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IN THE HIGH COURT OF DELHI AT NEW DELHI

**RESERVED ON:04.09.2009
PRONOUNCED ON: 20.11.2009**

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CS (OS) 401/2009 & IA Nos.2847/2009 & 2851/2009

Mrs. Pushpa Kanwar

..... Plaintiff

Through : Ms. Amrita Sanghi and Mr. Gaurav Duggal, Advocates

Vs.

Mrs. Urmil Wadhawan & Ors

..... Defendants

Through : Mr. Prashant Bhushan, Advocate
Mr. S.P. Pandey, Advocate
Ms. Divya Chaudhary, Advocate

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

HON'BLE MR. JUSTICE S.RAVINDRA BHAT

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1. The plaintiff in the suit seeks declaration, partition, possession, permanent injunction and rendition of accounts in respect of the properties and assets of late Kailash Berry (hereafter called "the deceased"), her brother, as a Class II heir (under the Hindu Succession Act, 1956).

2. According to the suit, the deceased, who died on 13-1-2006, was unmarried; he is survived by the plaintiff, and his other Class II heirs (brother and sister), i.e Defendant Nos. 1 to 3. Defendant Nos. 5 to 17, are Banks and depository participants with whom the deceased operated and managed depository accounts in respect of investments, accounts, etc. Details of those accounts are furnished in the suit. These, it is contended, constitute the deceased's self

acquired properties. It is claimed that some properties were purchased by Kailash Berry in his name, and others, jointly with Defendant Nos 1, 2 and Defendant No. 4. It is claimed that *“certain other properties were also purchased by the late Kailash Berry in the sole name of Defendant No. 1 or Defendant No.4.”* The properties so held either in the name of the defendants, or jointly, it is urged, are in a fiduciary capacity, for the benefit of the deceased. The plaintiff alleges that Defendant No.1 separated from her husband in 1968 and was living with the deceased, who used to care for her; it is contended that the Defendant No. 4 was disliked by the deceased, and used to depend on him (the deceased) during his life time. Similarly, it is alleged that the defendant No. 2 (apparently the son of a predeceased brother of the deceased Kailash Berry) was in jail in England. The deceased had a power of attorney, and used it to acquire several movable and immovable properties for the benefit of his family, with the intention of creating an empire.

3. It is submitted that during his lifetime, the deceased used to operate all the accounts, and manage his investments, even though some of them were in the name of the defendants. The plaintiff says that after death of Kailash Berry, Defendant Nos. 1,2 and 4 became dishonest and started claiming interest in the properties and investments left behind by him, as their own, denying the plaintiff's legitimate rights and contrived to exclude her. An allegation is made against Defendant No. 1 that she used her position to appropriate the properties of the deceased, to her advantage and deny the plaintiff's share. It is also contended that the Defendants (except Defendant No. 3) have sold shares, etc, in various companies, purchased by late Kailash Berry, even though he had real interest in them. It is alleged, importantly that the defendants appropriated the shares and other movables, claiming that they were owners *“...being the only other person named in the share certificate...”* The plaintiff says that the defendants stand is falsified, because the first defendant separated from her husband in 1968, and was dependant on the deceased entirely. The shares purchased in

their names, were from the funds of the deceased; similarly, the fourth defendant was entirely dependent on the deceased, having no independent income. As far as defendant No. 2 is concerned, he was in jail; the shares and investments in his name were also funded by the deceased.

4. The plaintiff says that the defendants, though owning the shares, were doing so really for the benefit of the deceased. They were, and are holding the investments and shares in a fiduciary capacity, on and on behalf of the plaintiff, and other Class II heirs, all of whom are entitled to 1/4th shares each. The plaintiff alludes to a previous suit, CS (OS) 586/2006, where a declaration that she and Defendant No. 3 were entitled to 1/4th share in the said investments of the deceased was sought. According to her, as there was an objection to maintainability of the suit, on account of Section 34 of the Specific Relief Act, she sought for her transposition as a defendant. The plaintiff therefore, says that she had withdrawn from the conduct of that suit; therefore, it is submitted that the present suit is maintainable. The plaintiff has also, in the list of documents, filed copies of the pleadings and documents in the suit. Though the suit mentions two schedules, there are no schedules, or description of the properties.

