trial Court has, thus, virtually given his finding that the alleged transaction does not come within the purview of benami transaction. It, however, appears that such an observation has been made without considering the fact as to whether it was purchased by the Plaintiff from her known source of income, i.e., *Stridhan* in order to

arrive at such a conclusion. It is, therefore, rather premature to hold that the suit is not barred by the provision prescribed under Section 4 of the Act, 1988.

14. Whether the property in question has been purchased by the Plaintiff from her *Stridhan*, i.e., known source of income, or not is virtually the fact and could be determined only at the time of trial and not prior to that. At this stage, the principles laid down in the matter of ***Mangathai Ammal (Died) through LRs. and others v. Rajeswari and others*** reported in **AIR 2019 SC 2918** are to be seen, wherein the Supreme Court while referring to the certain decisions delivered by the Supreme Court on this particular issue has observed at paragraphs 8 to 8.4 as under:-

8. While considering the issue involved in the present appeal viz. whether the transactions/Sale Deeds in favour of defendant No.1 can be said to be benami transactions or not, the law on the benami transactions is required to be considered and few decisions of this Court on the aforesaid are required to be referred to.

8.1 In the case of Jaydayal Poddar (AIR 1974 SC 171) (supra) it is specifically observed and held by this Court that the burden of proving that a particular sale is benami and the apparent purchaser is not the real owner, always rests on the person asserting it to be sold. It is further observed that this burden has to be strictly discharged by adducing legal evidence of a definite character which would either directly prove the fact of the benami transaction or establish circumstances unerringly and reasonably raising an inference of that fact. In paragraph 6 of the aforesaid decision, this Court has observed and held as under :

“6. “It is well-settled that the burden of proving that a particular sale is benami and the apparent purchaser is not the real owner, always rests on the person asserting it to be so. This burden has to be strictly discharged by adducing legal evidence of a definite character which would either directly prove the fact of benami or establish circumstances unerringly and reasonably raising an inference of that fact. The essence of a benami is the intention of the party or parties concerned; and not unoften, such intention is shrouded in a thick veil which cannot be easily pierced through. But such difficulties do not relieve the person asserting the transaction to be benami of any part of the serious onus that rests on him; nor justify the acceptance of mere conjectures or

surmises, as a substitute for proof. The reason is that a deed is a solemn document prepared and executed after considerable deliberation, and the person expressly shown as the purchaser or transferee in the deed, starts with the initial presumption in his favour that the apparent state of affairs is the real state of affairs. Though the question whether a particular sale is benami or not, is largely one of fact, and for determining this question, no absolute formulae or acid tests, uniformly applicable in all situations, can be laid down; yet in weighing the probabilities and for gathering the relevant indicia, the courts are usually guided by these circumstances: (1) the source from which the purchase money came; (2) the nature and possession of the property, after the purchase; (3) motive, if any, for giving the transaction a benami colour; (4) the position of the parties and the relationship if any, between the claimant and the alleged benamidar; (5) the custody of the title deeds after the sale and (6) the conduct of the parties concerned in dealing with the property after the sale.

In the case of *Thakur Bhim Singh* (AIR 1980 SC 727) (supra) this Court in paragraph 18 observed and held as under :

“18. The principle governing the determination of the question whether a transfer is a benami transaction or not may be summed up thus: (1) the burden of showing that a transfer is a benami transaction lies on the person who asserts that it is such a transaction; (2) it is proved that the purchase money came from a person other than the person in whose favour the property is transferred, the purchase is *prima facie* assumed to be for the benefit of the person who supplied the purchase money, unless there is evidence to the contrary; (3) the true character of the transaction is governed by the intention of the person who has contributed the purchase money and (4) the question as to what his intention was has to be decided on the basis of the surrounding circumstances, the relationship of the parties, the motives governing their action in bringing about the transaction and their subsequent conduct, etc.”

