

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL REVISION No.246 of 2019

1. Kabita Devi, W/o Mahesh Lal Gayab (Deceased-Petitioner No. 1)
 - 1(a) Amar Nath Gayab, S/o Mahesh Lal Gayab
 - 1(b) Aman Raj Gayab, S/o Mahesh Lal Gayab
 - 1(c) Abhilasha, D/o Mahesh Lal Gayab
 - 1(d) Akansha, D/o Mahesh Lal Gayab
 - 1(e) Shefali, D/o Mahesh Lal Gayab
 2. Ramesh Lal Gayab, S/o Deceased-Sole Petitioner
- Petitioners

Versus

1. Bacchu Lal Gayab Son of Late Shyam Lal Gayab Resident of Mohalla-Kathgachi, Police Station- Vishnupad, District- Gaya.
 2. Sanjay Lal Gayab @ Sanju Lal Gayab Son of Late Shyam Lal Gayab Resident of Mohalla- Kathgachi, Police Station- Vishnupad, District- Gaya.
 3. Rajeev Lal Gayab @ Karu Son of Late Shyam Lal Gayab Resident of Mohalla- Kathgachi, Police Station- Vishnupad, District- Gaya.
 4. Chanda Devi Wife of Late Shyam Lal Gayab Resident of Mohalla-Kathgachi, Police Station- Vishnupad, District- Gaya.
 5. Jamuna Devi W/o Sri Kishanlal Agniwar, Resident of Moh. Gyatri Ghat, Navagarhi, P.S. Vishnupad, Distt. Gaya.
 - 6.1. Girdhar Lal Gurda husband of Late Mira Devi, R/o Mohalla-Pirvechi, P.S.- Vishnupad, P.O.-Chand Chaura, District-Gaya.
 - 6.2. Uttam Lal Gurda, S/o Late Mira Devi, R/o Mohalla-Pirvechi, P.S.- Vishnupad, P.O.-Chand Chaura, District-Gaya.
 - 6.3. Panchu Lal Gurda, s/o Late Mira Devi, R/o Mohalla-Pirvechi, P.S.- Vishnupad, P.O.-Chand Chaura, District-Gaya.
 - 6.4. Vikash Lal Gurda, S/o Late Mira Devi, R/o Mohalla-Pirvechi, P.S.- Vishnupad, P.O.-Chand Chaura, District-Gaya.
 - 6.5. Rinku Devi, W/o Manoj Lal Pathak, R/o Mohalla-Panch Mahla, P.S.- Bishnupad, P.O.-Chand Chaura, District-Gaya.
 - 6.6. Rekha Devi, W/o Gautam Lal Dhokri, R/o Mohalla-Krishna Dwarika, P.S.- Vishnupad, P.O.-Chand Chaura, District-Gaya.
- Opposite Parties

Appearance :

For the Petitioners : Mr. Rajeev Kumar Sinha, Advocate
For the Opposite Parties : Mr. Praveen Kumar, Advocate

CORAM: HONOURABLE MR. JUSTICE KHATIM REZA
CAV ORDER



14 27-04-2023 Heard learned counsel for the petitioners and learned counsel for the opposite parties.

2. By the impugned order dated 21.11.2019, the learned Sub-Judge has rejected the petition filed by the defendant-petitioner (original petitioner) praying for rejection of plaint under Order VII Rule 11 D of the Code of Civil Procedure in Title Suit No. 404 of 2016.

3. The plaintiffs filed the suit for declaring the Schedule 1 land of the plaint as it is the joint family property and for permanent injunction restraining the defendant, namely, Anpurna Devi (original petitioner) not to transfer the suit property in favour of any person till her lifetime. The defendant filed the petition praying for rejection of plaint on the ground that from plain reading of the plaint, it will appear that the suit property is purchased in the name of defendant, namely, Anpurna Devi (original petitioner), the suit is barred by the provision of Benami Transactions (Prohibition) Act, 1988 as well as barred under Hindu Law and the plaintiffs have got no cause of action.

4. Learned Court below, after hearing the parties has rejected the petition.

5. The case of the plaintiffs in short is that defendant, namely, Anpurna Devi (original petitioner), is the widow of



Madan Lal Gayab. Madan Lal Gayab had three sons, namely, Shyam Lal Gayab, Mahesh Lal Gayab and Ramesh Lal Gayab. The plaintiff No. 4, namely, Chanda Devi is widow of Shyam Lal Gayab and the plaintiff Nos. 1 to 3, namely, Bacchu Lal Gayab, Sanjay Lal Gayab and Rajeev Lal Gayab are sons of Shyam Lal Gayab. Further case of the plaintiffs is that the Joint Hindu Family had family business i.e. *Jajmanka briti* and out of the income of *Jajmanka briti* the properties given in Schedule 1 of the plaint were purchased in the name of defendant, namely, Anpurna Devi (original petitioner) with the income of joint family business. In the Revenue Record as well as in Municipal Corporation name of the defendant, namely, Anpurna Devi (original petitioner) was mutated but ground rent was paid from the income of the joint family business. The suit property was purchased through a registered sale deed dated 13.06.1990 from one Bhupendra Nath and others in the name of defendant namely Anpurna Devi (original petitioner) from the joint family business income. Similarly, other properties were also purchased on 21.3.2005 and 27.10.10 in the name of defendant namely Anpurna Devi (original petitioner) from the income of joint family business. Further, the case of the plaintiffs is that the husband of plaintiff No. 4, namely, Shyam Lal Gayab had constructed residential house upon Plot No. 987 (new) with the



income of joint family business, in which the plaintiffs resided. Defendant No. 2 and 3 are cunning and shrewd men and has intention to grab share of the plaintiffs and as such, they have brought the defendant No. 1 in collusion and the plaintiffs have apprehension that they would create any document of transfer in favour of defendant Nos. 2 and 3 or any other person. Further case of the plaintiffs is that defendant Nos. 2 and 3 have confined defendant No. 1 in their custody and cause of action for the suit arose on 13.06.2016, when the plaintiffs came to know that the defendant No. 1 is going to transfer the suit land in favour of the defendant Nos. 2 and 3.