5. This court had, on 4-9-2009, permitted Suit No. 586/2006 to be dismissed as withdrawn and observed that the plaintiff there (i.e the Defendant No. 3 here) could seek such remedies as were available in law. The present plaintiff was co-plaintiff in that suit, and had been granted transposition as defendant, by previous order dated 6-4-2009. She did not object to dismissal of CS (OS) 586/2006; nor did she seek transposition back as plaintiff. The plaintiff in that suit, nor the present plaintiff, sought leave- at that time, to file another suit. Though the plaintiff filed the present suit on 25th February, 2009, during pendency of the previous suit, the court had not issued summons. Both the suits were listed together, when the other suit was dismissed as withdrawn. In these circumstances, the plaintiff was asked to address the court about maintainability of the suit, in the light of provisions of Order II, Rule

2, CPC, and Order 23, Rule 1. The other question of maintainability pertained to applicability of provisions of the Benami Transactions (Prohibition) Act, 1988.

6. Arguing about applicability of Order II, Rule 2, the plaintiff submits that there is a material difference between the two suits – the previous one, where the present plaintiff was initially a plaintiff, and the present suit, where the reliefs sought are different. It is submitted that the plaintiff has here sought a wider array of reliefs, such as declaration, partition, possession of the movable and immovable properties (forming the estate of the deceased) and a decree for accounts. The plaintiff relies on the decisions of the Supreme Court, reported as *Inacio Martins –vs- Narayan Hari Nayak* 1993 (2) SCC 123 and *Bengal Waterproof Ltd –vs- Bombay Waterproof Manufacturing Company* 1997 (1) SCC 99 to say that in the circumstances of the case, the bar enacted under Order II Rule 2 is inapplicable, since the plaintiff is seeking reliefs different from those sought in the previous civil action.

7. It is urged by the plaintiff, next, that the bar created by Section 4 (1) of the Benami Act is relieved by Section 4(3) (b) which intends that if property is held in a fiduciary capacity, on behalf of another, and in trust, the civil suit for recovery of the property or amount is maintainable. It is urged, therefore, that even if the suit averments or materials point to ownership of assets by Defendants 1-2 and 4, that they hold it in fiduciary capacity, on behalf of the deceased, is sufficient for the court to be satisfied about maintainability of the present suit. It is urged that the judgment reported as *P. Rajagopal Reddy –vs- Padmini Chandrasekharan* 1995 (2) SCC 630 considers the effect of provisions of Sections 4 (1) and 4(2), and not of Section 4(3). The plaintiff also relied on *P.V. Sankara Kurup v. Leelavathy Nambiar*, AIR 1994 SC 2694.

8. It can be gathered from the above discussion that the plaintiff in the suit, is the sister of late Kailash Berry. He was unmarried, at the time of his death; he was survived by the

plaintiff, his sister, and two other sisters, i.e the first, and third defendant. The second defendant apparently is the son of a predeceased brother of Kailash Berry; the fourth defendant is the son of the first defendant. The present plaintiff and the third defendant had filed a suit claiming ownership of one fourth of the estate, of Kailash Berry, consisting of movable property, investments, and shares. They had sought mandatory injunction also. The defendants had, in that suit, entered appearance and contested the proceedings. During the pendency of that suit, the present plaintiff sought leave to be, and was permitted to transpose herself as defendant. Without leave of court, she filed the present suit; notice was not issued. In the meanwhile, the previous suit was withdrawn. At that stage, the court heard arguments about maintainability of the present suit.

9. The first question is whether the present suit, filed before the withdrawal of the previous suit- or even the plaintiff's transposition, asking for the same, was considered and allowed, is maintainable. The provisions under the Civil Procedure Code (CPC) in this regard are extracted below:

“Order 2 Rule 2. Suit to include the whole claim.

(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any court.

(2) Relinquishment of part of claim. - Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs. - A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

Explanation : *For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.*

Illustration

A lets a house to B at a yearly of rent Rs. 1200. The rent for the whole of the years 1905, 1906 and 1907 is due and unpaid. A sues B in 1908 only for the rent due for 1906. A shall not afterwards sue B for the rent due for 1905 or 1907.

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Order 23 Rule 1. Withdrawal of suit or abandonment of part of claim

1. Withdrawal of suit or abandonment of part of claim.—(1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim:

Provided that where the plaintiff is a minor or other person to whom the provisions contained in Rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.

(2) An Application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other, person.

(3) Where the Court is satisfied,—

(a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim,

it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.

