

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH AT NAGPUR**

CIVIL REVISION APPLICATION NO. 136 OF 2022

Shriram S/o Bansilal Sharma,
Aged about 69 years, Occ. Business,
R/o Sharma Electronics, Ingole Chowk,
Wardha, Tahsil & District – Wardha
442 001

... APPELLANT
(Ori. Defendant No. 2)

.. Versus ..

- 1) **Smt. Jyoti Wd/o Nitin Sharma,**
Aged about 41 years,
- 2) **Ku. Astha D/o Nitin Sharma,**
Aged about : 13 years,
- 3) **Mast. Laksha S/o Nitin Sharma,**
Aged about : 10 years,
No 2 & 3 being minors
represented through their natural
guardian & mother
Smt. Jyoti Wd/o Nitin Sharma,
All c/o Rameshwar Chhaganlal Upadhyay
Gopinagar, Khamgaon,
Tahsil – Khamgaon, Dist – Buldhana (Ori. Plaintiffs on R.A.)
- 4) **Gopal S/o Ramrao Adhav,**
Aged about : 36 years, Occ: Business,
R/o – Jaswant Colony, Khamgaon,
Tahil – Khamgaon,
District – Buldhana (Ori. Defendant No.3)
- 5) **Laxminarayan S/o Nathuram Sharma,**
Aged about : 69 years, Occ: Business,
R/o – A-1/G-1, Mahavir Housing Society,
Shivneri Building, Tilakrwadi,
Wardha, District – Wardha – 442001 (Ori. Defendant No.1)

...RESPONDENTS

Shri Rohit Joshi, Advocate for applicant.
Ms Deepali Sapkar, Advocate for respondent Nos.1 to 3

CORAM : SMT. M.S. JAWALKAR, J.

DATE OF RESERVING THE JUDGMENT : 05/04/2023

DATE OF PRONOUNCING THE JUDGMENT : 05/06/2023

JUDGMENT

Heard.

2. Being aggrieved by the common order dated 06/10/2022 rejecting the application filed by the applicant defendant No.2 for rejection of plaint vide Exh. 14 and Exh. 16, the applicant/defendant No.2 is constrained to challenge the same in the present civil revision application.

3. The applicant and respondent No.5 has purchased an immovable property being a piece of land admeasuring 0.16 HR in land bearing Survey No. 408, admeasuring 1.17 HR at Village – Sutala (Bk.), Post and Tahsil – Khamgaon, District Buldhana, hereinafter referred to as the ‘suit property’. They have purchased the suit property vide registered sale deed dated

20/12/2013, which is registered on 26/12/2013, bearing Doc. No. 7953.

4. The applicant and the respondent No.5 has agreed to sale the suit property to the respondent No.4 and a registered sale deed dated 18/02/2021 bearing document No. 638/2021 is executed by the applicant and respondent No.5 in favour of the respondent No.4. According to the applicant and respondent No.5 said sale deed is a conditional sale deed and a basic condition in respect of payment of consideration has not been fulfilled by the purchaser, i.e. by the respondent No.4. Hence the applicant and respondent No.5 have filed a suit in C.J.S.D. Court Khamgaon bearing Special Civil Suit No. 30/2021 against the respondent No.4 to declare said sale deed dated 18/02/2021 bearing document No. 638/2021 as inoperative void.

5. The respondent Nos. 1 to 3 have also filed a suit being Special Civil Suit No. 19/2021 challenging about sale deed dated 18/02/2021 bearing document No. 638/2021 executed by the applicant and respondent No.5 in favour of the respondent No.4 and for perpetual injunction to the effect that the applicant and the respondent No.5/defendant Nos. 2 and 1

in the said suit should not do any act, which would adversely affect rights, title, interest and possession of the respondent Nos.1 to 3/plaintiffs over the suit property. It is the case of the respondent Nos. 1 to 3/the plaintiffs that the suit property was self-acquired property of Late Nitin Sharma, who had purchased the same from his own income. It is alleged in the plaint that the suit property was purchased in the name of the respondent No.5 and the applicant, who are father and maternal uncle respectively of Late Nitin Sharma. The respondent Nos. 1 to 3/plaintiffs contended that after the demise of Nitin Sharma, the suit property is inherited by them being his widow, daughter and son respectively. It is alleged that the applicant and respondent No.5 defendant Nos.2 and 1 had sold the suit property to the respondent No.4/defendant No.3 without lawful authority.