6. Learned counsel for the petitioners submits that the defendant, namely, Anpurn Devi (original petitioner), being a widow of Madan Lal Gayab was not a co-parcener and not a member of co-parcenary of the Hindu Joint Family, as such, any property standing in her name could not be treated as joint family property and so, there was no cause of action for declaration that the suit property standing in the name of defendant, namely, Anpurna Devi (original petitioner) is joint family property. It is further submitted that there is no averment in the plaint that who purchased in the capacity of *Karta* of the joint family property in the year 1990, 2005 and 2010.

7. It is admitted fact that the property is standing in



the name of defendant, namely, Anpurna Devi (original petitioner). She is the grandmother of plaintiff Nos. 1 to 3 and Mother-in-law of the plaintiff No. 4. Anpurna Devi filed petition under Order VII Rule 11 of the Code of Civil Procedure , which was rejected by the Trial Court.

8. Learned Trial Court has considered the provision of Section 3 and 4 of the Benami Transactions (Prohibition) Act, 1988. From perusal of impugned order of the Trial Court it appears that the claim of the defendant, namely, Anpurna Devi (original petitioner) of this Civil Revision application is barred by Benami Transactions (Prohibition) Act, 1988.

9. **Section 4** of the **Benami Transactions (Prohibition) Act, 1988** reads as follows:-

“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.”*

10. In view of the provision, Sub-section 3 of Section 4 will not be applicable where the person in whose name the property is held is co-parcener in any Hindu Undivided Family and property is held for the *bona fide* of the co-parceners in the family. It is the case of the defendant that she was also a co-parcener. It is settled principle of law that a female member is never considered as co-parcener in a Hindu Undivided Family.

11. In the case of ***Nand Kishore Mehra Vs.***



Shushila Mehra reported in ***AIR 1995 SC 2145***, the Hon'ble Supreme Court has held that if the property is standing in the name of wife, the provision under Section 4 will not be applicable because it is saved under Section 3 of the said Act. However, it may be mentioned that the claim of the plaintiffs is that the property is the joint family acquisition.

12. In the aforesaid decision, the Hon'ble Supreme Court has held that although the provision under Section 4 of the Benami Transactions (Prohibition) Act, 1988 will be applied but it has to be made clear that when a suit is filed or defence is taken in respect of such *Benami* transaction, involving purchase of property by any person in the name of his wife or unmarried daughter, he cannot succeed in such suit or defence unless he proves that the property although purchased in the name of his wife or unmarried daughter, the same had not been purchased for the benefit of either the wife or the unmarried daughter, as the case may be, because of the statutory presumption contained in Sub-section (2) of Section 3 that unless a contrary is proved that the purchase of property by the person in the name of his wife or his unmarried daughter, as the case may be, was for her benefit.

13. Therefore, in view of the aforesaid settled



principle of law, even after the property is purchased by the husband in the name of the wife the onus/burden is on the husband to draw that the property was purchased not for the benefit of the wife.

14. Further, the question whether the property is self-acquired property or joint family property is purely a question of fact and that cannot be agitated in Order VII Rule 11 of the Code of Civil Procedure.

15. However, another relief in the nature of permanent injunction has been prayed for restraining defendant, namely, Anpurna Devi, (original petitioner) not to transfer the same by any mode to any person till her lifetime.

16. It is, now, well settled that when considering the prayer for rejection of plaint under Order VII Rule 11 of the Code of Civil Procedure only averments made in the plaint are to be taken.

17. In the case of ***P.V. Guru Raj Reddy and another Vs. P.Neeradha Reddy and others*** reported in ***(2015) 8 SCC 331***, the Hon'ble Supreme Court has held that rejection of the plaint under Order VII Rule 11 of the Code of Civil Procedure is a drastic power conferred in the court to terminate a civil action at the threshold. The conditions precedent to the



exercise of power under Order VII Rule 11 of the Code of Civil Procedure, therefore, are stringent and have been consistently held to be so by the Court. It is the averments in the plaint that have to be read as a whole to find out whether it discloses a cause of action or whether the suit is barred under any law. At the stage of exercise of power under Order VII Rule 11 of the Code of Civil Procedure, the stand of the defendants in the written statement or in the application for rejection of the plaint is wholly immaterial. It is only if the averments in the plaint *ex-facie* do not disclose a cause of action or on a reading thereof the suit appears to be barred under any law the plaint can be rejected. In all other situations, the claims will have to be adjudicated in the course of the trial.

18. The plaintiffs have asserted for permanent injunction for restraining the defendant from alienating the suit property especially by defendant, namely, Anpurna Devi (original petitioner). It is, therefore, obvious that the plaint could not have been rejected as prayed by the defendant under the provision of Order VII Rule 11 of the Code of Civil Procedure especially with regard to first relief regarding the declaration of joint family property.



19. Learned Trial Court is directed to consider the said issue of *Benami* after the parties have led their evidences.

20. In the aforesaid background, this Court, therefore, does not find that the lower Court below has committed error of jurisdiction and illegality in passing the impugned order.

21. Accordingly, this Civil Revision application is dismissed.

(Khatim Reza, J)

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