(4) Where the plaintiff—

(a) abandons any suit or part of claim under sub-rule (1), or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3),

he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(5) Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs.]”

1-A. When transposition of defendants as plaintiffs may be permitted.—Where a suit is withdrawn or abandoned by a plaintiff under Rule 1, and a defendant applies to be transposed as a plaintiff under Rule 10 of Order I, the Court shall, in considering such application, have due regard to the question whether the applicant has a substantial question to be decided as against any of the other defendants.]

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In *State of Maharashtra v. National Construction Co.*, (1996) 1 SCC 735, the Supreme Court explained the *rationale* and working of Order 2, Rule 2 as follows:

“Both the principle of res judicata and Rule 2 of Order 2 are based on the rule of law that a man shall not be twice vexed for one and the same cause. In the case of Mohd.

*Khalil Khan v. Mahbub Ali Mian*³ the Privy Council laid down the tests for determining whether Order 2 Rule 2 of the Code would apply in a particular situation. The first of these is, “whether the claim in the new suit is in fact founded upon a cause of action distinct from that which was the foundation for the former suit”. If the answer is in the affirmative, the rule will not apply. This decision has been subsequently affirmed by two decisions of this Court in *Kewal Singh v. Lajwanti*⁴ (SCC at p. 295 : AIR at p. 163) and in *Inacio Martins case*².

10. It is well settled that the cause of action for a suit comprises all those facts which the plaintiff must aver and, if traversed, prove to support his right to the judgment.”

10. Here, the plaintiff had filed the previous suit, for the same relief – declaration and injunction. The averment in the present suit, that a declaratory suit was not maintainable, is incorrect; the previous sought did seek the relief that the plaintiff had one fourth right to the properties of Kailash Berry –exactly what is sought now; only partition is now sought, as a consequential relief. The averments in the present suit are no different from those in the previous suit – a copy of which along with all pleadings and list of documents, is placed on the record. As a matter of fact, in the previous suit, the plaintiffs had pleaded about schedules, describing the properties which were the subject matter of proceedings, but not filed the schedule. An interim order was granted; later the plaintiffs filed the schedules. In the present suit, however, the plaintiff mentions the schedule, but has neither described the properties, nor even annexed the schedules to the plaint. From the above, it is apparent that the plaintiff could and should have sought for the additional reliefs which are now sought, (in the previous suit) in any case, what was sought in the previous suit was sufficient, having regard to the consequential relief claimed. This is because entitlement to a share, in the investments would have been efficacious; if the plaintiff wanted to, she could have sought partition, too. That she did not, is no ground for the court to infer that such relief could not have been claimed, or could not have been the subject matter of the previous suit. The claim for partition and consequential relief constitutes an integral part of the bundle of facts composing the “cause of

action” in this case. Since the plaintiff withdrew from the previous suit, without seeking any leave, to file the present suit, and rather only sought transposition, and even at a later stage, did not object to the withdrawal of the suit, Order 2 Rule 2 precludes this suit.

11. The court is also of the opinion that Order 23 Rule 1 (4) precludes the present suit. That provision precludes a latter suit, in respect of the same subject matter, if the plaintiff withdraws the previous suit, or part of the claim, or withdraws from the suit, without seeking leave to file another suit, for that cause. A latter suit, for the same cause of action is barred. This provision –even before its amendment was commented upon by the Supreme Court, in *Hulas Rai Baij Nath v. Firm K.B. Bass &Co.*, AIR 1968 SC 111 thus:

“The language of order 23 Rule 1 sub-rule (1) CPC, gives an unqualified right to a plaintiff to withdraw from a suit and, if no permission to file a fresh suit is sought under sub-rule (2) of that Rule, the plaintiff becomes liable for such costs as the Court may award and becomes precluded from instituting any fresh suit in respect of that subject-matter under sub-rule (3) of that Rule. There is no provision in the Code of Civil Procedure which requires the Court to refuse permission to withdraw the suit in such circumstances and to compel the plaintiff to proceed with it. It is, of course, possible that different considerations may arise where a set-off may have been claimed under order 8 CPC, or a counter claim may have been filed, if permissible by the procedural law applicable to the proceedings governing the suit.”