6. The applicant and respondent No.5/defendant Nos. 2 and 1 filed their written statement. They have denied the contentions as regard the ownership of the suit property by plaintiff and pointed out that both of them had purchased the suit property from their own fund and accordingly, they both were jointly true and lawful owners of the suit property and

were completely entitled to sell the same to the respondent No.4/defendant No.3 vide sale deed dated 18/02/2021 impugned in the suit. They also pointed out that the suit on the face of it was barred by the provisions of the Benami Transaction (Prohibition), Act.

7. The applicant / defendant No.2 filed an application for rejection of plaint under Order 7, Rule 11 of Code of Civil Procedure on 21/06/2021 vide Exh.14. The applicant has contended in the application for rejection of plaint as the case of the respondent Nos. 1 to 3/plaintiffs was that Late Nitin Sharma was true owner of the suit property, who had purchased the same in their names and as such the suit was barred by the provisions of Section 4 of the Prohibition of Benami Property Transactions Act, 1988.

8. The respondent No.1 to 3/plaintiffs filed common reply to both these applications on 24/11/2021 vide Exh.18. It is contended in the reply that the respondent No.5/defendant No.1 was father of deceased Nitin Sharma, and deceased Nitin Sharma was real owner of the suit property and, therefore, the suit property being purchased in the name of a coparcener in the

family, prohibition under the Benami Transactions Act is not applicable.

9. The learned Trial Court has held that since the suit property was purchased in the name of a coparcener of a Joint Hindu Family, the suit was not hit by the provisions of the Benami Transaction Act.

10. Learned Counsel for the applicant contended that the learned Trial Court ought to have appreciated that the respondent Nos. 1 to 3/plaintiffs had come up with a specific case in the plaint that the suit property was purchased by late Nitin Sharma, husband of respondent No.1 and father of respondent Nos. 2 and 3, from his self-earned income in the names of the applicant and respondent No.5. It is further averred that they had inherited the suit property upon the demise of Late Nitin Sharma. They have clearly stated that the applicant and respondent No.5 had no right, title or interest over the suit property.

11. Learned Counsel for the applicant relied on following judgments:

1. *Commissioner of Wealth Tax, Kanpur and others Vs. Chander Sen and others, reported in (1986) 3 SCC 567*
2. *Madan Lal Khurana and others Vs. Santosh Khurana and others, reported in 2017 SCC OnLine Del 12196*
3. *Nikhil Batra Vs. Diwakar Batra and others, reported in 2019 SCC OnLine Del 8253*
4. *Arshnoor Singh Vs. Harpal Kaur and others, reported in (2020) 14 SCC 436*

12. Learned Counsel for the respondents relied on following judgments:

1. *Smt. Mridula Singh alias Bulbul and others Vs. Brahmdeo Pd. Singh and other, reported in AIR 2006 Patna 27*
2. *Marcel Martins Vs. M. Printer and others, reported in (2012) 5 SCC 342*
3. *Nand Kishore Mehra Vs. Sushila Mehra, reported in AIR 1995 SCC 2145*

13. I have heard both the parties. Perused impugned order and considered the citations relied by both the parties. The contention of the learned Counsel for appellant is that as

claim of the plaintiff Nos.1 to 3 that husband of plaintiff No.1 and father of plaintiff Nos.2 and 3 Nitin purchased property out of his own income in the name of his father and maternal uncle. The amount was invested by deceased Nitin. It is further contention of the plaintiff that father being co-parcener, there would not be any application of the Prohibition of Benami Property Transactions Act, 1988. As such, the sale deed in favour of defendant No.3 by defendant Nos. 1 and 2 is illegal and not binding on plaintiffs.

14. It is contention of the applicant herein that the suit is hit by provisions of Benami transaction. He relied on *Commissioner of Wealth Tax Kanpur and other (supra)*, however, in my considered opinion that the ratio is not applicable in the present set of facts. In the first place, the matter before the Hon'ble Apex Court was under Wealth Tax and it is held that whenever the father gets a property from whatever source, from the grandfather or from any other source, be it separated property or not, his son should have a share in that and it will become part of the joint Hindu family of his son and grandson and other members who form joint Hindu family with

him. The facts involved in the present matter are not identical as involved in the matter before the Hon'ble Supreme Court.

15. The learned Counsel for applicant also relied on *Madan Lal Khurana and ors (supra)*, however in view of paragraph No.9 of the said judgment, the ratio would not apply in the present set of facts. Here application for rejection of plaint is in question whereas in the matter before the Delhi High Court, the Court has observed that appellants have failed to lead any evidence. Once the defendants failed to lead any evidence obviously the onus of proof upon them was not discharged that the suit property was not owned by the plaintiff but was owned by the defendant No.1. It was held in view of the fact that there is no pleading or evidence of the defendants as to the defendants being covered by the exceptions contained in Section 2(9)(A) of the Benami Act, or the erstwhile Section 4 (3) of the Benami Act of there existing of any HUF or any fiduciary capacity or other reason as found in the aforesaid exceptions contained in Section 2(9) (A) of the Benami Act exist.

