

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**MA No. 20 of 2020**

Order Reserved on : 01.07.2021

Order Delivered on : 20.07.2021

1. Peer Mohammad S/o Taar Mohammad Musalman, aged about 56 year.
2. Zahir Mohammad S/o Taar Mohammad, aged about 50 year.
Both R/o Musalman Para, Simga, Post Simga, Tahsil Simga, District Baloda Bazar-Bhatapara (C.G.)

---- Appellants**Versus**

1. Yakub Mohammad S/o Taar Mohammad, aged about 53 years, R/o Musalman Para, Simga, Post Simga, Tahsil Simga, District Baloda Bazar-Bhatapara (C.G.).
2. State of Chhattisgarh, through Collector, Baloda Bazar-Bhatapara (C.G.).

---- Respondent

For Applicants	:	Mr. H.B. Agrawal, Sr. Advocate with Ms. Richa Dwivedi, Advocate
For Respondent No.1	:	Mr. Hemant Gupta, Advocate.
For State/Respondent 2	:	Mr. Vimlesh Bajpai, G.A.

Hon'ble Smt. Justice Rajani Dubey**CAV Order****20/07/2021**

1. Proceeding through video conferencing.
2. The appellants/defendants have preferred this miscellaneous appeal being aggrieved by the judgment and order dated 20.01.2020 passed in Civil Appeal No.H-28A/2019 by the Additional District Judge, Bhatapara, District Balodabazar-Bhatapara (C.G.), whereby the learned Additional District Judge allowed the appeal filed by respondent No.1./plaintiff arising out of order dated 22.02.2019 passed in Civil Suit

No.6-A/2019 by Civil Judge Class-II, Simga, District Balodabazar-Bhatapara and remitted the case to Civil Judge Class-II, Simga.

3. Briefly stated facts of the case are that a civil suit was filed by the respondent No.1 against the appellants/defendants and State before the Civil Judge Class-II for declaration of title, permanent injunction and separation of possession as per partition. The plaint was filed with injunction application and application under Section 151 of the Code of Civil Procedure (for short 'the CPC') was also filed along with Batwaranama, which was replied by the appellants/defendants of the suit on 12.07.2019. The Civil Judge Class-II, Simga, passed an order dated 22.07.2019 allowing the application under Section 4(1) of Benami Transaction Prohibition Act, 1988 (for short 'the Act') and also under Order 7 Rule 11 (d) of the Code and rejected the plaintiff's suit. Against this order, respondent No.1 filed an appeal before the Additional District Judge, Bhatapara, along with an application under Section 39 Rule 1 & 2 and under Section 151 of the Code. The learned Additional District Judge, vide order dated 20.01.2020, allowed the appeal of respondent No.1 and case was remitted back to the trial Court for adjudication of the matter afresh by setting aside the order dated 22.07.2019. Hence, this appeal by the appellants/defendants.
4. Learned Sr. Advocate appearing for the appellants submits that there is no scope for interference by the lower appellate Court as the plaint is hit by Section 4(1) of Act. Learned

counsel further submits that the learned lower appellate Court did not consider that unless the case is not made out, the same cannot be remitted back, therefore, the order of appellate Court remanding the case may be set aside by restoring the order of the learned trial Court. In support of his submission, learned Sr. Advocate placed reliance on the decision of Hon'ble Supreme Court in the matter of **Syeda Rahimunnisa Vs. Malan Bi (dead) by Legal Representatives and Another** reported in **(2016) 10 SCC 315.**

5. On the other hand, learned counsel for respondents supported the impugned judgment and order. Learned counsel for respondent No.1, referring the decision of Hon'ble Supreme Court in the matter of **Pawan Kumar Vs. Babulal since Deceased Through Legal Representatives and Others** reported in **(2019) 4 SCC 367**, submits that application for rejection of plaint on the ground of being barred by law in the Act and from the statement in the plaint it appears without doubt or dispute that suit is saved by Section 4 (3) (b) of the Act, such disputed question of fact has to be adjudicated on basis of evidence and cannot be decided at the stage of consideration of application under Order 7 Rule 11 (d) of the CPC.
6. I have heard learned counsel for the parties and perused the material available on record.
7. A bare perusal of the order sheets of trial Court filed by the appellants/defendants would show that on 19.06.2019, plaintiff/respondent No.1-Yakub Mohammad had filed civil suit

before the Civil Judge Class-II. Defendants/appellants herein did not file their written statement and an application under Order 7 Rule 11 of CPC was filed. On 22.07.2019, the learned trial Court allowing the application of the appellants/defendants rejected the suit on the ground of being not maintainable under Order 4 (1) of the Act. Section 4 of the Act, as it stood before it was amended by Act 43 of 2016, was 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.

(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.”

8. It is clear from Sub-Section 3 to Section 4 (a) of the Act which

deals with acquisitions by and in the name of a coparcener in a Hindu undivided family or the benefit of such coparceners in the family and Section 4(3)(b) of the Act deals with the trustee and the beneficiaries thereof and the other that deals with the persons standing in a fiduciary capacity and those towards whom he stands in such capacity.

9. Hon'ble the Supreme Court in the matter of **Pawan (supra)** has held in para 13, which reads thus:-

“13. *In the present case, the controversy has arisen in an application under Order 7 Rule 11 CPC. Whether the matter comes within the purview of Section 4(3) of the Act is an aspect which must be gone into on the strength of the evidence on record. Going by the averments in the plaint, the question whether the plea raised by the appellant is barred under Section 4 of the Act or not could not have been the subject-matter of assessment at the stage when application under Order 7 Rule 11 CPC was taken up for consideration. The matter required fuller and final consideration after the evidence was led by the parties. It cannot be said that the plea of the appellant as raised on the face of it, was barred under the Act. The approach must be to proceed on a demurrer and see whether accepting the averments in the plaint the suit is barred by any law or not. We may quote the following observations of this Court in Popat and Kotecha Property V. SBI Staff Assn. (2005) 7 SCC 510 : (SCC p.515, para 10)”*

10. The pleading of the plaintiff Yakub Mohammad is that disputed property is a joint family property and appellants/defendants are his real brother but the disputed property is on his name and this dispute cannot be decided

only by advancing argument while deciding the application under Order 7 Rule 11 of CPC. It is clear from order sheets that appellants/defendants did not file written statement and they had only filed an application under Order 7 Rule 11 of CPC. Hon'ble the Supreme Court has already held in **Pawan (supra)** that the disputed questions cannot be decided at the time of considering an application filed under Order 7 Rule 11 CPC. Clause (d) of Rule 11 of Order 7 applies in those cases only where the statement made by the plaintiff in the plaint, without any doubt or dispute shows that the suit is barred by any law in force.

11. The lower appellate Court has rightly observed that the order of learned trial Court being not sustainable in the eye of law set-aside and remitted back the case to the trial Court for deciding afresh. The order of the learned appellate Court is based on proper appreciation of law laid down by Hon'ble Supreme Court in **Pawan (supra)**, which does not calls for interference by this Court.
12. Appeal thus being devoid of merit is liable to be dismissed and it is hereby dismissed. No order as to costs.

Sd/-

(Rajani Dubey)
Judge