Again the Supreme Court, in *Upadhyay & Co –vs- State of U.P* 1999 (1) SCC 91 held that:

“Order 23 Rule 1 of the Code of Civil Procedure deals with withdrawal of suit or abandonment of part of the claim. Sub-rule (3) says that the court may in certain contingencies grant permission to withdraw from a suit with liberty to institute a fresh suit in respect of the subject-matter of such suit. Sub-rule (4) reads thus :

“1. (4) Where the plaintiff -

(a) abandons any suit or part of a claim under sub-rule (1), or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3),

he shall be liable for such costs as the court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.”

13. *The aforesaid ban for filing a fresh suit is based on public policy. This Court has made the said rule of public policy applicable to jurisdiction under Article 226 of the Constitution (Sarguja Transport Service v. STAT [(1987) 1 SCC 5 : 1987 SCC (Cri) 19]). The reasoning for adopting it in writ jurisdiction is that very often it happens, when the petitioner or his counsel finds that the court is not likely to pass an order admitting the writ petition after it is heard for some time, that a request is made by the petitioner or his counsel to permit him to withdraw it without seeking permission to institute a fresh writ petition. A court which is unwilling to admit the petition would not ordinarily grant liberty to file a fresh petition while it may just agree to permit withdrawal of the petition. When once a writ petition filed in a High Court is withdrawn by the party concerned, he is precluded from filing an appeal against the order passed in the writ petition because he cannot be considered as a party aggrieved by the order passed by the High Court. If so, he cannot file a fresh petition for the same cause once again. The following observations of E. S. Venkataramiah, J. (as the learned Chief Justice then was) are to be quoted here : (SCC p. 12, para 9)*

"[W]e are of the view that the principle underlying Rule 1 of Order 23 of the Code should be extended in the interests of administration of justice to cases of withdrawal of writ petition also, not on the ground of res judicata but on the ground of public policy as explained above. It would also discourage the litigant from indulging in bench-hunting tactics. In any event there is no justifiable reason in such a case to permit a petitioner to invoke the extraordinary jurisdiction of the High Court under Article 226 of the Constitution once again. While the withdrawal of a writ petition filed in the High Court without permission to file a fresh writ petition may not bar other remedies like a suit or a petition under Article 32 of the Constitution of India since such withdrawal does not amount to res judicata, the remedy under Article 226 of the Constitution of India should be deemed to have been abandoned by the petitioner in respect of the cause of action relied on in the writ petition when he withdraws it without such permission." "

Now, in this case, the plaintiff, for her own reasons, withdrew from the previous suit, and sought transposition as defendant. At that stage, she neither sought, nor, more importantly, was granted leave to file another suit. The bar under Order 23, Rule 1(4) squarely applies to such situations. The court is also of the opinion that the decisions cited by the plaintiff – *Inacio Martin* and *Bengal Waterproof*, are inapt. In the former, the second suit was held maintainable, because the first suit

12. The second question is whether the suit is barred by provisions of the Benami Act. Sections 2(a), 3(2)(a) and 4 of the Benami Act, may be quoted here for convenience of reference :

"Definitions--In this Act, unless the context otherwise requires,--

2(a) 'Benami transaction' means any transaction in which property is transferred to one person for a consideration paid or provided by another person;

3. Prohibition of benami transactions--

(2) Nothing in Sub-section (1) shall apply to--

(a) the purchase of property by any person in the name of his wife or unmarried daughter and it shall be presumed, unless the contrary is proved, that the said property had been purchased for the benefit of the wife or the unmarried daughter;

"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."

13. The provisions of the Benami Act are intended to effectuate Parliamentary intention to outlaw the practise of "benami" transactions, whereby someone purchases, or holds property, on behalf of the other. The practice is made subject matter of an offence; Section 3 prohibits it. To give teeth to this intention, actions and suits, on the part of the "real" owners against benamidars, or ostensible owners, are not maintainable. Section 4(3) provides for exceptions to such a rule; in the event the ostensible owner claims that the benamidar holds the property, in a fiduciary capacity, and establishes it, the suit lies.

14. As to what is a fiduciary capacity has been explained by the Supreme Court, in *Canbank Financial Services –vs- Custodian* AIR 2004 SC 5123, as follows:

"Fiduciary duty :

Chapter IX of the Indian Trusts Act provides for certain obligations in the nature of trusts. The Trusts Act recognizes various kinds of trusts including resulting trust. An express trust, however, may be created by reason of an agreement between the

parties, (Barclays Bank Ltd. v. Quistclose Investments Ltd. [1970] AC 567 (HL)) ([1969] 39 Comp Cas 105 (HL)).

