

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.7 of 2020

1. Umesh Rai Son of Late Tilakdhari Rai Resident of Village- Elahibagh, Police Station- Gopalpur, District- Patna.
2. Smt. Kishmatia Devi W/o Late Tilakdhari Rai Resident of Village- Elahibagh, Police Station- Gopalpur, District- Patna.

... .. Petitioner/s

Versus

1. Sri Deo Bachan Rai Son of Late Nokhelal Rai Resident of Village- Elahibagh, Police Station- Gopalpur, District- Patna.
2. Azad Kumar Son of Sri Deo Bachan Rai Resident of Village- Elahibagh, Police Station- Gopalpur, District- Patna.
3. Mukesh Kumar Son of Sri Deo Bachan Rai Resident of Village- Elahibagh, Police Station- Gopalpur, District- Patna.
4. Sri Sheo Bachan Rai Son of Late Nokhelal Rai Resident of Village- Elahibagh, Police Station- Gopalpur, District- Patna.
5. Manoj Kumar Son of Sri Sheo Bachan Rai Resident of Village- Elahibagh, Police Station- Gopalpur, District- Patna.
6. Binod Kumar Son of Sri Sheo Bachan Rai Resident of Village- Elahibagh, Police Station- Gopalpur, District- Patna.
7. Binay Kumar Son of Sri Sheo Bachan Rai Resident of Village- Elahibagh, Police Station- Gopalpur, District- Patna.
8. Pravin Kumar Son of Sri Sheo Bachan Rai Resident of Village- Elahibagh, Police Station- Gopalpur, District- Patna.
9. Tunmun Rai Son of Late Doma Rai Resident of Village- Pitambarpur, Post Office- Fatuwa, Police Station- Fatuwa, District- Patna.
10. Bijendar Rai Son of Late Doma Rai Resident of Village- Pitambarpur, Post Office- Fatuwa, Police Station- Fatuwa, District- Patna.
11. Surendra Rai Son of Late Doma Rai Resident of Village- Pitambarpur, Post Office- Fatuwa, Police Station- Fatuwa, District- Patna.
12. Dilip Rai Son of Late Doma Rai Resident of Village- Pitambarpur, Post Office- Fatuwa, Police Station- Fatuwa, District- Patna.
13. Raju Rai Son of Late Nagina Rai Resident of Village- Pitambarpur, Post Office- Fatuwa, Police Station- Fatuwa, District- Patna.
14. Rajesh Gupta Proprietor of M/s Royal Timber, Post Office and Police Station- Kankarbagh, Lohiya Nagar, District- Patna, 800020.

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr. J.S. Arora, Sr. Adv. Mr. Rabi Bhushan Prasad, Adv. Mr. Manoj Kumar, Adv.
For the Respondents -9, 10 & 12:		Mr. P.L. Jaiswal, Adv., Mr. Chandra Shekhar Prasad, Adv.
For the Respondents-11 & 13:		Mr. Chiranjiva Ranjan, Adv.



CORAM: HONOURABLE MR. JUSTICE ANIL KUMAR SINHA
CAV JUDGMENT

Date : 14-11-2022

1. The present application has been filed by the petitioners-defendant nos. 6 & 7 in a Partition Suit for setting aside the order dated 24-09-2019 passed by learned Sub Judge-I, Patna in Title Partition Suit No. 136 / 2016 by which part of the plaint has been rejected in respect of some of the defendant nos. 8-12 under Order VII Rule 11 (d) of the Code of Civil Procedure (hereinafter referred to as the “C.P.C.”).

2. The plaintiffs-respondent 1st set filed a Title Partition Suit No. 136 / 2016 seeking a decree for partition for 1/3rd share of the plaintiffs in the suit property described in Schedule I and Schedule II of the plaint by metes and bounds.

3. Short facts involved in the suit is that suit property was purchased by one Nokhelal Rai, who was the common ancestor of the plaintiffs-respondent 1st set. He died in the year 1960 leaving behind his three sons, Tilakdhari Rai, Shiv Bachchan Rai and Deo Bachchan Rai. The parties are governed by Mitakshra School of Hindu Law and there is unity of title and possession amongst them. The defendants 1st set are the successors of Tilakdhari Rai, who died in the year 1985. Plaintiff No. 1 / Deo Bachchan Rai is one of the sons of Nokhelal Rai