8.2 In the case of *P. Leelavathi* (AIR 2019 SC 1938) (supra) this Court held as under :

“9.2 In *Binapani Paul* case (supra), this Court again had an occasion to consider the nature of benami transactions. After considering a catena of decisions of this Court on the point, this Court in that judgment observed and held that the source of money had never been the sole consideration. It is merely one of the relevant considerations but not determinative in character. This Court ultimately concluded after considering its earlier judgment in the case of *Valliammal v. Subramaniam* (2004) 7 SCC 233 : (AIR 2004 SC 4187) that while considering whether a particular transaction is benami in nature, the following six circumstances can be taken as a guide:

“(1) the source from which the purchase money came;

- (2) the nature and possession of the property, after the purchase;
- (3) motive, if any, for giving the transaction a benami colour;
- (4) the position of the parties and the relationship, if any, between the claimant and the alleged benamidar;
- (5) the custody of the title deeds after the sale; and
- (6) the conduct of the parties concerned in dealing with the property after the sale. (Jaydayal Poddar v. Bibi Hazra (supra), SCC p. 7, para 6 (AIR 1974 SC 171)).

8.3 After considering the aforesaid decision in the recent decision of this Court in the case of P. Leelavathi (AIR 2019 SC 1938) (supra), this Court has again reiterated that to hold that a particular transaction is benami in nature the aforesaid six circumstances can be taken as a guide.

8.4 Applying law laid down by this Court in the aforesaid decisions to the facts of the case on hand and the reasoning given by the Trial Court confirmed by the High Court, it appears that both, the learned Trial Court and the High Court have erred in shifting the burden on the defendants to prove that the sale transactions were not benami transactions. As held hereinabove in fact when the plaintiffs' claim, though not specifically pleaded in the plaint, that the Sale Deeds in respect of suit properties, which are in the name of defendant No.1, were benami transactions, the plaintiffs have failed to prove, by adducing cogent evidence, the intention of the Narayanasamy Mudaliar to purchase the suit properties in the name of defendant No.1 – his wife.

15. While applying the aforesaid principles to the case in hand, it is evident that the question whether a particular sale is a benami or not is largely one of fact and that cannot be decided in absence of evidence and in order to get the exclusive ownership, the Plaintiff has to establish the said fact by way of cogent and reliable evidence that it was acquired from her *Stridhan* and the alleged transaction does not fall within the ambit of benami transaction defined under Section 2(9) of the Act, 1988 and only after its establishment, it could be held that the suit is not barred under Section 4 (1) of the Act, 1988. However, without considering all these facts, the trial Court in a cursory manner has opined that the suit is not barred by the said provision. The finding of the trial Court, therefore, in so far as the

suit cannot be held to be hit or barred by Section 4 of the Act, 1988 in such a pre-matured stage, is liable to be and is hereby set aside.

16. Before parting with the matter, it is profitable to note at this juncture the provision prescribed under Order 14 Rule 2 of CPC which reads as under:-

2. Court to pronounce judgment on all issues.-- (1) Notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues.

(2) Where issue both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to-

(a) the jurisdiction of the Court, or

(b) a bar to the suit created by any law for the time being in force,

and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue.

17. From perusal of the aforesaid provision, it is clear that the Court is vested with the discretion under this Order to deal with an issue of law, which it may try as a preliminary issue if it relates to the jurisdiction of the Court, or is a bar to the suit created for the time being in force. Obviously, this provision would apply after issues are struck, i.e., after written statement is filed and this is the principle which has been laid down by the Supreme Court in the matter of ***Kuldeep Singh Pathania vs. Bikram Singh Jaryal*** reported in **(2017) 5 SCC 345**, whereby while dealing with the aforesaid provision, it has been observed at paragraph 6 as under:-

6. Order 14 deals with settlement of issues and determination of suit on issues of law or on issues agreed upon. Order 14 Rule 2 provides for disposal of a suit on a preliminary issue and under sub-rule (2) of Rule 2, if the court is of opinion

that a case or part thereof can be disposed of on an issue of law only, it may try that issue first, in case it relates to jurisdiction of the court or bar to entertaining the suit. After the 1976 amendment, the scope of a preliminary issue under Order 14 Rule 2(2) is limited only to two areas, one is jurisdiction of the court, and the other, bar to the suit as created by any law for the time being in force.

18. In view of the forgoing discussions, the revision petition is disposed of with the aforesaid observations. No order as to costs.

Sd/-

(Sanjay S. Agrawal)
JUDGE

Nikita