IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

222 **CR No.8252-2016 (O&M)**
Date of decision: 27.01.2023

Niranjan Kaur (Since Deceased) through LRs ...Petitioner(s)

Vs.

Amarjit Kaur & Others ...Respondent(s)

CORAM: HON'BLE MS. JUSTICE NIDHI GUPTA

Present:- Mr. A.K. Jain, Advocate for the petitioners.

Mr. Ivan Khosa, Advocate and
Mr. Shivam Grover, Advocate for
respondents No.1 and 2.

***

NIDHI GUPTA, J.

Present Revision Petition has been filed by the petitioner/defendant for setting aside order dated 26.05.2016 passed by learned Additional Civil Judge (Senior Division), Mohali whereby petitioner/defendant's application dated 20.08.2015 under Order 7 Rule 11 CPC has been dismissed.

Brief facts of the case are that petitioner-Niranjan Kaur (now deceased) had purchased suit property from the funds given to her by her son, who is the husband of plaintiff/respondent No.1 herein. It is the pleaded case of the plaintiff/respondent No.1 that prior to buying the said property in the name of petitioner-Niranjan Kaur, there was mutual agreement between the parties that the house in question/suit property will be transferred in the name of respondent No.1 and her children. However, as relationship between the parties became strained, petitioner refused to transfer suit property in the name of respondent No.1. Accordingly, respondent No.1 filed a Civil Suit dated 12.06.2015 (Annexure P1) for declaration, permanent injunction and mandatory injunction. In the said Suit, petitioner/defendant moved an application under Order 7 Rule 11 CPC seeking rejection of the plaint on the ground that property in the name of petitioner could not be claimed by the respondents due to prohibition as contained in Section 4 of the Benami Transaction (Prohibition) Act, 1988 (hereinafter referred to as "the Benami Act"). It is this application, which has been dismissed by the learned trial Court by way of impugned order. Hence, the present Revision Petition.

It is submitted by learned counsel for the petitioner that the petitioner has purchased property in her name by finances provided by her son. It is submitted that as such, the Suit was barred by afflux of law as, as per Section 4 of the Benami Act, right to recover benami property is prohibited. It is further submitted that moreover, the respondents/plaintiffs had no locus to file the instant Suit which was solely filed with intent of causing harassment to the petitioner and to usurp property of the petitioner. It is further submitted that at best, son of the petitioner could have laid challenge but the respondents/plaintiffs have no locus to do so.

No other argument is made on behalf of the petitioner.

In response, it is submitted by learned counsel for respondents No.1 and 2 that under Section 2 sub-section 9 of the Benami Act, certain exceptions are provided, and in the present case, respondents fall under the first exception of *karta* of Section 2 sub-section 9 of the Benami Act. It is further submitted that in any event, this aspect of the matter will be taken into consideration by the learned trial Court at the time of adjudicating upon the Suit. It is submitted that the question whether the present transaction was benami or not, is a matter of evidence and therefore, application under Order 7 Rule 11 CPC will not lie. Learned counsel also places reliance upon judgments in ***Civil Appeal No.3367 of 2019 titled as "Pawan Kumar Vs. Babulal Since Deceased through LRs & Others"; RFA No.855 of 2018 titled as "Anis Ur Rehman Vs. Mohd. Tahir & Others"*** *and* ***RFA No.522 of 2017 titled as "Manoj Arora Vs. Mamta Arora".***

No other argument is raised on behalf of the parties.

I have heard learned counsel for the parties and perused the record.

Parties are ad idem that the suit property in question was purchased in the name of petitioner from the funds sent to the petitioner by husband of respondent No.1. Section 2 sub-section 9, and Section 4 of the Benami Act are reproduced hereinbelow:-

> *"2. (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 (22 of 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

(B) a transaction or an arrangement in respect of a property carried out or made in a fictitious name; or

(C) a transaction or an arrangement in respect of a property where the owner of the property is not aware of, or, denies knowledge of, such ownership;

(D) a transaction or an arrangement in respect of a property where the person providing the consideration is not traceable or is fictitious;

Explanation.—For the removal of doubts, it is hereby declared that benami transaction shall not include any transaction involving the allowing of possession of any property to be taken or retained in part performance of a contract referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882), if, under any law for the time being in force,—

(i) consideration for such property has been provided by the person to whom possession of property has been allowed but the person who has granted possession thereof continues to hold ownership of such property;

(ii) stamp duty on such transaction or arrangement has been paid; and

(iii) the contract has been registered."

> *"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."*

A bare reading of Section 4 shows that in order to establish that the present Suit is prohibited thereunder, or falls in the exception carved out under Section 2(9) of the Benami Act, evidence is required to be led. It is an established position in law that under Order 7 Rule 11 CPC, only averments made in the plaint have to be seen and nothing else can be considered while adjudicating upon such an application. In order to establish that the suit property is benami, and it was purchased out of funds sent by son of the petitioner, and it falls under the prohibition of Section 4, or falls in the exception under Section 2(9), evidence will have to be led. As such, in the present case, plaint could not have been rejected under Order 7 Rule 11 CPC.

Moreover, as per judgment rendered by the Hon'ble Supreme Court in ***Civil Appeal No.3367 of 2019 (supra)*** it has been held as follows:-

> *"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. State Bank of India Staff Association, 2005(4) RCR (Civil) 334 : (2005) 7 SCC 510:***

> *"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 CPC. Clause (d) of Rule 11 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 CPC. 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."

In para 9 of the judgment in ***RFA No.855 of 2018 (supra)*** it has been held as under:-

"9. Accordingly, it is held that there did not exist any vested right that a particular transaction was specified as an exempted transaction as not being a barred benami transaction under the expressions 'fiduciary capacity' and 'trustee' under the repealed provision of Section 4(3) of the unamended Act, and by Section 2(9) of the Amended Act a 'benami transaction' is defined and the exceptions have been specifically defined which are the exceptions

to the prohibited benami transaction. No vested right is thus taken away, and therefore, the trial court has erred in holding that there existed a vested right in favour of the respondents/defendants by the repealed provisions of Section 4(3) of the unamended Act when it used the expressions 'fiduciary capacity' and 'trustee'. It is, therefore, held that definitions of the exempted transactions to the prohibited benami property transactions, and now contained in the four exceptions in Section 2(9) of the Act are always deemed to have been included in the exceptions to the prohibited benami transactions, and in the facts of the present case, the suit of the appellant/plaintiff would be maintainable by the third exception contained in Section 2(9) of the Amended Act, and that whether or not on facts, the appellant/plaintiff is able to make out a case under the third exception, the same is a disputed question of fact requiring trial, and can only be decided after evidence is led by the parties, and the suit plaint thus could not have been rejected under Order 7, Rule 11 CPC without trial."

From the above facts, as well as the undisputed position in law as noticed above, it is clear that there is no error in the order impugned herein. Accordingly, I find no merit in the present Revision Petition and the same is hereby dismissed.

Pending application(s) if any, also stand(s) disposed of.

27.01.2023 **(Nidhi Gupta)**
Sunena **Judge**

Whether speaking/reasoned: Yes/No
Whether reportable: Yes/No