*By reason of section 88 of the Indian Trusts Act, a person bound in **fiduciary** character is required to protect the interests of other persons but the heart and soul thereof is that as between two persons one is bound to protect the interests of the other and if the former availing of that relationship makes a pecuniary gain for himself; section 88 would be attracted. What is sought to be prevented by a person holding such **fiduciary** benefit is unjust enrichment or unjust benefit derived from another which is against conscience that he should keep. When a person makes a pecuniary gain by reason of a transaction, the cestui que trust created thereunder must be restored back.”*

In view of Section 7 of the Benami Act, (which repealed Sections 81 and 82 of the Indian Trusts Act, 1882), the same concept of trusteeship or relationship of fiduciary capacity as understood in trust law, or that of the transferee being deemed to be holding for the benefit of the person buying or providing the consideration as was the position prior to the Act of 1988, does not exist. At the same time, Section 4(3)(b) a proviso, excludes the bar to recover property held *benami*, in such situations where the person in whose name the property is held, is a trustee or other person standing in a fiduciary capacity. This court, in *Anil Bhasin –vs- Vinay Kumar Bhasin* (2003) 102 DLT 932 had reconciled and rendered a harmonious construction of the provisions of the Benami Act, to mean that “fiduciary capacity” would imply relationships akin to partnerships, or those owed by directors, etc, exercising special duties to the organization, or where property is “appropriated” by someone contrary to the instructions regarding acquisition or ownership. Recently, in *Aarti Sabharwal –vs- Jitendra Singh Chopra* MANU/DE/1898/2009, the position was explained further in the following terms:

“35. It is plain from Section 4(1) that no suit shall lie to enforce any right in respect of any property held benami against the person in whose name the property is held. Even if one were to stretch the argument, as is sought to be done by the Defendants, the plaintiff cannot claim ownership to the suit properties but only lay claim for recovering maintenance from Defendant No. 1, who according to her is the real owner of such property. Such a prayer in any event cannot be made on account of Section 4(1) Benami Act. It was sought to be contended that under Section 4(3)(b) Defendant No. 3 was holding the property in fiduciary capacity for Defendant No. 1.

This event is neither pleaded nor substantiated even prima facie through any document filed along with the plaint. Even if the plaint is read as it stands, no case is made out to show that Defendant No. 3 was in fact holding the property at 32, Sultanpur Farms, Mehrauli, New Delhi in any fiduciary capacity for Defendant No. 1. Viewed from any angle, the bar under Section 4 of the Benami Act would apply and prevent the Plaintiff from claiming any relief vis-a-vis the properties shown to be owned by Defendant No. 3 and FMPL.

15. According to *Law Lexicon*, one acts in a “fiduciary” capacity, in the following circumstances:

“One is said to act in a “fiduciary capacity” or to receive, money or contract a debt in a “fiduciary” capacity”, when the business which he transacts. or the money or property which he handles, is not his own or for his own benefit, but for ' the benefit of another person, as to whom he stands in a relation implying and necessitating great confidence and trust on the one part and a high degree of good faith on the other part. The term is not restricted to technical or express trusts, but includes also such offices or relations as those of an attorney at law, a guardian, executor, or broker, a director of a Corporation, and a public officer.”

16. The entire averments in the plaint here are that the real owner of the shares and other movables (none of which have been disclosed- let alone with any specificity) was Kailash Berry. It is not revealed as to when the deceased acquired those assets; concededly they were self acquired. The plaintiff is vague about ownership, and also suggests that the assets in the name of the defendants are benami holdings. Apart from merely mentioning “fiduciary” capacity, no attempt is made to show that Kailash Berry, during his lifetime, ever claimed that such property belonged to him, or asserted as such. The date of acquisition of such investments and properties, by the deceased, is not shown. In these circumstances, the plaintiff’s right to claim it – when the alleged real owner never appears to have asserted any proprietary right over such assets and investments – is not shown. The court is therefore of the opinion that the mere incantation of the Defendant Nos. 1, 2 and 4 owning such assets in a “fiduciary” capacity is insufficient to escape the bar under Sections 3 and 4, and also to secure the benefit of Section 4 (3) (b).

17. In view of the above discussion, it is held that the suit is not maintainable; it has to be rejected. The plaint in the civil suit is, therefore, rejected; all pending applications too are therefore disposed of.

DATED: November 20, 2009

(S. RAVINDRA BHAT)
JUDGE