16. The learned Counsel for applicant relied on *Nikhil*

Batra (supra), wherein Delhi High Court held that it is open to the plaintiff to contend that the property was held Benami by Kanta Batra on behalf of the HUF. Moreover, there is nothing, save for a bald plea to this effect and which does not constitute a pleading in law. It is held that exceptions in Section 4 of the prohibition of Benami Property Transactions Act would not be attracted inasmuch as neither can a Hindu female be a coparcener nor is Kanta Batra said to be standing or stood in law in a fiduciary capacity qua her husband or qua the alleged HUF. However, in the present matter, the wife alongwith children of Nitin filed suit. Thus, facts in the matter before Delhi High Court was not identical to the matter before this Court.

17. The learned Counsel for applicant relied on ***Arshnoor Singh (supra)***, however in my considered opinion, said citation is not at all relevant and not applicable in the present set of facts. The question before the Hon'ble High Court was power of Karta to sell the coparcenary property. It is held that karta can sell coparcenary property for legal necessity or for benefit of estate. Onus of proof that coparcenary property was alienated for legal necessity or for benefit of the estate, held, is

on alienee.

18. On perusal of impugned order, it would be seen that the learned Trial Court rightly appreciated that as per Section 4 of the Prohibition of Benami Property Transactions Act, 1988, no suit can be filed by the real owner against the person in whose name property is standing. There is prohibition from claiming the Benami property. Section 4 (3)(A) provides exception to this rule by which if the property is held in the name of coparcener of Joint Hindu Family, in that circumstances, the transaction is not hit by provision of Benami Act.

19. In view of the plea of plaintiff that her husband had purchased property in the name of his father, as such, *prima facie* property is Joint Hindu Family property and father-in-law will be the coparcener. Section 4(2) save the transaction which deals with acquisition in the name of coparcener. There is no dispute about relationship that defendant No.1 is the father-in-law of the plaintiff No.1. It is pleaded that the suit property is jointly purchased in the name of father-in-law and the maternal uncle. As such, unless the evidence is led, this issue cannot be

concluded. It can be seen that in view of joint purchase of property and one of the joint purchaser is admittedly coparcener, thus, prima facie suit can not be said to be hit by the provision of Section 4 of the Prohibition of Benami Property Transactions Act.

20. The learned Counsel for respondents Ms Sapkal relied on the judgment of ***Smt. Mridula Singh @ Bulbul and others (supra)***, wherein Patna High Court held that in partition suit, defendant seeking rejection of plaint on the ground that property in question was purchased benami and also praying to decide issue of bar of law as preliminary issue. Issue whether property in question was purchased benami and at the time of said purchase in the year 1956 and 1965 what was intention of buyers actual or name lender, can be decided only after considering merits of respective claims of parties on basis of their evidence and specific provisions of law. It is held that thus, only on the basis of Section 4 of the Act, entire suit cannot be allowed to fall at preliminary stage.

21. The learned Counsel for respondents also relied on

Marcel Martins (supra), wherein meaning of fiduciary capacity is discussed, after discussing the meaning of fiduciary capacity in various law for benefit of another person, the Hon'ble Apex Court held that some of transactions saved from prohibition under Section 4. The property held by person standing in a fiduciary capacity for benefit of another person implies relationship of trust or confidence between trustee and beneficiary. Existence of fiduciary relationship has to be determined in the fact situation of a particular case. The said citation is relied by learned Counsel for respondent in support of her contention that there was fiduciary relation between her husband and maternal uncle.

22. After considering citations relied on by the parties and after perusing the order passed by learned Joint Civil Judge, Senior Division, Khamgaon, I do not see any perversity in the order. The exception of Section 4 of Benami Act, *prima facie*, appears to be covered the matter as defendant No.1 is the father of deceased Nitin i.e. husband of plaintiff No.1 and father of plaintiff Nos.2 and 3 and there is also possibility of maternal uncle standing in fiduciary capacity was shown as the joint

purchaser along with father. Ultimately, this would be decided after leading evidence and cannot be decided on the basis of application under Order 7 Rule 11 of the Civil Procedure Code. As such, present Civil Revision Application stands dismissed. No order as to costs.

[SMT. M.S. JAWALKAR, J.]

R.S. Sahare