and Plaintiff nos.-2 and 3 i.e. Azad Kumar & Mukesh Kumar are the sons of Deo Bachchan Rai. Late Nokhelal Rai purchased the suit land being item no. 1 of the Schedule I in the name of his brother-in-law namely, Lal Das Rai being 4 Anna share (25%) of the total land of the vendor and remaining 12 Anna share (75 %) was purchased by one Dev Karan Rai having total area being 31.73 acres of land at Mauja- Ram Chak, PS- Gopalpur through a registered deed of sale dated 5-8-1953. The land to the extent of share of Dev Karan Rai was auction sold on account of non payment of complete consideration by him , as such, only the land of Nokhelal Rai purchased in the name of his lender Lal Das Rai remained intact. The said Nokhelal Rai always remained as owner and in peaceful possession of the purchased property. Lal Das Rai did not have any interest in the said property. He neither had title nor he ever came in possession of the said property. The defendant nos. 8-12 in the suit being defendant 2nd set are the successors of the said Lal Das Rai. The defendant no.13, namely Rajesh Gupta is a builder in whose favour the defendant 2nd set without any legal authority has entered into an agreement in respect of the said land for development. The plaintiffs accordingly filed the suit in question for partition. The defendant 2nd set i.e. successors of Lal Das Rai ap-



peared in the suit and filed a petition under Order 7 Rule 11 of the CPC for rejection of the plaint on 19 / 5/ 2017 (Annexure-3). The ground for rejection of the plaint has been taken by the defendant 2nd set is that the suit is barred under the provisions of Prohibition of Benami Property Transactions Act, 1988 (hereinafter referred to as the “Benami Act”). The plaintiffs filed rejoinder to the same (Annexure – 4). According to the petitioners the suit is not barred under the provisions of the Act.

4. Learned senior counsel appearing for the petitioners assailing the impugned order submits that the learned trial court while allowing the said petition has taken into consideration the objection raised by the defendant 2nd set regarding Section 4 of the Benami Act and also taken note of the contention of the petitioners that since the date of purchase of the property by Nokhelal Rai in the name of his brother-in-law; Nokhelal Rai himself remained in possession of the said property as owner thereof and thereafter his successors are in possession. However, the court below has given a finding that prima facie there appears to be no valid cause of action for the plaintiffs against the defendant nos. 8-12 under Order VII Rule 11 (d) of the C.P.C. He next submits that the plaint cannot be rejected in part, rather it can only be rejected as a whole or not at all. However, the plea



of Benami cannot be taken as a ground for rejecting plaint in view of the statements made in the plaint. He argued that the Hon'ble Supreme Court in few recent judgments has held that a plaint cannot be rejected in part or against some of the defendants under the provision of Order VII Rule 11 of the C.P.C. as there is no provision for rejection of the plaint in part or against some of the defendants as such, the court below had no jurisdiction to reject part of the plaint or against some of the defendants. He relies upon the judgments reported in (2018) 11 SCC 780 Sejal Glass Limited Versus Navilan Merchants Private Limited, (2019) 7 SCC 158 Madhav Prasad Aggarwal Versus Axis Bank Limited , AIR 2022 (SC) 1519.

5. He next submits that the plea of Benami is not a ground for rejecting the plaint inasmuch as the plea that a suit is barred under the provisions of Section 4 of Benami Act is no ground for rejection of the plaint, if as per the pleading a controversy is raised by the plaintiff that a suit is saved by Section 4 (3) of the Benami Act then such disputed question has to be adjudicated on the basis of the evidence and can not be decided at the stage of consideration of application under Order VII Rule 11 of the C.P.C. He relies upon the judgment of Hon'ble Supreme Court reported in (2019) 4 SCC 367 Pawan Kumar



Versus Babulal paragraph nos. 13 and 14.

6. Further submission is that for the purposes of Order VII Rule 11 of the C.P.C. the court is required to look into the statement made in the plaint and that too as a whole and neither written statement nor the contents of the petition for rejection of the plaint can be taken into consideration. He relied upon a judgment of the Hon'ble Supreme Court reported in (2017) 5 SCC 345 Kuldeep Singh Pathania Versus Bikram Singh Jaryal and AIR 2012 SC 3912, The Church of Christ Charitable Trust & Education Charitable Society v. M/s Ponniamman Educational Trust. He also submits that apart from the above there are two properties involved in the plaint which would be apparent from Schedule 1 of the plaint and the petition for rejection was only in respect of the property item no. 1 of Schedule- 1 having an area of 12 Bigha 14 Katha and not with regard to item no. 2 being the residential house on plot no. 532. There has been no objection with regard to property described at item no. 2, as such, the plaint cannot be splitted under Order VII Rule 11 of the C.P.C. The learned trial court has committed jurisdictional error by rejecting the plaint against the provisions of Order VII Rule 11 (d) of the C.P.C.

7. On the other hand, learned counsel appearing for the



respondent no. 9, 10, 12, 11 & 13 submits that the present writ application is not maintainable in view of the definition of “decree” under Section 2 (2) of the C.P.C. as such the impugned order is appealable under Section 96 of the C.P.C.

8. The provisions of Section 4(1) of the Benami Act is attracted against the plaintiff and rest of the defendants in the present case and exception created under Section 4 (3)(b) of the Benami Act will apply under the terms of fiduciary capacity or trust relationship if the property is held as a trustee or other persons standing in a fiduciary capacity. It is admitted position that defendants nos. 8-12 / respondent nos. 9 to 13 are the grandson of Late Lal Das Rai and have a right, title and interest in the properties acquired by their grandfather under the Hindu Succession Act, 1956 and it is also admitted that the father of the plaintiff purchased the land in the name of Late Lal Das Rai in which share of Lal Das Rai was prescribed as 1/4th of the total area which comes to around 12 Bigha 14 Kattha for Lal Das Rai. From bare perusal of Section 4 of the Benami Act it is clear that 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 the real owner of such prop-



erty.

9. It is further submitted that with regard to residential house over plot no. 532 described in Schedule 1 item no. 2 the same cannot be a subject matter of partition in view of the statement made in paragraph-5 of the plaint in which it has been stated that due to some difference amongst the plaintiffs and defendant nos. 1 & 7 they amicably partitioned the house as described in Schedule -I of the plaint with equal value of 1 / 3rd each but the land in Schedule -II remained in joint cultivation. In support of his argument that the order impugned is appealable being a decree under Section 2(2) of the C.P.C. he relies upon a judgment of the Supreme Court reported in (2021) 7 SCC 456 Sayyed Ayaz Ali Vs. Prakash G. Goyal, 2019 (1) PLJR 329 (D.B.) Meera Sinha Vs. Girja Sinha, 2016(4) WBLR 159 (Ajit Kumar Saha Vs. Smt. Sampa Saha). In support of his argument that suit is barred under Section 4 (1) of the Benami Act he relies upon judgments reported in 1999 (82) DLT 862; 2012 Supreme (Del) 1292 and on the point of no cause of action disclosed from the reading of the entire plaint he relies on another judgment reported in 2012 AIR SC 3912.

10. I have heard learned counsel for the parties and perused the material on record. The present application has been



filed challenging the impugned order of part rejection of the plaint on the ground that the learned trial court has committed jurisdictional error by exercising jurisdiction not vested in it by law inasmuch as there is no provision under order VII Rule 11 of the C.P.C. for rejection of some part of the plaint and against some defendants. Now the principle is well settled that if a subordinate court exercises jurisdiction not vested in it by law or fails to exercise the jurisdiction so vested, the said order can be assailed under Article 227 of the Constitution of India as per the principle laid down in *Surya Dev Rai versus Ram Chander Rai* reported in (2003) 6 SCC 675. The High Court can interfere in exercise of its power of superintendence when there has been gross error and patent perversity in the order of the sub-ordinate court or where there has been manifest failure of justice.

11. Learned counsel for the petitioner has argued that under Order VII Rule 11 (d) of the C.P.C. the plaint cannot be rejected in part. He relies upon the judgment of the Hon'ble Supreme Court reported in (2018) 11 SCC 780 *Sejal Glass Limited Versus Navilan Merchants Private Limited* (Supra). Paragraph – 8 of the judgment reads as follows:-

“8. We are afraid that this is a misreading of the Madras High Court judgment. It was only on the peculiar facts of that case that want of Section 80 C.P.C. against one



defendant led to the rejection of the plaint as a whole, as no cause of action would remain against the other defendants. This cannot elevate itself into a rule of law, that once a part of a plaint cannot proceed, the other part also cannot proceed, and the plaint as a whole must be rejected under Order 7 Rule 11. In all such cases, if the plaint survives against certain defendants and/or properties, Order 7 Rule 11 will have no application at all, and the suit as a whole must then proceed to trial.”

12. In all such cases if the plaint survives against certain defendants, then Order VII Rule 11 of the C.P.C. will have no application and the suit must proceed to trial. He also relies upon the judgment reported in (2019) 7 SCC 158 *Madhav Prasad Aggarwal and Another Versus Axis Bank Limited and Another*. Paragraph nos.-10, 11, 12 of the same read as follows:-

“10. We do not deem it necessary to elaborate on all other arguments as we are inclined to accept the objection of the appellant(s) that the relief of rejection of plaint in exercise of powers under Order 7 Rule 11(d) C.P.C. cannot be pursued only in respect of one of the defendant(s). In other words, the plaint has to be rejected as a whole or not at all, in exercise of power under Order 7 Rule 11(d) C.P.C. Indeed, the learned Single Judge rejected this objection raised by the appellant(s) by relying on the decision of the Division Bench of the same High Court. However, we find that the decision of this Court in *Sejal Glass Ltd. [Sejal Glass Ltd. v. Navilan Merchants (P) Ltd., (2018) 11 SCC 780 : (2018) 5 SCC (Civ) 256]* is directly on the point. In that case, an application was filed by the defen-



dant(s) under Order 7 Rule 11(d) C.P.C. stating that the plaintiff disclosed no cause of action. The civil court held that the plaintiff is to be bifurcated as it did not disclose any cause of action against the Director's Defendant(s) 2 to 4 therein. On that basis, the High Court had opined that the suit can continue against Defendant 1 company alone. The question considered by this Court was whether such a course is open to the civil court in exercise of powers under Order 7 Rule 11(d) C.P.C. The Court answered the said question in the negative by adverting to several decisions on the point which had consistently held that the plaintiff can neither be rejected as a whole or not at all. The Court held that it is not permissible to reject plaintiff qua any particular portion of a plaintiff including against some of the defendant(s) and continue the same against the others. In no uncertain terms the Court has held that if the plaintiff survives against certain defendant(s) and/or properties, Order 7 Rule 11(d) C.P.C. will have no application at all, and the suit as a whole must then proceed to trial.

11. In view of this settled legal position we may now turn to the nature of reliefs claimed by Respondent 1 in the notice of motion considered by the Single Judge in the first instance and then the Division Bench of the High Court of Bombay. The principal or singular substantive relief is to reject the plaintiff only qua the applicant, Respondent 1 herein. No more and no less.

12. Indubitably, the plaintiff can and must be rejected in exercise of powers under Order 7 Rule 11(d) C.P.C. on account of non-compliance with mandatory requirements or being replete with any institutional deficiency at the time of presentation of the plaintiff, ascribable to clauses (a) to (f) of Rule 11 of Order 7 C.P.C. In other words, the



plaint as presented must proceed as a whole or can be rejected as a whole but not in part. In that sense, the relief claimed by Respondent 1 in the notice of motion(s) which commended to the High Court, is clearly a jurisdictional error. The fact that one or some of the reliefs claimed against Respondent 1 in the suit concerned is barred by Section 34 of the 2002 Act or otherwise, such objection can be raised by invoking other remedies including under Order 6 Rule 16 C.P.C. at the appropriate stage. That can be considered by the Court on its own merits and in accordance with law. Although, the High Court has examined those matters in the impugned judgment the same, in our opinion, should stand effaced and we order accordingly”.

13. Learned counsel also relies upon (2019) 4 SCC 367 Pawan Kumar *Versus* Babulal. Paragraph 13 & 14 of the judgment is quoted hereinbelow:-

“13. In the present case, the controversy has arisen in an application under Order 7 Rule 11 C.P.C. 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 C.P.C. 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.* [*Popat*



and Kotecha Property v. SBI Staff Assn., (2005) 7 SCC 510] : (SCC p. 515, para 10)

“10. Clause (d) of Order 7 Rule 7 speaks of suit, as appears from the statement in the plaint to be barred by any law. Disputed questions cannot be decided at the time of considering an application filed under Order 7 Rule 11 C.P.C. 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.”

14. We, therefore, allow this appeal, set aside the view taken by the courts below and dismiss the application preferred by the second defendant under Order 7 Rule 11 C.P.C. Since the suit has been pending since 2006, we direct the trial court to expedite the matter and dispose of the pending suit as early as possible and preferably within six months from today. Needless to say that the merits of the matter will be gone into independently by the trial court.”

14. The clear cut law laid down by the Hon’ble Supreme Court is evident from the aforesaid judgments that plaint cannot be rejected in part and the same can either be rejected as a whole or not at all. It is evident that there is no provision under Order 7 Rule 11 (d) of the C.P.C. for rejection of the plaint in part as such it is not permissible to reject the plaint against some of the defendants and continue the same against others. In view of the settled legal proposition, I come to the conclusion that



learned trial court has committed jurisdictional error inasmuch as it has no jurisdiction to reject the plaint in part and against some of the defendants i.e. defendants nos. 8-12. I am of the opinion that learned trial court has exercised jurisdiction not vested in it by law. Accordingly, the impugned order is not sustainable on this ground alone.

15. The second leg of the argument of learned senior counsel appearing for the petitioner is that plea advanced that the suit is barred under the provision of Section 4 of the Benami Act is not tenable, as there is no ground for rejection of the plaint, if as per the pleadings made in the plaint it appears that suit is saved by Section 4 (3) of the Benami Act then such disputed question has to be adjudicated on the basis of the evidence and cannot be decided at the stage of consideration of application under Order VII Rule 11 of the C.P.C. He relies upon the judgment of Pawan Kumar Case (Supra) wherein it has been held that the application for rejection of the plaint on ground of being barred by law under the Benami Act, the test is whether from the statement made in the plaint it appears without doubt or dispute that the suit is so barred and the controversy raised by the plaintiff that the suit is saved by Section 4 (3) of the Benami Act has to be adjudicated on the basis of evidence and



cannot be decided under the provision of Order VII Rule 11 of the C.P.C. In the said judgment provision of Section 4 of the Benami Act has been discussed in detail in paragraph 8 to 12 and also clause (a), (b) of sub-section 3 of Section 4 of the Benami Act in which it has been explained that so far bar contained under sub -section 1 & 2 of Section 4 of the Benami Act is not applicable if the suit is covered by clause (a) or (b) of sub section 3 of Section 4 of the Benami Act. “Fiduciary relationship” has been classified and it is mentioned that the expression “fiduciary capacity” has not been defined in the Benami Act. Meaning thereby that “fiduciary capacity” from different dictionary has been considered and it has been held in paragraph- 38 of the aforesaid judgment (quoted therein) that such relationship is based upon trust or confidence relevant to determine whether the parties stand in fiduciary capacity. The court shall have to take into consideration the factual context in which question arises for it is only in the factual backdrop that the existence or otherwise of a fiduciary relationship can be deduced in a given case.

16. In the instant case the controversy involved was whether the suit is barred under Section 4 of the Benami Act or the same is saved under Section 4 (3)(b) of the Benami Act.



From perusal of the averments made in the plaint it is apparent that the plaintiff has stated that Nokhelal Rai purchased the property described in Schedule- 1 of the plaint in the name of his Sala (brother- in- law) Lal Das Rai, who was the name lender for the said Nokhelal Rai (common ancestor). It has also been stated by the petitioner that since the date of purchase of the property in the name of his brother- in- law / Nokhelal Rai who being in possession of the said property was the owner thereof and thereafter his successors are in possession. The said Nokhelal Rai always remained the owner and in peaceful possession of the said property and Lal Das Rai did not have any interest in the said property and he neither had title nor he ever came in possession of the property in question. Referring to the meaning of “fiduciary capacity” as discussed in the aforesaid judgment i.e. Pawan Kumar Case (Supra) it has also been argued that the relationship between the Nokhelal Rai and his Sala (brother-in-law) was based on trust and confidence which is the relevant consideration to determine whether the parties stood in fiduciary capacity and for which court shall have to take into consideration factual background regarding existence or otherwise of a fiduciary relationship.

17. After going through the statements made in the plaint



and the submissions advanced by learned counsel for the petitioner and law laid down by Apex Court, I am of the considered opinion that the plea raised by defendant nos. 8 – 12 that suit is barred under Section 4 of the Benami Act could not be decided at the stage of Order 7 Rule 11 of the C.P.C. inasmuch as the plea / matter requires complete consideration after the evidence is led by the parties.

18. In the present case admittedly the plaint has been rejected in part and against some of the defendants which is not permissible under Order 7 Rule 11 of the C.P.C. as held by Hon'ble Apex Court. A Division Bench of this Court in the case of Rameshwar Thakur Vs. Neeraj Kumar Thakur reported in 1996 (1) All. PLR 80 (D.B.) was considering the maintainability of Civil Revision application in a case where suit was held to be barred by the provisions of Section 4(b) of the Consolidation Act and the plaint was rejected under Order 7 Rule 11(a) C.P.C. holding that such an order is not a decree and Revision application is maintainable.

19. The learned Sub Judge-I, Patna has rejected the plaint in part on misconceived interpretation of facts under the provisions of Order VII Rule 11 (d) of the C.P.C. As such, the impugned order is not fulfilling the parameters of a “decree”.



Accordingly, I arrive at the conclusion that the present writ application under Article 227 of the Constitution of India is maintainable. The judgment relied upon by the respondent on this point is not applicable on the facts of the case.

20. In view of the aforesaid discussions and the proposition of law, I am of the considered opinion that the order impugned requires interference by this court and is not sustainable.

21. In the result the impugned order dated 24-09-2019 passed in Title Partition Suit No. 136 of 2016 is quashed.

22. The petition stands allowed.

(Anil Kumar Sinha, J)

praful/-

AFR/NAFR	AFR
CAV DATE	27-09-2022
Uploading Date	14-11-2022
Transmission Date	NA

